THE JOURNAL FOR MEMBERS OF THE TAX INSTITUTE

Taxation in Australia

VOL 55(5) NOV 2020

Controlling a tax audit

Adam Craig

Tax agents: beware of “administrative overpayments” added to your RBA

John Glover, FTI

Division 7A loan repayments: part 2

David Montani, CTA

Fifty shades of Greig: the spectrum of taxpayers in share trading

Michael Bearman, CTA, and Piotr Klank, CTA

THE TAX INSTITUTE

Contents

Cover article

234

Controlling a tax audit

Adam Craig, Barrister, Victorian Bar

Feature articles

238

Tax agents: beware of "administrative overpayments" added to your RBA

John Glover, FTI, Barrister, Victorian Bar

242

Division 7A loan repayments: part 2

David Montani, CTA, National Tax Director, Nexia Australia

250

Fifty shades of Greig: the spectrum of taxpayers in share trading

Michael Bearman, CTA, Barrister, and Piotr Klank, CTA, Barrister, Victorian Bar

Insights from the Institute

218 President's Report

219 CEO's Report

220 Tax Counsel's Report

Regular columns

217 Tax News – at a glance

221 Tax News – the details

228 Tax Tips

232 Tax Education

254 A Matter of Trusts

257 Superannuation

260 Alternative Assets Insights

265 Events Calendar

266 Cumulative Index

Invitation to write

We welcome original contributions that are of interest to tax professionals, lawyers, academics and students.

For details about submitting articles, please see Guidelines for Publication on our website taxinstitute.com.au, or contact publisher@taxinstitute.com.au.

Tax News – at a glance

by TaxCounsel Pty Ltd

October – what happened in tax?

The following points highlight important federal tax developments that occurred during October 2020. A selection of the developments is considered in more detail in the "Tax News – the details" column on page 221 (at the item number indicated).

Boost for skills training: FBT exemption

In a joint media release on 2 October 2020, the Treasurer and the Minister for Housing and Assistant Treasurer announced that the federal government will provide (with effect from 2 October 2020) an exemption from FBT for employer-provided retraining and reskilling for employees who are redeployed to a different role in the business. **See item 1.**

Expanding access to small business tax concessions

In another joint media release on 2 October 2020, the Treasurer and the Minister for Housing and Assistant Treasurer announced that the government will expand access to a range of small business tax concessions by increasing the small business entity turnover threshold for these concessions from $10m to $50m. **See item 2.**

Companies: temporary loss carry-back

Under a 2020-21 Budget proposal, eligible companies will be able to carry back tax losses from the 2019-20, 2020-21 or 2021-22 income years to offset previously taxed profits in the 2018-19 or later income years. **See item 3.**

Immediate write-off for eligible capital assets

As part of the 2020-21 Budget initiatives, businesses with an aggregated annual turnover of less than $5b will be able to deduct the full cost of eligible capital assets acquired from 7:30pm AEDT on 6 October 2020 and first used or installed by 30 June 2022. **See item 4.**

Corporate residency test

It was announced in the 2020-21 Budget that amendments are to be made to clarify the corporate residency test that applies for taxation purposes. **See item 5.**

Personal tax changes

It was also announced in the 2020-21 Budget that the second stage of the government's Personal Income Tax Plan will be brought forward by two years to 1 July 2020, while retaining the low and middle income tax offset for 2020-21. **See item 6.**

R&D tax incentive

Another measure announced in the 2020-21 Budget was that further enhancements will be made to the 2019-20 MYEFO measure "Better targeting the research and development tax incentive — refinements". **See item 7.**

CGT and granny flats

In another joint media release on 2 October 2020, the Treasurer and the Minister for Housing and Assistant Treasurer announced a targeted CGT exemption for granny flat arrangements where there is a formal written agreement in place. **See item 8.**

FBT: compliance and record-keeping

It was announced in the 2020-21 Budget that the Commissioner will be provided with the power to allow employers to rely on existing corporate records, rather than employee declarations and other prescribed records, to finalise their FBT returns. **See item 9.**

DTAs: general anti-abuse rules

The Commissioner has released a law administration practice statement that is intended to assist ATO staff on the administrative process of applying a principal or main purposes test included in any of Australia's tax treaties (PS LA 2020/2). **See item 10.**

Simplified working from home deductions: COVID-19

The Commissioner has extended the temporary arrangements put in place to make it easier for taxpayers to claim deductions for working from home due to COVID-19 (PCG 2020/3, as amended). **See item 11.**

Discretionary trust: distribution issues

In allowing an appeal from a decision of the AAT, the Full Federal Court (Jagot, Davies and Thawley JJ) has unanimously held that a purported distribution of income for the 2014 income year by the trustee of a discretionary trust (the Whitby Trust) was ineffective and that the default beneficiaries who would otherwise have been presently entitled to the income of the trust for that income year had effectively disclaimed their entitlements as such beneficiaries (*Carter v FCT* [2020] FCAFC 150). **See item 12.**

Extension of time: application for review

The AAT has exercised its statutory discretion to extend the time for a taxpayer to lodge applications to the tribunal for the review of the Commissioner's decisions on her objections against amended and original income tax assessments and penalty assessments for the four income years 2010 to 2013 (*Cassaniti and FCT* [2020] AATA 3447). **See item 13.**

Residence of individual: DTA tie-breaker rules

In a joint judgment, the Full Federal Court (Davies, White and Steward JJ) has dismissed an appeal (by the Commissioner) and a cross-appeal (by the taxpayer) from a decision of Logan J that the taxpayer was a resident of Australia and also of Thailand, and that the residency tie-breaker provisions of the Australia and Thailand double tax treaty operated to treat the taxpayer as a resident solely of Thailand (*FCT v Pike* [2020] FCAFC 158). **See item 14.**

Other cases

There have been a number of other recently decided cases that should be noted. **See item 15.**

President's Report

by Peter Godber, CTA

Engaging in the tax reform community discussion

Contribute your voice as we build a case for change in our tax system.

It has been about a month since the federal Budget was handed down and we reported on the important tax measures that were announced. That was a very busy time for The Tax Institute staff, and, again, the quality of the written *Federal Budget 2020-21 Report* and our following webinars that presented the key messages and insights to members were outstanding. Thanks to all involved.

We clearly noted in our media responses that, while the Budget contained many good and necessary stimulus measures for the short term, we cannot lose sight of the need for longer term meaningful reform of our tax system. Other commentators have joined a call for that to be the next fiscal focus of the federal government. Therefore, The Tax Summit: Project Reform is timely. We have harnessed a broad and impressive array of contributors, be they keynote speakers, session and discussion leaders, or volunteer draftspersons. The culmination is our Virtual Summit event on 24 and 25 November.

We have some wonderful sessions coming up this month for The Tax Summit: Project Reform, before we reach that final Summit. On 6 November, we will be hearing from keynote speaker Greg Smith, former Head of the Treasury Budget and Revenue Group, followed by our final keynote on 13 November, delivered by well-known futurist, analyst, adviser, commentator and author, Bernard Salt, AM. These are sure to be informative and inspiring presentations.

There are also two more focus sessions left in the line-up. These sessions have allowed our members to tackle some of the big issues in our tax system and have been vital in the process of building our case for change. I am very much looking forward to the next two sessions, covering the role of the tax system in encouraging innovation and jobs, and the design of indirect taxes such as the GST.

At the Virtual Summit itself, all of this learning, discussion and innovation will allow us to present the options for reform and to discuss our priorities as a profession. I am excited to see the insights that arise from this entire process. It is an ambitious endeavour that we have embarked on, but one that is extremely important. I have no doubt that the dedication and excellence of our committees, delegates and members will ensure that the end result is exceptional.

Strengthen your ties to our community

On a slightly different note, let's not lose sight of the fact that this has been a trying year for all of us, both personally and professionally. This year has been a timely reminder that technical excellence, though important, is not the only marker of success as a tax professional; it has proven that skills like clear communication, professional resilience and leadership under pressure are vital to success. However, it is exactly years like 2020 that can put development of those skills on hold.

We are all incredibly busy, working hard to keep our clients, employees and ourselves above water. Sometimes it seems like there's little time, or energy, left for anything else. The Tax Institute is looking at ways that we can help our members better hone these important skills, including a refresh of our Go for Growth platform. This platform includes access to over 70,000 professional development courses, videos and resources, and members can access it at a reduced price. I encourage you to keep up to date with your continued professional development and the skills that will see you successfully through years such as 2020.

It is also an important time to build connections within our profession. It can be a great help to have a circle of like-minded colleagues to lean on — whether to get through stressful times or to spark inspiration and celebrate successes. If you're not already on our Community forum, I urge you to set up your account. One of the silver linings to come from this year is that we are all getting much more comfortable with working (and networking) online, and this space is a wonderful place for our community of tax professionals to come together to discuss, debate and answer each other's questions.

The Community forum is also where we will be carrying on discussion related to The Tax Summit: Project Reform, giving you an opportunity to further explore the ideas raised in each session. This member discussion and sharing of ideas and experience are vital to the process of building a case for change, and I hope you can all be a part of it.

CEO's Report

by Giles Hurst

Full steam ahead on tax reform

The task of defining meaningful, holistic change in our tax system is in good hands.

I recently spent a sunny Sunday on the veranda relearning the art of tying a monkey's fist knot. It's a lovely old sailor's knot, used mainly for weighing down heaving lines so they can be thrown to the dock from on deck. It's also one of the more complex knots around and, in that sense, not dissimilar to our tax system: useful and necessary, but complicated and time-consuming (and, in the wrong hands, dangerous!)

With everything going on in the world this year, it seems we have an opportunity to begin unpicking the complex knot of our tax system.

The federal Budget announced on 6 October was a sensible one that the Institute feels was appropriate for the current economic circumstances. It was a recovery Budget, aimed at getting us back on our feet after the economic impacts of COVID-19 this year. The Institute team was on board on Budget night to deliver the *Federal Budget 2020-21 Report*, which was comprehensive and informative. I'd venture to say that it was one of the most comprehensive Budget reports ever produced, and I'm incredibly proud of the team for its efforts.

No doubt the Budget will have implications for our members and their clients as the rest of the financial year unfolds, so please remember that the Institute is always here to help and advocate for you, should you need it.

As sensible as this Budget was, it did not address some key issues that those in the tax profession hoped it might. While there was some measure of tax reform, it was far from the holistic, meaningful change that we have identified as necessary in our system.

There is more work to be done. Luckily, the Institute and our members are on the job.

As you are aware, we are well underway with The Tax Summit: Project Reform, with the Virtual Summit event on 24 and 25 November fast approaching. With this series of events, we are aiming to draw a blueprint for a better tax system, not just for us, but also for future tax professionals and for the wider community which will benefit from fairer taxation.

I truly believe that change of this importance and magnitude should come from those who know our system best — those who work with it every day, and know its ins and outs, frustrations and loopholes. There is no larger, more insightful, or more generous group of those people than The Tax Institute's membership. Thank you to everyone — Institute volunteers, committee members, staff and members who have attended the sessions so far — for lending your talents and expertise to untangling this knot.

So far, we have heard from a number of thought leaders, including one of Australia's best-known economists, Chris Richardson of Deloitte Access, the Hon. Peter Costello, AC, our longest serving Treasurer, Danielle Wood, CEO of The Grattan Institute and Rosheen Garnon, CTA, Chair of the Board of Taxation. We have also explored the challenges and pathways for reform from all corners of the profession, including superannuation, business taxes and, most recently, employment taxes. There is a lot to digest and unpack, and even more to come this month.

Though we are full steam ahead, if you have not yet been involved in The Tax Summit: Project Reform, you haven't missed the boat. By registering today, you will have access to the recordings of all past sessions, together with access to the live and recorded sessions to come. That means there is still ample opportunity for you to contribute your voice to the conversation.

You might have also noticed that some of the highlights from The Tax Summit: Project Reform are being discussed on our new Community forum. This is yet another avenue for you to make sure your voice is heard. I am excited about the potential that this space has for generating even more insight, discussion and debate around all aspects of our profession, including tax reform.

And if you are doubting whether your voice is important in that arena, let me lay that to rest now: it is. This is a collaborative effort which will only be made better and more nuanced by including voices from all levels of our profession. Even if you think you don't have anything to say, I can personally attest to the flashes of inspiration that are shared at the event sessions.

We have already had many brilliant insights and ideas arise from the sessions held so far, and more are sure to come. This is a once-in-a-generation chance to help shape change in our tax system — and indeed in the world we live in. I urge you not to let it pass you by.

One last thought about that monkey's fist knot. Other than being used as a line weight, it is also rumoured to have been used to safely transport precious gems hidden in its centre. So, when we pick the right knot to untangle, the pay-off might be even better than expected.

Tax Counsel's Report

by Michelle Ma, ATI

Greater appetite for more

A closer look at two welcome measures from the federal Budget 2020-21: the full expensing of depreciating assets and the loss carry-back rules.

On 6 October 2020, the federal Treasurer, Josh Frydenberg, delivered his second Budget.

As outlined in The Tax Institute's *Federal Budget 2020-21 Report*, the key challenge for the government as the economy moves through and beyond the COVID-19 pandemic, facing an estimated deficit of $213.7b for 2020-21, is to support business investment and encourage business and household consumption.

In this regard, the clear winners from the Budget are middle income earners and businesses with an aggregated turnover of less than $5b. There was little support in the Budget for businesses with an aggregated turnover of greater than $5b.

Full expensing of depreciating assets

New assets

The full expensing of eligible depreciating assets first held at or after 7:30pm on 6 October 2020 which are first used, or installed ready for use, by 30 June 2022 provides a strong incentive for businesses with an aggregated turnover of less than $5b to partake in business investment.

The measure is designed to improve cash flow for qualifying businesses by providing up-front deductions instead of spreading them over the effective life of the asset. Amounts invested are ultimately delivered back into the economy as stimulus, with growth stemming from this investment over the short term. The bringing forward of investment spending by eligible businesses will boost sales of computer and office equipment, along with cars and trucks. The absence of a limit on the deductible amount of each eligible asset is a generous and welcome short-term opportunity for eligible businesses.

That said, many Australian businesses are unlikely to qualify for this measure due to the aggregation of the entity's turnover with that of its foreign affiliates and entities connected with it. This may result in the $5b turnover threshold being exceeded.

This measure can be used in conjunction with the loss carry-back measure.

Second-hand assets

Businesses with an aggregated turnover of less than $50m will also be allowed to write off second-hand assets under the new measure. Businesses with a turnover of between $50m and less than $500m can deduct the full cost of second-hand assets only under the instant asset write-off (the asset must cost less than $150,000, be purchased by 31 December 2020, and be first used or installed ready for use by 30 June 2021).

Small businesses

Small businesses (with an aggregated turnover of less than $10m) must deduct the low pool value of their general small business pools on 30 June 2021. This is not a choice.

Pre-existing commitments

Businesses with an aggregated turnover of between $50m and less than $500m cannot use this full expensing measure for assets where the commitment to first hold the asset was entered into before the Budget announcement on 6 October 2020.

The loss carry-back rules

Temporary loss carry-back will provide a significant boost for struggling corporate tax entities (CTEs) making current year losses but profits in previous years. In such cases, tax paid in a previous year is refunded to the CTE. There is no monetary cap on the relief, but the following restrictions apply:

- aggregated turnover must be less than $5b;
- the measure applies to revenue losses only;
- the losses must arise in 2019-20 to 2021-22;
- the losses can be carried back to 2018-19 to 2020-21;
- the loss carry-back must not generate a franking account deficit; and
- the loss carry-back tax offset is claimed in either or both of the 2020-21 and 2021-22 income tax returns.

While a welcome measure, the majority of small businesses are ineligible for loss carry-back as they are conducted outside a corporate structure (eg as a trust, partnership or sole trader). This measure offers such taxpayers nothing in the way of refunds of previous tax paid.

Conclusion

The Tax Institute supports the 2020-21 Budget as it provides positive incentives that are designed to make a difference to many Australian businesses in the short to medium term. However, there remains an important need for longer term and more significant reform. This includes addressing the corporate tax rate, which is uncompetitive by international standards.

The Budget is a positive start but is merely a first step towards what ultimately must be holistic and substantial tax reform. If you haven't already, join us in our The Tax Summit: Project Reform endeavours as we lead the historical case for change in reforming the Australian tax system.

Tax News – the details

by TaxCounsel Pty Ltd

October – what happened in tax?

The following points highlight important federal tax developments that occurred during October 2020.

Government initiatives

1. Boost for skills training: FBT exemption

In a joint media release on 2 October 2020, the Treasurer and the Minister for Housing and Assistant Treasurer announced that the federal government will provide (with effect from 2 October 2020) an exemption from FBT for employer-provided retraining and reskilling for employees who are redeployed to a different role in the business.

The media release states that removing costly barriers to training as the economy rebuilds is essential to ensure that Australian employees have the opportunity to reskill or retrain for the jobs that will come back as the economy reopens.

Currently, FBT is payable if an employer provides training to its employees that is not sufficiently connected to their current employment. For example, a business that retrains their sales assistant in web design to redeploy them to an online marketing role in the business can be liable for FBT. By removing FBT, employers will be encouraged to help workers transition to new employment opportunities within or outside their business.

The exemption will not extend to retraining acquired by way of a salary packaging arrangement or training provided through Commonwealth supported places at universities, which already receive a benefit.

In addition, the government will consult on potential changes to the current arrangements for workers who undertake training at their own expense. The current rules, which limit deductions to training related to current employment, may act as a disincentive for Australians to retrain and reskill to support their future employment needs.

2. Expanding access to small business tax concessions

In another joint media release on 2 October 2020, the Treasurer and the Minister for Housing and Assistant Treasurer announced that the government will expand access to a range of small business tax concessions by increasing the small business entity turnover threshold for these concessions from $10m to $50m.

Businesses with an aggregated annual turnover of between $10m and $50m will have access to up to 10 small business tax concessions.

The expanded concessions will apply in three phases:

- from 1 July 2020, eligible businesses will be able to immediately deduct certain start-up expenses and certain prepaid expenditure;
- from 1 April 2021, eligible businesses will be exempt from the 47% FBT on car parking and multiple work-related portable electronic devices (such as phones or laptops) provided to employees; and
- from 1 July 2021, eligible businesses will be able to access the simplified trading stock rules, remit pay as you go (PAYG) instalments based on GDP adjusted notional tax, and settle excise duty and excise-equivalent customs duty monthly on eligible goods.

Eligible businesses will also have a two-year amendment period apply to income tax assessments for income years starting from 1 July 2021, excluding entities that have significant international tax dealings or particularly complex affairs.

In addition, from 1 July 2021, the Commissioner's power to create a simplified accounting method determination for GST purposes will be expanded to apply to businesses below the $50m aggregated annual turnover threshold.

An amending Bill (the Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Bill 2020) to give effect to this proposed measure was introduced into parliament on 7 October 2020.

3. Companies: temporary loss carry-back

Under a 2020-21 Budget proposal, eligible companies will be able to carry back tax losses from the 2019-20, 2020-21 or 2021-22 income years to offset previously taxed profits in the 2018-19 or later income years.

Corporate tax entities with an aggregated turnover of less than $5b will be able to apply tax losses against taxed profits in a previous year, generating a refundable tax offset in the year in which the loss is made. The tax refund is limited by requiring that the amount carried back is not more than the earlier taxed profits and that the carry back does not generate a franking account deficit. The tax refund will be available on election by eligible businesses when they lodge their 2020-21 and 2021-22 tax returns.

An amending Bill (the Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Bill 2020) to give effect to this proposed measure was introduced into parliament on 7 October 2020.

4. Immediate write-off for eligible capital assets

As part of the 2020-21 Budget initiatives, businesses with an aggregated annual turnover of less than $5b will be able to deduct the full cost of eligible capital assets acquired from 7:30pm AEDT on 6 October 2020 and first used or installed by 30 June 2022.

Full expensing in the year of first use will apply to new depreciable assets and the cost of improvements to existing eligible assets. For small and medium-sized businesses

(with an aggregated annual turnover of less than $50m), full expensing also applies to second-hand assets.

Businesses with an aggregated annual turnover of between $50m and $500m can still deduct the full cost of eligible second-hand assets costing less than $150,000 that are purchased by 31 December 2020 under the enhanced instant asset write-off. Businesses that hold assets eligible for the enhanced $150,000 instant asset write-off will have an extra six months, until 30 June 2021, to first use or install those assets.

Small businesses (with an aggregated annual turnover of less than $10m) can deduct the balance of their simplified depreciation pool at the end of the income year while full expensing applies. The provisions which prevent small businesses from re-entering the simplified depreciation regime for five years if they opt out will continue to be suspended.

An amending Bill (the Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Bill 2020) to give effect to this proposed measure was introduced into parliament on 7 October 2020.

5. Corporate residency test

It was announced in the 2020-21 Budget that amendments are to be made to clarify the corporate residency test that applies for taxation purposes.

The amendments will provide that a company that is incorporated offshore will be treated as an Australian tax resident if it has a "significant economic connection to Australia". This test will be satisfied where both the company's core commercial activities are undertaken in Australia and its central management and control is in Australia.

The corporate residency rules are fundamental to determining a company's Australian income tax liability. The ATO's interpretation following the High Court's 2016 decision in *Bywater Investments Ltd v FCT* [1] departed from the long-held position on the definition of a "corporate resident".

This measure will have effect from the first income year after the date of royal assent of the enabling legislation, but taxpayers will have the option of applying the new law from 15 March 2017 (the date on which the Commissioner withdrew TR 2004/15).

6. Personal tax changes

It was also announced in the 2020-21 Budget that the second stage of the government's Personal Income Tax Plan will be brought forward by two years to 1 July 2020, while retaining the low and middle income tax offset (LMITO) for 2020-21.

This will mean that:

- the top threshold of the 19% personal income tax bracket will increase from $37,000 to $45,000;
- the low income tax offset (LITO) will increase from $445 to $700. The increased LITO will be withdrawn at a rate of 5 cents per dollar between taxable incomes of $37,500 and $45,000. The LITO will then be withdrawn at a rate of 1.5 cents per dollar between taxable incomes of $45,000 and $66,667; and
- the top threshold of the 32.5% personal income tax bracket will increase from $90,000 to $120,000.

An amending Bill (the Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Bill 2020) to give effect to this proposed measure was introduced into parliament on 7 October 2020.

Retaining the LMITO for the 2020-21 income year

The LMITO will be retained for the 2020-21 income year, providing further targeted tax relief for low and middle income earners.

Stage 3 of the Personal Income Tax Plan is to remain unchanged and is to commence in 2024-25 as legislated.

An amending Bill (the Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Bill 2020) to give effect to this proposed measure was introduced into parliament on 7 October 2020.

7. R&D tax incentive

Another measure announced in the 2020-21 Budget was that further enhancements will be made to the 2019-20 Mid-Year Economic and Fiscal Outlook measure "Better targeting the research and development tax incentive — refinements".

For small companies (with an aggregated annual turnover of less than $20m), the refundable R&D tax offset is being set at 18.5 percentage points above the claimant's company tax rate, and the $4m cap on annual cash refunds will not proceed.

For larger companies (with an aggregated annual turnover of $20m or more), the number of intensity tiers will be reduced from three to two. This will provide greater certainty for R&D investment while still rewarding those companies that commit a greater proportion of their business expenditure to R&D.

The R&D premium ties the rates of the non-refundable R&D tax offset to a company's incremental R&D intensity, which is R&D expenditure as a proportion of total expenses for the year. The marginal R&D premium will be the claimant's company tax rate plus:

- 8.5 percentage points above the claimant's company tax rate for R&D expenditure between 0% and 2% R&D intensity for larger companies; and
- 16.5 percentage points above the claimant's company tax rate for R&D expenditure above 2% R&D intensity for larger companies.

The government will defer the start date so that all changes to the program apply to income years starting on or after 1 July 2021.

An amending Bill (the Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Bill 2020) to give effect to this proposed measure was introduced into parliament on 7 October 2020.

8. CGT and granny flats

In another joint media release on 2 October 2020, the Treasurer and the Minister for Housing and Assistant Treasurer announced a targeted CGT exemption for granny flat arrangements where there is a formal written agreement in place.

Under the exemption, CGT will not apply to the creation, variation or termination of a formal written granny flat arrangement providing accommodation for older Australians or people with disabilities. This exemption will only apply to agreements that are entered into because of family relationships or other personal ties and will not apply to commercial rental arrangements.

The media release notes that, when faced with a potentially significant CGT liability, families may opt for informal arrangements which can leave open the risk of financial abuse and exploitation, for example, following a family or relationship breakdown.

The exemption is to apply from the first income year after the date of royal assent of the enabling legislation.

9. FBT: compliance and record-keeping

It was announced in the 2020-21 Budget that the Commissioner will be provided with the power to allow employers to rely on existing corporate records, rather than employee declarations and other prescribed records, to finalise their FBT returns.

Currently, the FBT legislation prescribes the form that certain records must take and forces employers, and in some cases employees, to create additional records in order to comply with FBT obligations.

The proposed measure will allow employers — with what the Commissioner determines as adequate alternative records — to rely on existing corporate records, removing the need to complete additional records. This will reduce compliance costs for employers, while maintaining the integrity of the FBT system.

The measure is to have effect from the start of the first FBT year (1 April) after the date of royal assent of the enabling legislation.

The Commissioner’s perspective

10. DTAs: general anti-abuse rules

The Commissioner has released a law administration practice statement that is intended to assist ATO staff on the administrative process of applying a principal or main purposes test included in any of Australia’s tax treaties (PS LA 2020/2).

The practice statement uses the expression “purpose test” as a term of convenience to cover the tests it applies to. These are:

- the principal purposes test under para 1 of art 7 of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* as it applies to a covered tax agreement (the MLI PPT);
- a principal purposes test in an Australian tax treaty that is not a covered tax agreement; and
- a main purposes test in an Australian tax treaty that is yet to be or will not be modified by the Convention.

The practice statement is divided into the following sections:

1. what to do when considering applying a purpose test;
2. framing questions and documents that may be relevant when you are considering applying a purpose test; and
3. background and relevant considerations when applying the MLI PPT.

The practice statement has been developed in recognition of the fact that applying a purpose test to deny a benefit under a tax treaty is a serious matter.

11. Simplified working from home deductions: COVID-19

The Commissioner has extended the temporary arrangements put in place to make it easier for taxpayers to claim deductions for working from home due to COVID-19 (PCG 2020/3, as amended).

As extended, the guideline applies from 1 March 2020 and will cease to apply on 31 December 2020. Further consideration is to be given as to whether the date the guideline will cease to apply may be extended beyond 31 December 2020.

The further extension will allow taxpayers working from home to continue to claim a rate of 80 cents per hour by keeping a record of the number of hours they have worked from home, rather than needing to calculate specific running expenses, until 31 December 2020.

These simplified arrangements do not prohibit taxpayers from making a standard working from home claim using the two standard approaches should they wish to do so.

Recent case decisions

12. Discretionary trust: distribution issues

In allowing an appeal from a decision of the AAT, the Full Federal Court (Jagot, Davies and Thawley JJ) has unanimously held that a purported distribution of income for the 2014 income year by the trustee of a discretionary trust (the Whitby Trust) was ineffective and that the default beneficiaries who would otherwise have been presently entitled to the income of the trust for that income year had effectively disclaimed their entitlements as such beneficiaries (*Carter v FCT*[2]).

For each of the 2011 to 2013 income years, the Commissioner assessed the individuals who were the default income beneficiaries under the Whitby Trust deed on the net income of the trust for the income year. The default beneficiaries executed deeds of disclaimer in respect of their entitlements for each of the income years which the Commissioner accepted were retrospectively effective and assessed the trustee in respect of those income years.

For the 2014 income year, by amended assessments issued on 27 October 2015, the Commissioner assessed the default income beneficiaries under the Whitby Trust deed in respect of the net income of the trust for that income year. It was these assessments that were the subject of dispute.

Purported distribution

In a joint judgment, the Full Court rejected an argument advanced by the default beneficiaries that there had been a distribution of the income of the Whitby Trust for the 2014 income year to another trust as a result of a resolution that the trustee of the Whitby Trust made on or before 30 June 2014. The Full Court held that the default beneficiaries had not established that the AAT had erred in not being satisfied

that a purported 30 June 2014 meeting of the trustee occurred or that the alleged resolution was in fact made.

Additionally, under the terms of the trust deed that established the Whitby Trust, the consent of the guardian would have been required as a condition precedent to a valid distribution to the other trust. The failure to obtain such consent would mean that a purported exercise of the power to distribute income was invalid.

2014 disclaimers

In early November 2015, the default beneficiaries executed deeds of disclaimer in respect of the 2014 income year which were in terms similar to the disclaimers that had been made (and accepted by the Commissioner) in respect of the earlier income years. On 20 December 2015, each of the default beneficiaries objected to the amended assessments of income tax issued to them for the 2014 income year on the basis that the November 2015 disclaimers were effective to disclaim any gift to them under the trust deed. The Commissioner did not accept the effectiveness of the disclaimers because they only purported to disclaim in relation to the 2014 income year, rather than to disclaim any entitlement at all in any income year as a default beneficiary.

On 30 September 2016, each of the default beneficiaries executed a further deed of disclaimer which expressly disclaimed any interest as a default beneficiary.

The Full Federal Court said that the AAT had correctly noted that the primary beneficiaries of the Whitby Trust had two pathways by which they could be distributed trust income — as discretionary objects in respect of whom the trustee might distribute shares of annual income under cl 3.1 of the trust deed, and as default beneficiaries through the operation of cl 3.7 of the deed. As discretionary objects, each distribution was a separate gift capable of being disclaimed year by year. As default beneficiaries, they were donees with a vested entitlement liable to be divested and there was a single gift able to be disclaimed within a reasonable time of becoming aware of it.

The Full Federal Court said that, on these facts, there was only one conclusion reasonably open to the tribunal. The applicants' conduct was consistently directed towards one end — to reject any right to any income from the trust. In circumstances where the Commissioner had accepted the efficacy of the disclaimers in respect of the 2011 to 2013 income years, it was unsurprising that the first disclaimers in respect of the 2014 income year were executed in equivalent terms to disclaim the right to any income for that income year. Further, when the Commissioner rejected the efficacy of these disclaimers, the applicants promptly executed the new disclaimers on 30 September 2016, as they put it, to confirm the position they (wrongly) believed they had already made clear — their intention not to accept any income from the trust.

In other words, the only inference reasonably open on the facts before the tribunal was that, immediately on gaining full knowledge of the nature of their interests (by the Commissioner's notification of the rejection of the November 2015 disclaimers), the beneficiaries effectively disclaimed their interests. In all of these circumstances, it was not reasonably open to the tribunal to affix to the beneficiaries implicit or tacit acceptance of the income of the trust for the 2014 income year, including by reason of delay. The time between the 2011 to 2013 disclaimers and the ultimate 2014 disclaimers had to be "considered as but one circumstance in the overall circumstances". When that was done, on the uncontested facts, the only conclusion reasonably open was that the applicants had not lost their right to disclaim any income from the trust. Accordingly, the September 2016 disclaimers were effective.

Retrospective disclaimer and s 97 ITAA36

The Commissioner also contended that the general law consequence of a retrospective disclaimer was not binding as against him by reason that present entitlement for the purposes of s 97 of the *Income Tax Assessment Act 1936* (Cth) is temporal to the particular income year in which the present entitlement arises, as the allocation of the net income of a trust estate for the particular income year is based on that entitlement to income at year end so that returns may be lodged and tax assessed within the statutory time limits.

In rejecting this contention, the Full Federal Court said that, where the entitlement is disclaimed, the consequence is that s 97 is not engaged because the application of that section fixes the liability on the beneficiary only in the case where the beneficiary has a present entitlement to income under a trust. Until disclaimer, a beneficiary's entitlement to income under a trust is operative for the purposes of s 97 from the moment it arises but, on disclaimer, the general law extinguishes the entitlement to trust income ab initio. The disclaimer is determinative as against the Commissioner in the application of s 97 to the beneficiary as the effect of a disclaimer is that the beneficiary must be treated as never entitled to the income for the purposes of s 97 in respect of the relevant income year.

The decision in this case is important in that it demonstrates that there may be difficult issues in relation to the administration of a discretionary trust that may lie below the surface. Practitioners need to pay careful attention to the terms of the trust deed and trust law principles when dealing with discretionary trust issues.

13. Extension of time: application for review

The AAT has exercised its statutory discretion to extend the time for a taxpayer to lodge applications to the tribunal for the review of the Commissioner's decisions on her objections against amended and original income tax assessments and penalty assessments for the four income years 2010 to 2013 (*Cassaniti and FCT*[3]).

The relevant assessments were issued on 20 July 2016 and the taxpayer lodged objections against the assessments on 19 September 2016. The Commissioner's decisions on the objections were made on 27 October 2017. On 9 August 2019, the taxpayer filed with the AAT an application for a review of the Commissioner's decisions and also an application for the AAT to extend the 60-day period for lodging the application for review which had expired on 28 December 2017.

The test for determining whether an extension of time to file an application for review with the AAT should be granted are set out in s 29(7) of the *Administrative Appeals Tribunal Act*

1975 (Cth). This is whether "the Tribunal is satisfied that it is reasonable in all the circumstances" to extend the time.

The AAT said that an assessment of what may lead to the required state of satisfaction involves an objective assessment of all of the circumstances. Needless to say, the guidance found in the statement of principles in cases like *Hunter Valley Developments Pty Ltd v Cohen*[4] and, specifically in relation to objection decisions relevant to taxation matters, *Brown v FCT*[5] assist in identifying the matters and the approach that should be taken when determining what is "reasonable in all the circumstances". Those cases, however, do not restrict the width of the matters that are relevant because of the phrase "all the circumstances". It is necessary to ensure that mindless adherence to the guidance offered in those cases does not stand in the way of arriving at what, in each case, must be "reasonable".

The AAT said that the *Hunter Valley Developments* and *Brown* cases directed attention to matters that provide a useful framework for determining what is reasonable. The matters to which attention is specifically drawn include: whether there is an acceptable explanation for the delay; whether the taxpayer simply rested on their rights; whether there is prejudice between the parties or, as a wider matter, prejudice to the public, occasioned because of the delay; and the merits of the case. The category of matters that might be relevant in a case is not confined to these matters and other factors which point to the reasonableness of allowing more time to file an application for review may be relevant.

After considering each of those matters, the AAT said that it was important to not lose sight of the fact that the overarching purpose of a provision allowing an extension of time is to avoid injustice or, perhaps more accurately, the prospect of injustice. In this case, the taxpayer's explanation for her delay was acceptable. It explained why she did not adhere to the 60-day time limit. There was a certain reality about everything that was happening at the time and, no doubt, the effect that it was having on the taxpayer. The AAT did not consider that the taxpayer engaged in some deliberate or pre-determined strategy of forestalling her application for some other and ulterior reason. There was no prejudice to the Commissioner and, quite properly, none was relied on. The only prejudice occasioned by any delay was to the taxpayer herself. On the material put forward by the taxpayer, she had an arguable case for demonstrating error in that she has been required by the Commissioner's decision to pay more tax than she should.

14. Residence of individual: DTA tie-breaker rules

In a joint judgment, the Full Federal Court (Davies, White and Steward JJ) has dismissed an appeal (by the Commissioner) and a cross-appeal (by the taxpayer) from a decision of Logan J that the taxpayer was a resident of Australia and also of Thailand, and that the residency tie-breaker provisions of the Australia and Thailand double tax treaty (DTA) operated to treat the taxpayer as a resident solely of Thailand (*FCT v Pike*[6]).

As with most residency cases, the facts are somewhat extensive. The following are sufficient to get a feeling for the position. The taxpayer was born in 1972 in what was then the British colony of Southern Rhodesia and later became the Republic of Zimbabwe. In Zimbabwe, the taxpayer developed a career in the tobacco industry. By 2004, he had become highly experienced in tobacco selection, production and sales. The taxpayer was then, and continued to be, in a longstanding de facto relationship with a Ms Michelle Thornicroft. She was also born in Southern Rhodesia in 1971 and they had two sons, each born in Zimbabwe in 1995 and 1999, respectively.

By 2004, the economic crisis and shortages of food and basic supplies in Zimbabwe caused the taxpayer and Ms Thornicroft to decide to leave that country with their children. To that end, Ms Thornicroft sought, was offered, and accepted an appointment in Ernst & Young's Brisbane office that was due to commence on 4 April 2005. The taxpayer was then employed in Harare under a contract with the tobacco industry company, Alliance One. Prompted by the decision to relocate to Australia, the taxpayer negotiated an arrangement with Alliance One, under the terms of which he would receive a payment after serving out the term of his existing contract.

In February 2005, Ms Thornicroft was granted a subclass 457 visa, and the taxpayer and their sons were also granted visas allowing them to accompany Ms Thornicroft to live in Australia during the currency of her subclass 457 visa. On 17 March 2005, the family travelled to Australia. On their arrival in Australia, the taxpayer and Ms Thornicroft leased an apartment in Fortitude Valley, Brisbane.

The taxpayer returned to Zimbabwe shortly after the family's arrival in Australia to serve out his contract with Alliance One, to sell some assets (but not their Harare home) that the couple owned in that country, and to pack up and arrange the transportation to Australia of their furniture. He returned to Australia in September 2005.

On his return to Australia, the taxpayer sought employment, but the period during which he and Ms Thornicroft transitioned from Zimbabwe to Australia coincided with the winding-up of the tobacco growing industry in Australia and the taxpayer found that he was unable to find suitable employment in Australia. Ultimately, in late 2006, he was offered and took up a position based in Thailand as a tobacco and leaf consultant with Premium Tobacco (Asia) Ltd. His initial contract for this work was for six months. However, in June 2006, he entered into a further contract with Premium Tobacco (Asia) Ltd as a sales manager. This position was for an indefinite duration. His duties required that he be based in Thailand but also that he undertake duties elsewhere in Asia as required. The taxpayer was granted a work visa by the Thai Government which allowed him to live and work in Thailand. He opened a bank account in Thailand and his salary was paid into that account.

Over the next eight years, the taxpayer continued to be based in Thailand for employment purposes, travelling elsewhere in the Asian region as required. He was granted successive Thai work visas, each keyed, in terms of a right to live and work in Thailand, to ongoing employment in that country. Though he intended to, and did, return to his family in Australia, circumstance required that he spend most of his time working and living in Thailand.

The Full Federal Court said that the objective facts pressed by the taxpayer, if considered alone, would appear to weigh against a conclusion that he was a resident of Australia within ordinary concepts in the relevant years. But those facts were only part of the matrix of facts that had a bearing on the question of residency, and they were a blinkered snapshot of the total matrix of the facts. Specifically, the court rejected the contention that Logan J at first instance placed too much emphasis on the continuing presence in Australia of the taxpayer's de facto wife and children. The evidence as a whole and as considered by Logan J amply supported the conclusion reached by his Honour that, when the taxpayer returned to Australia, he did not do so as a visitor but returned to resume living with his de facto wife and family at the family home, and such a conclusion was plainly open on the evidence.

Accordingly, the Full Federal Court agreed with the conclusion and reasons of Logan J that the taxpayer was a resident according to ordinary concepts in the 2009 to 2016 income years. There was no dispute that the taxpayer was a resident of Thailand for the purposes of Thai tax during the income years 2009 to 2014 (inclusive).

As the taxpayer had dual residency during the relevant income years, it was necessary to consider the application of the tie-breaker provisions in art 4(3) of the Australia and Thailand DTA to determine whether the taxpayer was deemed to be a resident of Australia or, as the case may be, Thailand. On the facts of the present case, the relevant tie-breaking rule was that the taxpayer would be resident solely of the country with which the taxpayer's personal and economic relations were closer.

The Full Federal Court rejected both the contention that Logan J applied a disjunctive test, not a conjunctive test, and the contention that the findings of facts should have led Logan J to conclude that the taxpayer's personal and economic relations were closer to Australia. The Full Federal Court made these points:

- no error was discernible in the approach of Logan J in examining the taxpayer's personal and economic considerations. Each case must be fact specific. In some cases, the personal and economic considerations may be so intertwined that they are not separate considerations, whereas in other cases, they may be quite separate and distinct matters. The test poses a composite test, and in each case, it will be a matter of fact and degree as to whether a taxpayer's personal and economic relations, viewed as a whole, support ties closer to one contracting state over the other contracting state;
- it was not put that Logan J failed to make any necessary finding of fact, nor that he made any wrong findings of fact, nor that he took irrelevant considerations into account or failed to take relevant considerations into account. Rather, the Commissioner's case, in substance, rested on the weight which the Logan J attributed to some of the facts. Critically, in that regard, Logan J expressly considered, and was of the view, that the taxpayer's personal relations were closer to Australia than Thailand; and
- an evaluation of the facts did not persuade the Full Federal Court that the conclusion of Logan J was wrong. Nor could it be said that the conclusion reached by his Honour was not reasonably open.

15. Other cases

There have been a number of other recently decided cases that should be noted. These include:

- *Eichmann v FCT*,[7] in which the Full Federal Court has clarified how the definition of "active asset" in s 152-40 of the *Income Tax Assessment Act 1997* (Cth) is to be interpreted and applied. The decision is considered in the Tax Tips column of this issue of the journal (see page 228);
- *VGDW and FCT*,[8] in which the AAT considered whether certain payments to the taxpayer were made "in consequence of" the termination of his employment;
- *Gurney and FCT*,[9] in which the AAT considered whether an individual was a resident of Australia, and in which the concepts of domicile and a permanent place of abode outside Australia were particularly relevant; and
- *Crown Melbourne Ltd v FCT*,[10] in which Davies J considered the operation of GST (including the special provisions of Div 126 of *A New Tax System (Goods and Services Tax) Act 1999* (Cth)) in relation to casino junket arrangements.

Amending Bill now law

The amending Bill referred to in items 2, 3, 4, 6 and 7 has now been passed by parliament and is Act No. 92 of 2020.

TaxCounsel Pty Ltd
ACN 117 651 420

References

1 [2016] HCA 45.
2 [2020] FCAFC 150.
3 [2020] AATA 3447.
4 [1984] FCA 176.
5 [1999] FCA 563.
6 [2020] FCAFC 158.
7 [2020] FCAFC 155.
8 [2020] AATA 3745.
9 [2020] AATA 3813.
10 [2020] FCA 1295.

THE TAX INSTITUTE

The *Tax* Summit
Project Reform

24–25 NOVEMBER / ONLINE

VIRTUAL SUMMIT

A CASE FOR CHANGE

50+ Speakers | 30 CPD hours | 15 Sessions | 1 Ticket

Two compelling half-days that consist of keynote sessions, panel discussions and breakout streams. The Virtual Summit will be the culmination of the event and discussion series to date and will present the options, discuss their merits and define the priorities for reform.

Full Access Virtual Pass

Member Pricing

$695

Up to 30 CPD hours

8 Focus Sessions

6 Keynotes

2 day Virtual Summit

+ Special 'Bonus' content

+ Watch Live & On Demand

All tickets include access to the full program of sessions at **The Tax Summit: Project Reform** right up to the Virtual Summit on 24–25 November 2020, including on-demand access to the recent Focus Sessions and Keynotes.

Register now

thetaxsummit.com.au

Tax Tips

by TaxCounsel Pty Ltd

Active asset test

A recent Full Federal Court decision has given some much-needed clarity to the active asset concept that is central to the operation of the CGT small business reliefs.

Background

The unanimous decision of the Full Federal Court (McKerracher, Steward and Stewart JJ) in *Eichmann v FCT*[1] has clarified how the definition of "active asset" in s 152-40 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97) is to be interpreted and applied in the case of a tangible CGT asset.

The decision of the Full Court reversed a decision of Derrington J at first instance[2] in which his Honour had held that certain land owned by the taxpayer and his spouse, and which was used by a family discretionary trust that carried on a business, was not an active asset as defined for the purposes of the CGT small business reliefs. The decision of Derrington J had reversed a decision of the AAT that was given on an application for the review of a decision of the Commissioner on an application for a private ruling.[3]

The actual decision of Derrington J and the reasoning underlying that decision did not appear to be satisfactory, and were discussed in the Tax Tips column in the February 2020 issue of the journal.[4] It was there suggested that the decision produced a somewhat harsh result by imposing too high a test for the application of provisions that are expressly directed at assisting small business.

Now, the Full Federal Court in a joint judgment has confirmed the unsatisfactory nature of the decision of Derrington J. The difficulties that the Full Court had with the decision of Derrington J were two-fold and are identified and highlighted in the following passage from the joint judgment:[5]

> "For the reasons which follow, and with the most profound respect for the learned primary judge, we have decided that his Honour did not correctly identify the applicable test and even if he did, in our view, on the ruled facts, the appellant's property was an active asset."

As mentioned, the *Eichmann* case arose out of an objection to a private ruling given by the Commissioner. Some comments about the efficacy of the private ruling procedure (rather than the assessment/objection procedure) to establish the meaning and application of provisions of the taxation law are given at the end of this article.

The facts

The taxpayer and his spouse carried on a business through the Eichmann Family Trust (the trust) which commenced operations before the relevant land was purchased. The business carried on by the trust was a business of building, bricklaying and paving. Eichmann and Sons Pty Ltd was the sole trustee of the trust. The taxpayer and his spouse were beneficiaries of the trust and were the shareholders and directors of the corporate trustee.

The taxpayer and his spouse purchased their matrimonial home in 1997. In the same year, they acquired the property next door as joint tenants. It was the status of this property (that is, whether it was or was not an active asset) that was in issue. The property, which is referred to in this article as "the relevant property", was sold in October 2016.

On 15 December 2016, the taxpayer lodged with the Commissioner an application for a private ruling on the question of whether the relevant property was an active asset as defined in s 152-40 ITAA97. The Commissioner issued a ruling on 20 July 2017 to the effect that the relevant property was not an active asset.

There were two sheds on the relevant property which each measured 4 metres x 3 metres, and the property had a 2 metre high block wall and a gate to secure it. There was no business signage on the relevant property.

The other facts about the usage of the relevant property, as found by the Commissioner for the purpose of making the private ruling, were as follows:[6]

- the two sheds were used for the storage of work tools, equipment and materials;
- the open space on the property was used to store materials that did not need to be stored under cover, including bricks, blocks, pavers, mixers, wheelbarrows, drums, scaffolding and iron;
- work vehicles and trailers were parked on the property;
- tools and items were collected on a daily basis;
- in some cases, the property would be visited a number of times a day in between jobs, depending on what each job required;
- the property was mainly for storage, as work would be done on work sites; and
- on occasion, some preparatory work was done at the property in a limited capacity.

The business of the trust had an aggregated turnover of less than $2m a year and was thus a small business entity for the purposes of the CGT small business reliefs. There was no dispute that the business was carried on by an entity that was connected with the taxpayer during the relevant period; what was in issue was whether the property fell within the expression "is used … in the course of carrying on a business" within the meaning of s 152-40(1)(a) ITAA97.

The legislation

The relevant provision of the ITAA97 was the definition of "active asset" in s 152-40. So far as is directly relevant, the section provides:

> "**152–40 Meaning of active asset**
>
> (1) A CGT asset is an ***active asset*** at a time if, at that time:
>
> (a) you own the asset (whether the asset is tangible or intangible) and it is used, or held ready for use, in the course of

carrying on a business that is carried on (whether alone or in partnership) by:

(i) you; or

(ii) your affiliate; or

(iii) another entity that is connected with you; or

(b) if the asset is an intangible asset — you own it and it is inherently connected with a business that is carried on (whether alone or in partnership) by you, your affiliate, or another entity that is connected with you."

The AAT decision

As indicated, the taxpayer applied to the AAT for a review of the Commissioner's adverse decision on the private ruling application. In a decision handed down on 15 February 2019, the AAT (constituted by Deputy President Hanger, QC) rejected the Commissioner's contention that the phrase "in the course of" in para (a) of the definition of "active asset" quoted above required the use of the asset to be integral to the process by which the business is carried on.

In the tribunal's view, the phrase only required the asset to be used "in the course of carrying on a business", encompassing, necessarily, a fairly wide range of activities. Nothing in the ITAA97, any applicable case authority or explanatory memoranda detracted from the ordinary and common sense meaning of the words "used in the course of carrying on a business". The legislature could easily have used the word "necessary", "integral" or "essential" in order to further limit the availability of the concession should it have so desired. It did not do so.

The tribunal also noted that the extent of the use of the relevant property by the trust was far from minimal, or incidental to the carrying on of the business.

The Federal Court: at first instance

In a decision handed down on 20 December 2019, the Federal Court (Derrington J) allowed an appeal by the Commissioner from the decision of the AAT.

Derrington J held that the relevant property was not used in the course of carrying on the business of building, bricklaying and paving. That was because his Honour formed the view that s 152-40 ITAA97 would only be satisfied where there existed a direct relationship between the use of an asset and the carrying on of a business. His Honour expressed the applicable test as follows:[7]

> "In essence, in order for an asset to be used 'in' the course of carrying on a business it is necessary for the use to have a direct functional relevance to the carrying on of the normal day-to-day activities of the business which are directed to the gaining or production of assessable income."

Derrington J concluded that the use of the relevant property did not have a direct functional relevance to the carrying on of the normal day-to-day activities of a business of building, bricklaying and paving. That was because those business activities took place at building sites. It followed that the use of the relevant property was preparatory to the course of carrying on that business. His Honour concluded:[8]

> "[T]he uses to which the land was put were preparatory to the undertaking of activities in the ordinary course of business. The property was used for the storage of materials for use by the company when it engaged in its business activities if those materials were required, but the storage itself was not an activity in the ordinary course of Eichmann & Sons' business. Whilst it may have been a use of the land 'in relation to' the carrying on of the business, it was not, of itself, an activity in the course of carrying on the business. There was no direct connection between the uses and the business activities and the uses had no functional relevance [sic] those activities. It follows that the land which was the subject of the private ruling was not 'used, or held ready for use, in the course of carrying on a business' and the Commissioner was correct to conclude that the land was not an active asset."

The Full Federal Court on appeal

An appeal by the taxpayer from the decision of Derrington J was allowed by a unanimous decision of the Full Federal Court.

In a joint judgment, the Full Federal Court said that, contrary to the Commissioner's submissions, the provisions conferring CGT small business relief (that is, Div 152 ITAA97) should be construed beneficially rather than restrictively in order to promote the purpose of the concessions conferred by the Division. The beneficial nature of the relief was described in the explanatory memorandum to the New Business Tax System (Capital Gains Tax) Bill 1999 (Cth) which, when enacted, inserted Div 152 into the ITAA97. The joint judgment continues:[9]

> "The beneficial nature of the CGT small business reliefs was also discernible in the Guide to Div 152, s 152-1, which states that, '[t]o help small business', the small business concessions are available on satisfaction of the relevant conditions. Guides are of limited assistance in interpreting the 1997 Act, but they may be considered in 'determining the purpose or object underlying [a] provision': s 950-150(2)(a). We have considered s 152-1 in this way in construing s 152-40(1)(a)."

It followed that, because s 152-40(1)(a) is beneficial in nature, "its language should be construed so as to give the most complete remedy which is consistent 'with the actual language employed' and to which its words 'are fairly open'".[10] The Full Court said that a beneficial construction of legislation may legitimately influence constructional choices in a given case which arise from the use of generalised language to describe a necessary connection between two things; here, those two things are the use of an asset and the carrying on of a business.

A further point made by the Full Court was that the language used in s 152-40(1)(a) relevantly required one to ascertain three matters. One must determine the use of a particular asset; one must then determine the course of the carrying on of a business; and then one must see whether the asset was used in the course of the carrying on of that business. These inquiries involved issues of fact and degree. Their Honours went on:[11]

> "But because s 152-40 should be construed beneficially, no narrow approach to the consideration of these issues should be applied. We also observe that, for these purposes, the legislature has not used language which might confine these inquiries. It has not, although it could have, referred to the 'ordinary' course of a business or to the 'day to day' course of a business; it has not used the words 'direct' or

'integral' to qualify the word 'in'. It is sufficient if the asset is used at some point in the course of the carrying on of an identified business."

The Full Court went on to make these further points:

- statutory context did not justify a different approach. Unlike the Commissioner's submissions, the phrase "inherently connected" in s 152-40(1)(b) could not be described as a reference to a close or direct connection with the carrying on of a business. Rather, this language was adopted because of difficulties that might otherwise have arisen if the test in relation to intangible assets (such as goodwill) had been confined to a test of asking whether such intangible assets had been "used" in a business;
- Derrington J repeatedly referred to the need for the relevant asset to be used in the course of carrying on the activities of a business "which are directed to the gaining or production of assessable income". Section 152-40(1)(a) ITAA97 imposes no such requirement; and
- no assistance was afforded "by the use of the label 'active asset' in construing s. 152-40(1)(b)".[12] It has long been established that "[i]t would be quite circular to construe the words of a definition by reference to the term defined".[13]

It followed, their Honours said, that s 152-40(1)(a) does not require the use of the relevant asset to take place within the day-to-day or normal course of the carrying on of a business. Nor does the provision require a relationship of direct functional relevance between the use of an asset and the carrying on of a business. Such narrowing qualifications to the statutory test were not supported by the language of the provision and were inconsistent with the need to construe that language beneficially.

Their Honours also said:[14]

> "Applying s. 152-40(1)(a) to the ruled facts, we are also of the opinion that the appellant's property was used in the course of carrying on the business here of building, bricklaying and paving. We respectfully reject the Commissioner's contention that the ruling should be construed as having made no finding concerning the existence of a connection between the use of the appellant's property and the business. The learned primary judge was plainly correct in deciding that it was implicit from the ruled facts that the appellant's property was being used in relation to the business. However, we would go further. In our view, the ruling makes it clear that the appellant's property was being used on a day to day basis as part of the business of building, bricklaying and paving."

Their Honours said that this last point was made clear from the references in paras 12 to 14 of the ruled facts: to the tools and items being "collected on a daily basis"; to the taxpayer's property being "visited a number of times a day in between jobs"; to the number of such visits "depending on what each job required"; to the occasional undertaking of "preparatory work" on the taxpayer's property; and to the very nature of the items kept on the taxpayer's property. They were all aptly directed to the business of building, bricklaying and paving.

Their Honours then went on:[15]

> "Paragraphs 12-14 of the ruled facts well identify the use of the asset here, being the appellant's property. In contrast, para 6 of the ruled facts[16] does not very well describe the parameters of the course of the carrying on of the business here, being the business of building, bricklaying and paving. On one view, the ruling is, in this respect, perhaps deficient. In applying s 152-40(1)(a), in our view, the drafter of the ruling could have made clearer findings of fact about how the business was carried on. If necessary, the drafter could have made further inquiries about that issue: s. 357-105 of Sch 1 of the TAA. However, notwithstanding para 6's shortcomings, they are not fatal to the appellant's case. That is because the nature of the business carries with it a clear implication or inference that it needed a place to store necessary tools and materials. Here, that place was the appellant's property. In our view, it is obvious that an ability to secure overnight on a daily basis, and otherwise store, necessary tools and materials is an element of the particular business here of building, bricklaying and paving. It follows that it cannot be said that the appellant's property was used outside of the course of carrying on the business of building, bricklaying and paving. Being a part of that activity, the use here took place 'in' the carrying on of that business.
>
> We also very respectfully disagree with the learned primary judge's characterisation of the use of the appellant's property as 'preparatory' in nature if that was intended as a finding that the appellant's property was used outside the course of the carrying on of the business. In our view, the secure storage of the tools and materials of the business on a daily basis was very much part of the course of the carrying on of that business. If, however, his Honour intended to characterise that storage as preparatory to any on-site building work, then we respectfully agree with it."

What if the test propounded by Derrington J were correct?

As indicated in the passage quoted from the judgment of the Full Federal Court at the beginning of this article (see "Background"), the Full Court considered that, if the reasoning of Derrington J were applied, the taxpayer's appeal should in any event be allowed.

This was because, even if the construction adopted by Derrington J were correct, the Full Court said that they would, in any event, characterise the use of the taxpayer's property as bearing a "direct functional relevance to the carrying on of the normal day to day activities" of the business. The taxpayer's property served the function of being a secure and necessary place for the storage of the plant and equipment of the business. That function bore a direct relationship to the activities of building, bricklaying and paving. Again, the safe overnight storage of such tools and materials was a central concern of that type of business. Storage took place on a daily basis. It therefore followed that the use of the taxpayer's property did not fall outside the course of carrying on the business in question.[17]

Some observations

There are several observations that may be made in relation to the Full Federal Court's decision in the *Eichmann* case.

First, the decision takes what is a clearly sensible approach to the construction of the definition of "active asset" in s 152-40 ITAA97. That construction emphasised the importance of the definition being construed in a beneficial way. The decision also demonstrates that, even if a narrower approach were to be taken to the construction of the definition, the same result would follow.

The attempt to use a challenge to a private ruling to resolve a dispute as to the construction and application of the tax law

can, in many cases, turn out to be an unsatisfactory modus operandi. In this regard, the Full Court in the *Eichmann* case said:[18]

> "As is sometimes the case with private binding rulings, ruled facts can, with the benefit of hindsight, be found to be not as fulsome as might be desired to decide the question of law before the Court. That is not meant as a criticism of the Commissioner's staff. They cannot be expected to predict all of the legal arguments that might subsequently be made in relation to the facts they identify in a ruling. But it does suggest that the rulings system … will not always be an apt mechanism to address disputes concerning facts, and even issues of characterisation of those facts."

The objection procedure in relation to a private ruling can potentially lead to a substantial imbalance for the taxpayer. On an appeal from, or on a review of, the Commissioner's decision on an objection in relation to a private ruling, the taxpayer is effectively confined to the facts as stated in the private ruling.[19] But the Commissioner is not. In the *Eichmann* case, the Commissioner sought to take advantage of this. Thus, Derrington J said:

> "Ms Brennan QC for the Commissioner submitted that the facts stated in the scheme did not identify the extent of the use of the land, but only the distinct uses to which it was put."

It is suggested that it is inequitable if the Commissioner may rely on an alleged deficiency in the facts stated in a private ruling in an attempt to defeat the taxpayer's application for a review of an objection decision given by the Commissioner in relation to the private ruling. In this regard, it is important to note that s 357-105(1) of Sch 1 to the *Taxation Administration Act 1953* (Cth) provides:

> "If the Commissioner considers that further information is required to make a *private ruling or an *oral ruling, the Commissioner must request the applicant to give that information to him or her."

This provision, it is submitted, effectively casts the onus on the Commissioner to ensure that all relevant information for the making of a private ruling has been supplied, and if he considers that all relevant information has not been supplied, it is mandatory that he requests the further relevant information ("the Commissioner must …"). If the Commissioner should have, but does not, request the supply of further information, this should not put the Commissioner at an advantage before the AAT or the Federal Court on a review or an appeal. For this to be the case may require legislative intervention.

There is one aspect of the appeal to the Full Federal Court that is a little puzzling. Although the case was funded under the test case litigation funding initiative, it is not clear why the taxpayer's appeal to the Full Federal Court was not filed within the ordinary appeal period; the taxpayer had to apply for an extension of time within which to lodge an appeal with the court. If the appeal had not been taken, the legacy would have been that a deficient precedent may have been effectively set.

A further appeal?

It would be open to the Commissioner to seek to obtain special leave to appeal to the High Court from the decision of the Full Federal Court in the *Eichmann* case. Whether the Commissioner will seek to obtain special leave to appeal to the High Court is not yet known. It is suggested, however, that if an application for special leave were to be brought, there would be a real likelihood that the application would be refused.

TaxCounsel Pty Ltd

References

1 [2020] FCAFC 155.
2 *FCT v Eichmann* [2019] FCA 2155.
3 *Eichmann and FCT* [2019] AATA 162.
4 See TaxCounsel Pty Ltd, "Active asset test", (2020) 54(7) *Taxation in Australia* 353.
5 [2020] FCAFC 155 at [3].
6 [2019] FCA 2155 at [8]-[14].
7 [2019] FCA 2155 at [61].
8 [2019] FCA 2155 at [63].
9 [2020] FCAFC 155 at [39].
10 *Khoury v Government Insurance Office of New South Wales* [1984] HCA 55 at [29] per Mason, Brennan, Deane and Dawson JJ.
11 [2020] FCAFC 155 at [41].
12 [2020] FCAFC 155 at [42]-[45].
13 *Owners of Shin Kobe Maru v Empire Shipping Co Inc* [1994] HCA 54 at [26].
14 [2020] FCAFC 155 at [47].
15 [2020] FCAFC 155 at [48] and [49].
16 That the trust carries on a business of building, bricklaying and paving.
17 [2020] FCAFC 155 at [50].
18 [2020] FCAFC 155 at [9].
19 See *FCT v McMahon* [1997] FCA 1087.

Tax Education

The skills you need to deliver the right advice

From business start-ups to retirement transitions, The Tax Institute's 2020 study period 1 duxes shares their views on developing tax advice skills.

Lee-Ming Au, General Manager – Business Services, TCF Services, Victoria

Can you provide a brief background of your career in tax?

With a background in engineering and commerce, I started my career in tax at KPMG in an R&D tax incentive role in 2013. After building and refining my skills and knowledge on large multinational clients for a number of years, I transitioned into a medium-sized firm four years ago to assist start-ups and SMEs in accessing their funding needs through government programs, with a focus on R&D tax incentives.

Most valuable aspect of studying with the Institute

CommLaw2 provides an excellent foundation in the legal aspects of business structures and their impact on taxation. The area I found most valuable was learning about advising clients on the optimum business structure based on their specific needs.

What are your areas of new confidence?

The CommLaw2 subject has provided me with enhanced knowledge to apply to my role in assisting clients to comply with their R&D tax obligations, most notably how businesses (especially in the start-up phase) can be legitimately structured to achieve the most effective tax planning.

What was the reason for undertaking CommLaw2 with the Institute?

I undertook this subject as part of the Tax Agent Program.

Where to now for you when it comes to continuing tax education?

I am aiming to complete the Tax Agent Program by the end of this year, and plan to continue my tax education in the Chartered Tax Adviser Program, so I can be up to date with the latest information to serve my clients better.

What are the challenges of juggling study and work?

Unexpected work deadlines can adversely affect your study plans. My tips for managing study and work include having a study plan in place, and staying ahead of the plan to account for any unanticipated events, both with work and life.

Advice for others considering the course

I believe the Tax Agent Program is essential if you are pursuing a career in tax as it provides relevant and practical knowledge for delivering the best advice to clients.

Natalie Talbot, Senior Accountant, Booth Partners, New South Wales

Can you provide a brief background of your career in tax?

Beginning my career in Sydney, at Chapman Eastway, while completing my degree and Graduate Diploma of Chartered Accounting, I was able to focus on gaining a broad knowledge of the tax system. After relocating to the south coast of NSW, I was able to continue developing my managerial skills and enjoyed the precise nature of self-managed superannuation funds. Since relocating to regional Victoria, due to my husband's employment, I have continued to mentor and train staff while expanding my tax knowledge and undertaking continued education.

Most valuable aspect of studying with the Institute

The Advanced Superannuation course allowed me to be more confident in giving advice to clients and developing tax management arrangements for year-end planning.

What are your areas of new confidence?

Advising clients who are reaching the point of being able to transition to retirement, retiring, the payment of death benefits, and wider estate planning issues.

What was the reason for undertaking Advanced Superannuation with the Institute?

I have enjoyed studying continuously throughout my career and The Tax Institute subjects offer a great amount of specific, client-focused information.

Where to now for you when it comes to continuing tax education?

Due to COVID-19, I am currently the primary carer for our three children while my husband is posted interstate for work, therefore I'm enjoying a short, well-earned break from study.

What are the challenges of juggling study and work?

As mentioned, I have always studied while working. Even while on maternity leave, I have undertaken further training as I like to keep my mind ticking over. Having three young children and a husband who works away from time to time, I have had to manage my time wisely. I schedule out each day in the morning and work towards targets, which helps make life easier. Also, I try to remember that life goes on and, if something does not go my way, I just need to let it wash over me.

Advice for others considering the course

I would suggest the sooner you start the course, the sooner you finish it. Enjoy the privileges we have in Australia and go for it!

THE TAX INSTITUTE

Take the CTA3 Advisory challenge this study period and stand out amongst your peers.

CTA3 Advisory is the final subject in the internationally recognised Chartered Tax Adviser (CTA) Program. Experienced tax professionals who have completed prior study may be eligible to progress directly to the CTA3 Advisory exam.

In preparation for the exam, candidates select one of the case studies and prepare a Letter of Advice. The exam presents a Late Breaking Fact and candidates amend their Letter of Advice accordingly.

Do you think you have the skills and experience?
Are you up to the challenge this study period?

Get in touch with our friendly education advisory team today on 1300 829 338 or submit an enquiry online.

CTA3 Advisory – Assessment only enrolments close 9 December

taxinstitute.com.au/cta3

0114LEARN_10/20

Controlling a tax audit

by Adam Craig, Barrister, Victorian Bar

This article starts by suggesting that it is more important than ever to have a strong factual position when dealing with an ATO audit. Therefore, the aim is to highlight a methodology that ensures that good evidence is at the centre of your case. The author's view is that having command of the facts and evidence places the adviser — or indeed ATO auditor — in a position to best achieve the right outcome in the most efficient way. The corollary of this is that tax technical skills are of less importance right now; almost certainly, that is so before the facts are settled.

Context

The wisest words I have ever heard about tax audits is that the ATO officer or adviser should approach the audit as though it is the beginning of litigation. This seems particularly sage advice when you consider the following:

- we are in the middle of a compliance funding cycle in which the government has provided the ATO with approximately $1.5b in funding to raise and/or collect approximately $8.9b.[1] It is reasonable to infer that a large number of those amended assessments will arise because of the ATO applying integrity rules or anti-avoidance provisions, or using its fraud or evasion amendment powers. Additionally, the ATO will be looking closely at taxpayer compliance with stimulus measures;
- the anti-avoidance rules have broadened in the last decade;[2]
- the underlying procedural laws give the ATO significant power, and taxpayers bear the burden of proof; and
- the numbers do not lie. In around 95% of cases in which there was an amended assessment, that amendment appears to be the final result.[3] And in 2018-19, there were 530,508 amendments arising from audits.[4]

There are different ways to read this data. One is that the approach taxpayers take to audits — which, in my view, is generally passive and not sufficiently focused on facts and evidence — needs to change if taxpayers are to have more "wins".

The following discussion is my interpretation of what it means to approach an audit as the beginning of litigation. Importantly, it does not mean being contentious. It means doing things that are both more helpful to the taxpayer and to the ATO. It means focusing on facts and evidence.

Objectives

At the beginning of an audit, it is necessary to help a taxpayer to define its objectives. You should consider all of the possible outcomes, risks, and strengths and weaknesses of the case. Importantly, tax advisers must place themselves in the ATO's shoes — as well as the shoes of the specific tax officers.

While the ATO will commonly provide you with a risk hypothesis, tax advisers need to go beyond that and ask themselves why the ATO does not like the particular transaction:

- Are the facts too vague? Are there evidentiary gaps?
- What is the integrity or anti-avoidance issue?
- Is there a decision in a recent case that the ATO does not like but did not appeal?
- Does the transaction resemble something described in a taxpayer alert?
- Is the tax governance paperwork as the ATO expects it should be?
- How does the transaction "look", for example, does it just look like people are moving wealth within a family without tax consequences?

Resist the urge to make an early technical argument

The nature of the law and the government's approach to funding the ATO must influence the way that tax advisers engage with the ATO. The presence of such strong anti-avoidance laws and specific compliance funding must change the focus away from technical proficiency concerning esoteric parts of the law, to a more holistic analysis of what the ATO would think. How would I defend against the ATO taking a position on Pt IVA? How do I explain the substance rather than the form? And so on. In theory, integrity and anti-avoidance provisions are a secondary consideration; in practice, they should not be. They will be an issue in any audit until they are not. And those provisions turn on facts and evidence.

You therefore must command the facts and evidence. And you must do significantly more than just answer the questions that the ATO drip feeds you and provide the documents that it asks for. That is what I mean by a "passive" approach.

Chronology

The most efficient way of developing a command of the available evidence is by compiling a chronology.[5] Such a document provides a meaningful "inventory" of all of the evidence and highlights the gaps.[6] It offers clarity — the process of organising the material in painstaking detail helps give shape to the narrative and shows where a case is strong and weak.[6]

A well-constructed chronology can serve multiple purposes.[7] You can give it to your client, and they can provide their views about it.[8] You can use it when interviewing your client in order to fill in any gaps and determine whether their version of events is consistent with what you have compiled from the documents.[8] You can use it throughout the dispute —

however long it lasts.[9] For example, you might give it to the ATO (you should, it will help their officers), you might give it to counsel at some point, and you might even provide it to the AAT or the court if you end up there.[9] But, to be fully effective at those later stages, it is necessary to treat the chronology as a living document.[9]

Case theory

It is crucial that you test the facts that emerge from your chronology against key pieces of law to come up with a case theory.[10] The case theory should include all facts that are relevant to each element of the law, constructed in a narrative form.[11] Do not mistake this for being a convoluted and nuanced technical argument.[12] The time for that is later. The purpose of this analysis is to determine the evidential strengths and weaknesses of your case. That is, it will draw your attention to the key facts that you need to establish; it is those crucial "taxable facts" that need to be fortified by the most robust evidence. For example, an inference that you draw about background does not require additional attention but, if an inference is critical to a substantial point, you need to find as much corroborating evidence as possible. The case theory forces you to do this and so highlights strengths and weaknesses. It is not just an early draft of your own position paper.

> *"Proving taxable facts is significantly more important than arguing about the meaning of a specific word in the tax law ..."*

Witnesses

If there are holes in your factual case and the taxpayer (or key staff of the taxpayer) is credible, do not be afraid to put them forward. Credible taxpayers can do two things — one, fill in gaps (for example, about the usual course of events at board meetings where minutes are overly brief), and two, demonstrate honesty and openness, which influences a decision-maker's actions. People have faces, voices and personalities; it is much easier to find in favour of a decent person trying to do the right thing than it is to find in favour of a name referred to in submissions by a tax adviser. Additionally, the ATO has a focus on the "client experience"[13] and "empathy"[13] — give the ATO someone with whom it can empathise.

Statement of facts

A chronology and case theory provide a basis from which to construct an accurate statement of facts, with every factual proposition having an evidentiary source. Where there is no evidence, and inferences are necessary, it is crucial to explain those inferences to turn them into factual propositions. If inferences seem implausible, it is essential to be careful about making assertions — the better approach is to look for additional evidence to support the narrative which is consistent with the one you want to present. When people are lazy about assertions, the tendency over time is to start believing they are facts, and this gets exposed when someone looks at things closely.

Provide a statement of facts to the ATO at the earliest possible point. Indeed, if possible, meet the first information request with a chronology and statement of facts.

Settle the facts

If, despite your best efforts, the ATO proceeds with issuing a position paper, there is the obvious question of how to reply. At this point, you will undoubtedly be itching to demonstrate your technical expertise. But do not rush. The first thing to do is to settle the facts. Ask yourself if you are happy with the facts as articulated? If the ATO used your version, then, of course, you will be. If the ATO has not accepted some things, then those are the things to work through first; the argument must be about facts and evidence before it is about the tax law so that everyone is applying the law to the same facts. If you cannot convince the ATO to accept your version of the facts because it interprets the evidence differently or refuses to accept some evidence, then so be it — the dispute is going to be about facts. Furthermore, when seeking to settle the facts, make sure that they are as concise as possible. All of the detail that appeared in your chronology should be gone — it is time for taxable facts only (and perhaps a little bit of context).

Get a clear articulation of the technical case

It is then critical to make sure that the ATO articulates its technical argument as clearly and succinctly as possible. Insist that it does that. If necessary, ask the audit team to escalate the position paper to someone else to refine it. Furthermore, ask as many questions or offer as many suggestions as you like to help draw that clarity out. It is of utmost importance that, if someone is going to escalate a dispute with you by amending an assessment, you ask them to articulate their case concisely so that you know what you must answer. And if you collaborate with them on this, it provides a strong foundation for the ATO and the tax adviser to work together on resolving those remaining issues, or for the objection officer to pick things up from the right place. (And, as an aside, imagine being an objections officer who picks up a case that has attached to it a detailed chronology, statement of facts, and proper references to evidence rather than all of the documents and two different positions).

Respond

Now it is time for your technical argument. But try this: structure it like a written submission to a court of appeal rather than a position paper. That is, use around 10 pages to point out the ATO's errors. For example, you have erred here because you have put to much weight on this piece of evidence, or you have erred here because you have misunderstood this phrase in that section. The purpose of doing this is again to narrow down the issues — to make the

case about specific things, rather than just a contest of who has written the best position paper.

Furthermore, this approach forces you to focus on your best arguments. If you cannot convince someone with your best three or four points, how will you persuade them with your ninth best? The accumulation of minor points does not usually work.

This approach also helps any officer in the ATO who might be asked to provide an opinion. They will receive the position paper and a clear and concise critique of the position paper. They will know what issues need research and consideration; this is much more helpful than reading two competing position papers.

Control

I told you this article would be about control and I have not used the word until now. Here are the ways the above approach should translate into control:

– you should be able to make a stronger, more objective assessment of the case early in the process and advise your client about the best approach to take. Accepting that an amendment is the right outcome early is more cost-effective than accepting it later;

– you will answer all of the ATO's questions before it asks them, and if the ATO does ask things that are already answered, you will simply be able to refer it to your statement of facts, chronology and supporting documents;

– you will have the high moral ground. If you need to escalate within the ATO, it will be clear that you have been most helpful;

– if the case proceeds, you will feel comfortable to call the ATO on time delays. For example, if the ATO needs more time, you should have no fear in saying something like "we will extend for 28 days but we need a decision". You should not fear the decision and should be ready for another decision-maker;

– the issues will be defined by the position paper process — anyone else who needs to become involved at this point will be able to do so easily;

– you will be better prepared to run an objection;

– you will be better prepared if the audit proceeds to litigation; and

– if the approach makes you feel uncomfortable or like you are not in control, that may indicate that you need to bring other specialists in. And so, you gain control that way. Dealing with an audit is different from doing a client's compliance work or providing advice. It is a different skillset — one that is focused on interrogating facts and evidence.

Concluding remarks

Tax cases rarely turn on technical points of law. Most tax cases do not happen in the Federal Court; they happen day-to-day in an audit context. In an environment in which the catch-all provisions favour the ATO, and the ATO has funding to pursue the application of those provisions, how tax advisers present facts and engage with the ATO has never been more important.

Analysing and, more importantly, arguing about facts is not simple. It is hard, detailed, tedious, forensic work. It requires a way of thinking and a process. The starting point of that process is collating and documenting everything you have available in a chronology. The next step is turning it into a statement of facts, and then filling gaps in those facts as highlighted by matching those facts to the key points of law you need to substantiate. Proving taxable facts is significantly more important than arguing about the meaning of a specific word in the tax law; there is a time and place for that, but it is rarely at the beginning or in the middle of an audit. And it may not even be at the end of an audit. Understand the facts. Argue the facts. Control the audit.

Adam Craig
Barrister
Victorian Bar

References

1 The 2018-19 Budget included funding for: (1) "a firm stance on tax and superannuation debts": the government provided the ATO with $133.7m over the forward estimates to collect $1.2b; (2) "the Black Economy Package — new and enhanced ATO enforcement against the black economy": the government provided the ATO with $318.5m over the forward estimates to raise $3b; and (3) "personal income tax — ensuring individuals meet their tax obligations": the government provided the ATO with $130.8m over the forward estimates to raise $1.1b. See Australian Government, Budget 2018-19, *Budget measures, Budget paper no. 2, 2018-19*, pp 19, 23 and 31. Available at https://archive.budget.gov.au/2018-19/bp2/bp2.pdf.

The 2019-20 Budget included funding for: "tax integrity — extension and expansion of the ATO Tax Avoidance Taskforce on large corporates, multinationals and high wealth individuals": the government provided the ATO with $1b over the forward estimates to raise $3.6b. See Australian Government, Budget 2019-20, *Budget measures, Budget paper no. 2, 2019-20*, p 24. Available at https://budget.gov.au/2019-20/content/bp2/download/bp2.pdf.

2 The *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013* amended Pt IVA of the *Income Tax Assessment Act 1936* (Cth). Part IVA was amended because the government perceived it to be weak after the ATO had lost cases in the Federal Court (see para 1.4 of the explanatory memorandum to the Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013). The government also introduced the multinational anti-avoidance law and diverted profits tax.

3 In 2018-19, there were 530,508 adjustments arising from audits. In the same year, there were 27,238 disputes resolved by objection, settlement, litigation or independent review. Although there are some difficulties in deriving an accurate number, this suggests that, in around 95% of cases, an amended assessment is the final result. See Australian Taxation Office, *Commissioner of Taxation annual report 2018-19*, p 168.

4 Ibid p 168.

5 A Palmer, QC, *Proof: how to analyse evidence in preparation for trial*, 2nd ed, Lawbook Co, 2010, p 17.

6 Ibid pp 17, 21-22.

7 Ibid pp 18-19.

8 Ibid p 18.

9 Ibid p 19.

10 Ibid pp 43-44.

11 Ibid p 44.

12 Ibid pp 45-51.

13 Australian Taxation Office, *ATO corporate plan 2020-21*, p i.

THE TAX INSTITUTE

Go for Growth

A complete eLearning solution

- Access to over 70,000 online courses to help your business grow and succeed.
- Delivered across 14 key business areas including communication, OHS and leadership.
- Flexible courses you can complete anytime, anywhere.

Over 70,000 courses
On demand
Earn CPD hours

Find out more
taxinstitute.com.au/G4G

0000_5MEM_10/20

Tax agents: beware of "administrative overpayments" added to your RBA

by John Glover, FTI, Barrister, Victorian Bar

The Commissioner has recently debited tax agents' running balance accounts (RBAs) with tax refund payments received by agents on behalf of their clients. It is alleged that the refunds can be recovered as amounts that the Commissioner "paid to a person by mistake" pursuant to s 8AAZN of the *Taxation Administration Act 1953* (Cth). The practice is insupportable. First, the wrong RBA is debited. The client, not the tax agent, is the "person" to whom tax refunds are paid. Second, the Commissioner rarely makes mistakes when paying tax refunds. Refunds are paid automatically and entitlement derives from self-assessment. Australia's only two s 8AAZN authorities have upheld these propositions.

Introduction

The *DCT v MWB Accountants Pty Ltd*[1] litigation in the Victorian courts and the Federal Court of Australia decision in *Auctus Resources Pty Ltd v FCT*[2] have put in doubt the correctness of the Commissioner debiting tax agents' running balance accounts (RBAs) with "tax debts" pursuant to s 8AAZN of the *Taxation Administration Act 1953* (TAA53), which provides:

> "**8AAZN Overpayments made by the Commonwealth under taxation laws**
>
> (1) An administrative overpayment (the ***overpaid amount***):
>
> (a) is a debt due to the Commonwealth by the person to whom the overpayment was made (the ***recipient***); and …
>
> (3) In this section:
>
> ***"administrative overpayment"*** means an amount that the Commissioner has paid to a person by mistake, being an amount to which the person is not entitled."

A recent practice of the Commissioner is to debit tax agents' RBAs with "administrative overpayments" of tax refunds pursuant to s 8AAZN. It is alleged that the payments were made "by mistake" to tax agents when acting for their clients. The identity of the person paid, or the "recipient", is the first issue of concern. Section 8AAZN supplies no basis for debiting tax agents' RBAs with "administrative overpayments" received by tax agents acting on behalf of their clients.

Proposition 1: the client is the "recipient" of tax refund payments

The structure of Pt IIB TAA53 assumes that RBA surplus refunds are paid to the entities that have generated the surpluses. Where, in the words of s 8AAZLF(1), a "refund" is paid to "an entity" of "the RBA surplus of the entity" or a "credit … in the entity's favour", the *intended object* of the payment must be the entity. This is obvious. Running balance account surplus provisions are otherwise inexplicable.[3]

Interpreting Pt IIB as it applied to overpaid GST refunds made to a tax agent, Steward J, for the Full Court of the Federal Court in *FCT v Travelex Ltd*, observed that there was a necessary correspondence between RBA surpluses which generate refunds and the Commissioner's "historical" allocation of debits and credits to RBAs.[4] There is no equivalent correspondence between overpaid refunds and the RBAs of tax agents.

Section 8AAZLH is titled "How refunds are made" and ends with a deeming provision. Section 8AAZLH(2) provides that the "Commissioner must pay … refunds to the credit of a financial institution account nominated in the approved form by that entity". Subsection (2A) states that the account must be held by one of three persons, including "the entity's registered tax agent or BAS agent". Finally, subs (5) states that:

> "If the Commissioner pays a refund to the credit of an account nominated by an entity, the Commissioner is taken to have paid the refund to the entity."

The wording of subs (5) makes it virtually impossible to contend that the tax agent, not the client, receives the Commissioner's tax refunds.

MWB Accountants litigation

In *MWB Accountants,* Judge Marks in the County Court of Victoria disallowed the Commissioner's s 8AAZN "administrative overpayments" claim. This was Australia's first reported decision on the section. Goods and services tax refunds were paid to MWB Accountants Pty Ltd (MWB) as tax agent pursuant to business activity statements (BASs) lodged on the client's behalf.[5] Approximately two years later, the Commissioner alleged for the first time that the refunds were administrative overpayments.

Perhaps the Commissioner chose *MWB Accountants* as a suitable case in which to litigate s 8AAZN because of certain additional facts. MWB did not pass on most of the refunds received on behalf of its client. Instead, the refunds were used to satisfy the client's debt owing to MWB's related company, the benefit of which was assigned to MWB. The Commissioner subsequently accepted the client's assertion that BASs lodged on its behalf were unauthorised and paid the tax refunds to the client for a second time. These facts gave the Commissioner the benefit of an additional contention: tax refunds which derived from *unauthorised* BASs were arguably outside TAA53 procedures.

Judge Marks held that the refund payments must have been "paid" to the client and not to MWB because surplus

and credit refunds due under Pt IIB's RBA provisions were payable to the "entities" for whom the RBAs were established. MWB's contentions about the interlocking structures of the TAA53 and the *A New Tax System (Goods and Services Tax) Act 1999* (GSTA99) were accepted by her Honour.[6]

Judge Marks considered that her analysis was fortified by s 8AAZLH, titled "How refunds are made". Section 8AAZLH(2) directs that RBA surpluses or credits be paid to the credit of a financial institution account nominated by the entity. Section 8AAZLH(3) provides that the nominated account be held, inter alia, by the entity's registered tax agent. Section 8AAZLH(5) then provides that:

> "If the Commissioner pays a refund to the credit of an account nominated by an entity, the Commissioner is taken to have paid the refund to the entity."

Deeming the refund to be paid "to the entity" leaves no room for the Commissioner's contention that MWB was the person paid.

Judge Marks also considered and rejected the Commissioner's unauthorised BAS argument, concluding that that authorisation was irrelevant to establishing the identity of the person receiving the payments.[7]

The Victorian Supreme Court of Appeal (Niall, Hardgrave and Sifris JJA) heard the Commissioner's appeal from the County Court's *MWB Accountants* decision on 3 September 2020.

The largest part of the Commissioner's case on appeal was based on his "additional" contention that the BASs were unauthorised, with the argued consequence that the tax agent was the "recipient" of the refund payments. Members of the court noted the case's unusual facts and drew attention to Judge Marks' observations to this effect.[8] One wonders why the appeal was brought, as an appellate decision in *MWB Accountants* based on the Commissioner's "unauthorised" argument would only have low precedential value about the application of s 8AAZN to refund payments.

A "wild card" in the *MWB Accountants* appeal was the effect of MWB's additional defence that the Commissioner's mistake was insufficient for the purposes of s 8AAZN The defence was based on the *Auctus* decision which was handed down in the Federal Court about a month before the hearing of the appeal. Not long after the hearing and prior to the judgment, the Commissioner quietly discontinued proceedings, paid MWB's costs and ended the *MWB Accountants* litigation.

Proposition 2: the Commissioner's mistake causes the making of few tax refund payments

Minimum conditions for a s 8AAZN "mistake" are not satisfied where the entitlement to an RBA surplus is self-assessed and refunds are paid by the Commissioner in an automatic procedure which excludes consideration. We are examining whether "administrative overpayments" comprising RBA surplus refunds can ever have been paid "by mistake". Such payments are obligatory. Section 8AAZLF(1) provides that:[9]

> "The Commissioner *must* refund to an entity so much of:
>
> (a) an RBA surplus of the entity … [as is not otherwise allocated]." (emphasis added)

Refunds are self-assessed

The Commissioner is not empowered to consider the correctness of a client's GST surplus claims in BASs lodged by or for the client. Running balance accounts and surplus refunds have prima facie validity. Stated by the Full Court of the Federal Court in the *Travelex* case:[10]

> "… Pt IIB gives the balance recorded in an RBA legal efficacy, even though the balance may be mistaken. Any other conclusion would seriously undermine the effectiveness of the RBA system. If a mistaken entry is made to an RBA it will then be a matter for either the taxpayer or the Commissioner to correct that balance by the filing of a GST return, or by the issue of an assessment."

Refunds are automatic

Not only does the Commissioner not have the power to question the RBA net amount data supplied by a client (or supplied on their behalf), there is no *time* for the Commissioner to consider the correctness of the client's claims before refund payments must be made.[11]

FCT v Multiflex Pty Ltd[12] concerned a taxpayer which had worked out its "net amount" for a tax period under the GSTA99 and claimed to be entitled to an immediate refund. The Full Court of the Federal Court in *Multiflex* confirmed that neither the GSTA99 nor the TAA53 provided the Commissioner with the "reasonable time" necessary for him to determine if a taxpayer's claim were truly payable.

The "imperative language" of s 35-5 GSTA99 meant that the refund had to be paid without consideration, and sometimes, the court in *Multiflex* added, the Commissioner is "obliged to make a refund based on a claimed net amount which he knows to be wrong".[13] Any "disquiet" that the Commissioner might have in this event could be overcome though the issue of new assessments.[14] It is perhaps not too much to say that it is practically impossible for the Commissioner to make a mistake about whether or not a GST refund should be paid.

Nature of a necessary "mistake" for s 8AAZN purposes

An "administrative overpayment" made pursuant to s 8AAZN(3) is an amount that "the Commissioner has paid to a person by mistake". The word "mistake" is preceded in the subsection by the preposition "by". Together, the words "by mistake" connote an "act or judgment" which is both the *cause* and *contemporaneous with* the Commissioner's payment. Placing the expression in the context of s 8AAZN, the words "paid to a person by mistake" describe a cause which was present when an overpayment was made. It follows that mistakes of a retrospective or ex post facto nature cannot activate the section.[15]

Statutory construction of the words "paid to a person by mistake" in the wider contexts of Pt IIB TAA53, the GSTA99 and associated tax legislation introduces further qualifications. The mistake must be an act or judgment which is wrong or incorrect in a way which can be made in an automatic transaction and does not undermine the validity of taxpayers' self-assessment (discussed above). An entity's entitlement to a tax refund cannot be denied by the Commissioner until the RBA of the entity is corrected by the filing of (another) GST return or the issue of an assessment.[16]

Consistently, Steward J in *Auctus* said that the type of mistakes made by the Commissioner to which s 8AAZN was directed were "mistakes made in the administration of an RBA". Examples of an administration mistake which his Honour gave were payment to the wrong person, payment arising from a misallocation of tax debts, and payment arising from computer error.[17]

Auctus

At first instance, the Federal Court in *Auctus* disallowed the Commissioner's attempt to use s 8AAZN(1) to recover a tax refund automatically paid to Auctus Resources.[18] The refund was paid in 2014 as the consequence of a research and development tax offset claimed in the company's 2013 income tax return.[19] Not until 2019 did the relevant authority establish that the refund was not due. In some ways, the facts of *Auctus* closely paralleled those of *MWB Accountants*.[20] Refund payments were automatic, and the recipient's entitlement was self-assessed in each case. However, the Commissioner in *Auctus* paid the refund directly to the company which claimed it and not to the financial institution account of a tax agent intermediary.

Refund recovery proceedings in *Auctus* began in September 2019 when Auctus Resources received a s 8AAZN notice stating that the Commissioner required repayment of "an amount paid to you by mistake being an amount to which you are not entitled".[21] The facts of *Auctus* were anomalous. Recovery of the overpaid amount by amended assessment was not possible when it was finally determined that the company was not entitled to the payment.[22] Legislation enabling the Commissioner to amend the company's 2013 assessment was post-dated[23] and transitional legislation conferring a comparable power was repealed before the taxpayer's non-entitlement to the refund was determined.[24]

In reply to the s 8AAZN notice, Auctus Resources asserted that the refund it received in 2014 had not been paid "by mistake", nor was there any "administrative overpayment" in the sense required by s 8AAZN(3). The Commissioner instead had given effect to what the taxpayer had claimed in its self-assessed tax return.[25]

The Commissioner made a logical error, the taxpayer said, by relying on subsequent events in order to justify the making of an earlier "mistake". The "administrative overpayment" definition in s 8AAZN(3) was inapplicable where the Commissioner made no "error in action, opinion or judgement … misconception or misapprehension" at the time that the payment was made.[26] Additionally, the Commissioner's action undermined a safeguard contained in Australia's tax legislation.[27]

Steward J held that the mistake required by the "administrative overpayment" definition in s 8AAZN(3) had to be "the activating cause of the overpayment". A mistake of this nature had to be made by (or imputed to) the Commissioner in order to satisfy the words "an amount the Commissioner has paid to a person by mistake".[28] His Honour's views correlate with the Full Court of the High Court of Australia's view in *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* that "fundamental mistakes" are needed to base general law restitutionary recovery of mistaken payments.[29]

Entitlement mistakes were not the sort of "mistake" with which s 8AAZN is concerned, Steward J added. The Commissioner does not make this type of mistake. The scheme of the *Income Tax (Transitional Provisions) Act 1997* (Cth), the *Industry Research and Development Act 1986* (Cth) and relevant provisions of the ITAA36 and the *Income Tax Assessment Act 1997* (Cth) were to the contrary. Entitlement mistakes are made by self-assessing taxpayers.[30]

His Honour then examined the right way to recover research and development tax offset refunds paid to persons who were not entitled the refunds:[31]

> "The Commissioner should have used the mechanism created by that former Subdivision [Subdiv 67-L] of the *Transitional Act* to recover the tax refund."

Parliament plainly so intended.[32] Section 8AAZN was more limited. The Commissioner had given that section a competence which made the Act's other provisions otiose.[33]

"It follows that, in my view," Steward J said, s 8AAZN is directed to "errors, essentially administrative or procedural in nature", such as "a payment to the wrong person, a payment arising from a misallocation of tax debts, or a payment arising from a computer error".[34] This is a significant passage. Section 8AAZN is denuded of the operation for which the Commissioner contended in *MWB Accountants* and *Auctus.*

Perhaps the Commissioner overreached statutory legalities in attempting to make s 8AAZN do the work of traditional assessment and amended assessment procedures.[35] The Commissioner's claim in *MWB Accountants* had the same characteristic — combined with an additional unfairness. For more than a year, the Commissioner invoked taxpayer confidentiality obligations owed to MWB's client in order to prevent MWB from learning details of the s 8AAZN liability added to its RBA.

Conclusion

Accountants, lawyers and tax agents should be concerned when client-related administrative overpayments are added to their RBAs. The practice is contrary to the terms of relevant legislation and to the relationship which exists between tax information professionals and their clients.

John Glover, FTI
Barrister
Victorian Bar

Note: Dr Glover was counsel for MWB Accountants before the County Court of Victoria and the Victorian Court of Appeal.

References

1 [2019] VCC 1516; an appeal to the Victorian Supreme Court of Appeal was discontinued after the hearing.

2 [2020] FCA 1096.

3 The history and policy of Pt IIB TAA53 do not support the imposition of an inexplicit liability on tax agents under s 8AAZN. Parts IIA and IIB were inserted into the TAA53 by the *Taxation Laws Amendment Act (No. 3) 1999*. In the explanatory memorandum which accompanied the relevant Bill, the purpose of s 8AAZN was described (once) as: "[to] introduce tax debts for administrative errors by the Commissioner."

4 [2020] FCAFC 10 at [166]-[167] per Steward J, Kenny J agreeing.

5 Pursuant to s 8AAZLH TAA53. See the reasons of Judge Marks in *MWB Accountants* [2019] VCC 1516 at [100]-[103] and [124]. How the refunds were constituted is discussed below at ref 9.

6 See the reasons of Judge Marks in *MWB Accountants* [2019] VCC 1516 at [91]-[103], examining s 31-15 GSTA99, s 8AAZLH TAA53, and ss 388-70 and 388-75 of Sch 1 TAA53.

7 See the reasons of Judge Marks in *MWB Accountants* [2019] VCC 1516 at [110]-[119]. Her Honour also accepted MWB's evidence that the BASs were properly authorised.

8 See the reasons of Judge Marks in *MWB Accountants* [2019] VCC 1516 at [40]-[43].

9 "RBA surplus amounts" are allocated by the Commissioner to the client's RBA pursuant to s 35-5 GSTA99. Refund entitlements are generated by s 35-5(1) and are payable under s 35-10 GSTA99 when entities lodge GST returns with "net amounts" which are "less than zero".

10 *Travelex* [2020] FCAFC 10 at [166] per Steward J, Kenny J agreeing.

11 This is the effect of ss 35-5 and 35-10 GSTA99, combined with s 8AAZLF(1) TAA53 and s 155-15(1) of Sch 1 TAA53.

12 [2011] FCAFC 142.

13 *Multiflex* [2011] FCAFC 142 at [26] and [40].

14 *Multiflex* [2011] FCAFC 142 at [26], referring to the now-repealed s 105-5 of Sch 1 TAA53. See also *Travelex* [2020] FCAFC 10 at [166].

15 As the successful taxpayer contended in *Auctus* [2020] FCA 1096 at [38] and [65] per Steward J. See also the definition of "mistake" in the *Oxford English Dictionary*, online version, 2019, Oxford University Press, 11.2.546.

16 As stated in *Travelex* [2020] FCAFC 10 at [166] per Steward J, Kenny J agreeing.

17 See *Auctus* [2020] FCA 1096 at [73].

18 The Commissioner has appealed from the *Auctus* decision.

19 Pursuant to s 27J of the *Industry Research and Development Act 1986* (Cth), and former s 166 of the *Income Tax Assessment Act 1936* (Cth) (ITAA36).

20 See *Auctus* [2020] FCA 1096 at [24]-[35].

21 See *Auctus* [2020] FCA 1096 at [28]-[31] per Steward J.

22 On the expiry of an appeals period on 19 July 2019, a determination by the board of Innovation and Science Australia pursuant to s 27J of the *Industry Research and Development Act 1986* (Cth) became binding to the effect that Auctus Resources was not entitled to the refund.

23 Section 172A ITAA36 was inserted in 2013 to allow the Commissioner to recover overpaid tax offset refunds by amended assessment. The provision operated only from 2014. See the reasons of Steward J in *Auctus* [2020] FCA 1096 at [12].

24 Subdivision 67-L of the *Income Tax (Transitional Provisions) Act 1997* contained a set of provisions applicable to the recovery of tax offset refunds paid by the Commissioner in the 2013 year. The transitional legislation was repealed in 2019. By this time, the two-year period for the amendment of assessments had expired. See s 355-710(2) ITAA97 and the reasons of Steward J in *Auctus* [2020] FCA 1096 at [14] and [40].

25 See *Auctus* [2020] FCA 1096 at [36]-[40].

26 The taxpayer's successful contention as set out by Steward J in *Auctus* [2020] FCA 1096 at [36].

27 See the reasons of Steward J in *Auctus* [2020] FCA 1096 at [40] and [68]-[72], noting the two-year limit on the time during which the Commissioner can alter an assessment.

28 See *Auctus* [2020] FCA 1096 at [65].

29 See [1988] HCA 17 at [8] and [14]. *Auctus* and *MWB Accountants* only involved s 8AAZN recovery claims. General law restitutionary principles were of no direct relevance.

30 See *Auctus* [2020] FCA 1096 at [14]-[27] and [77].

31 See *Auctus* [2020] FCA 1096 at [68].

32 See *Auctus* [2020] FCA 1096 at [71].

33 See *Auctus* [2020] FCA 1096 at [72].

34 Steward J in *Auctus* [2020] FCA 1096 at [73], citing (at [72]) *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28.

35 This was the view of Steward J in *Auctus* [2020] FCA 1096 at [62]-[72].

The *Tax* Summit
Project Reform
AUGUST – NOVEMBER / ONLINE

A CASE FOR CHANGE

Watch Project Reform
Live & On Demand

Catch up on all sessions from our lead-in event series to date including:

Focus Sessions

- Retirement and Wealth
- SMEs and Family Businesses
- Global and Transnational Businesses
- Small Business Tax Concessions
- Personal Taxation and Transfer Entitlements

Keynote Program

- Chris Richardson
- The Hon. Peter Costello AC
- Rosheen Garnon, CTA
- Danielle Wood

All tickets include access to the full program of sessions right up to the Virtual Summit on 24–25 November 2020.

Register now
thetaxsummit.com.au/register

0716NAT_10/20

Division 7A loan repayments: part 2

by David Montani, CTA, National Tax Director, Nexia Australia

In part 1 of this article, the author discussed the common practice of making the minimum annual Div 7A loan repayment by way of setting off against a dividend declared by the company. Risks, albeit low, arise where minutes documenting the resolution to declare the dividend are filed late, or the distribution statement is provided late to shareholders. In part 2, the author considers circumstances where the particular structure does not naturally provide for the creation of mutually opposing obligations for set-off between lender and borrower. This often leads to repayments purportedly being made via a round-robin of payments by journal entries. The ineffectiveness of this leads not only to Div 7A deemed dividends, but also to broader tax and commercial issues and risks, for both clients and practitioners. The article sets out a number of suggested practical solutions to these issues. This article is again written on the basis of an assumed level of Div 7A knowledge, and thus does not cover every relevant technical point.

Introduction

Division 7A in Pt III of the *Income Tax Assessment Act 1936* (Cth) (ITAA36) is an integrity regime that seeks to prevent shareholders and associates from accessing a private company's profits where the funds have borne tax only at the company rate. Part 1 of this article set out the background behind Div 7A's enactment, the abovementioned mischief that it seeks to redress, and the deemed dividend means that it uses to achieve its objectives. That led into the ongoing compliance requirement of making a minimum annual repayment towards a complying Div 7A loan.

As part 1 of this article discussed, Div 7A loan repayments are almost never made by transferring money. Rather, they are typically made by way of set-off against a dividend declared by the company. Where the borrower is also a shareholder, declaring a dividend creates the required mutually opposing obligations to effect a cashless repayment in this way. That is, the company owes the declared dividend amount to the shareholder/borrower, and the shareholder/borrower owes the Div 7A-compliant liability to the company.

In part 2, we move on to common circumstances where the structure does not naturally provide for creating mutually opposing obligations. The means used to effect repayments in these circumstances are often ineffective, exposing clients to Div 7A's self-executing outcome of a deemed dividend, as well as commercial risks. However, there are practical alternatives that will facilitate the effective making of minimum annual repayments.

No mutually opposing obligations – what then?

The three examples set out in part 1 of this article all feature structures in which mutually opposing obligations can arise naturally between lender and borrower. While they all require doing something in order to create the required mutually opposing obligations (eg declare a dividend, appoint trust income), they are normal processes readily able to be carried out in the ordinary course of those structures.

But what if a structure does not naturally provide for the creation of mutually opposing obligations between lender and borrower? This situation arises frequently, and it requires something additional in order to legally effect payments of money. These issues are addressed in the continuation of examples from part 1.

Example 4. Set-off not an option (yet)

Example 4 sets out a common structure that does not naturally provide for payments by way of set-off (see Diagram 8).

During the 2018-19 income year, the company made a loan to Ron, who is an associate of the company's sole shareholder. The loan was made Div 7A compliant before the lodgment day for the company's 2018-19 income tax return. This is a variation of example 1 in part 1, reflecting a more common structure, and making this situation more realistic. Similar to example 1, Ron is required to make a minimum annual repayment of $49,916 to Benson Pty Ltd by 30 June 2020. However, the problem with this scenario is that the company (lender) declaring a dividend does not create an obligation owing directly to Ron (borrower). It is essential that such an obligation owing by the company directly to Ron exists in the first place in order to set-off against Ron's debt owed to the company, just like in part 1's example 1.

Despite the above, this is what is typically done each year in this situation in order to comply with Div 7A:

1. Benson Pty Ltd resolves to declare a dividend of $50,000 on 30 June. This is a liability owing to the trust (and a receivable in the trust); and
2. the trust appoints trust income, represented by the dividend, to Ron on 30 June.[1] This creates an unpaid present entitlement (UPE) owing to Ron.

Diagram 8. Loan to non-shareholder

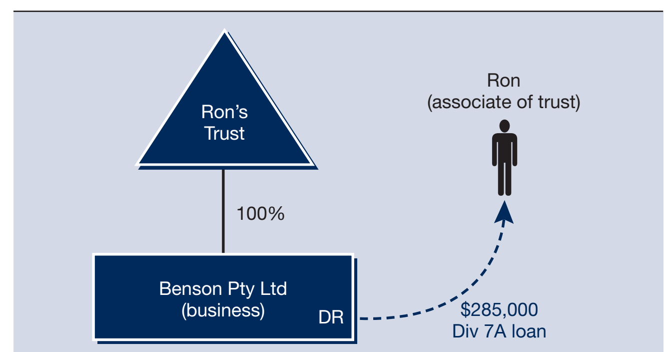


Diagram 9. Declare dividend, appoint trust income

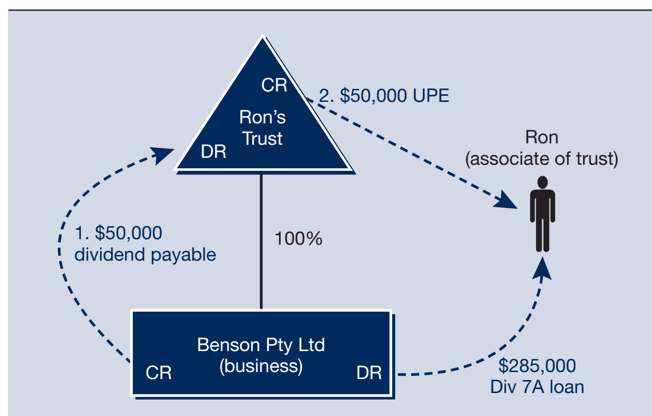


Diagram 9 illustrates the above two steps, resulting in what arises on 30 June.

As noted earlier, in order for two parties to effect payments to each other by way of set-off, it is essential that there be mutually opposing obligations between those two parties. However, it can be seen in this example that there are no mutually opposing obligations between Ron and the company. Despite that, the following series of journal entries are typically subsequently posted in the respective accounts of the trust and Benson Pty Ltd.

Journal series 1

The first series of journal entries records Benson Pty Ltd's declaration of the dividend, and Ron's Trust appointing that dividend income to Ron (see Tables 1 and 2).

Table 1. Company journal entry

Benson Pty Ltd				
Records this transaction	Date	Account	DR $	CR $
Declare dividend	30 June 2020	Dividend paid	50,000	
		Dividend payable to Ron's Trust		50,000

Table 2. Trust journal entries

Ron's Trust				
Records this transaction	Date	Account	DR $	CR $
Dividend receivable	30 June 2020	Dividend receivable from Benson Pty Ltd	50,000	
		Dividend income		50,000
Appoint trust income to Ron Benson	30 June 2020	Distribution	50,000	
		Ron Benson – UPE		50,000

Journal series 2

The second series of journal entries eliminates the $50,000 credit and debit–balance accounts in Ron's Trust, and that flows through to journal entries in Benson Pty Ltd that reflect Ron purportedly having made his Div 7A minimum annual repayment (see Tables 3 and 4).

Table 3. Trust journal entry

Ron's Trust			
Date	Account	DR $	CR $
30 June	Ron Benson – UPE	50,000	
	Dividend receivable from Benson Pty Ltd		50,000

Table 4. Company journal entry

Benson Pty Ltd			
Date	Account	DR $	CR $
30 June	Dividend payable to Ron's Trust	50,000	
	Interest income		15,297
	Loan to Ron Benson (Div 7A)		34,703

The second series of journal entries eliminates the dividend payable that Benson Pty Ltd owes to Ron's Trust, with the other side recording Ron's "payment" of the Div 7A minimum annual repayment of principal and interest. The calculation of the interest component is as per example 1 in part 1.

In other words, these journal entries record the following round-robin of payments that purportedly happened on 30 June:

1. Benson Pty Ltd pays out its $50,000 liability owing to Ron's Trust;
2. Ron's Trust pays out the $50,000 UPE owing to Ron; and
3. Ron makes a $50,000 payment to Benson Pty Ltd, covering his Div 7A minimum annual repayment obligation.

Is this effective?

As noted before, the problem in the above scenario is that there are no mutually opposing obligations between any two parties. Therefore, no payments can be effected by way of set-off, and so none of the above payments have legally been made. The passing of the journal entries do not themselves effect any payments. In the end, this means that Ron did not in fact make any payment to Benson Pty Ltd. Under s 109E ITAA36, the shortfall causes Benson Pty Ltd to be taken to have paid a dividend to Ron of $49,916.

Why example 4 is different

The scenario in example 4 is different to examples 1, 2 and 3 in part 1 in two important respects. First, as has been noted, the earlier examples feature structures in which mutually opposing obligations can be directly

created, and thus enable payments by way of set-off. The contentious issue that arose there was the minute-filing and distribution statement administrative deadlines. In any event, missing those deadlines does not automatically result in a self-executing breach of Div 7A. That is why there is room for taxpayers to gauge the risk of whether the potential consequences set out might or might not happen, and which might or might not result in fines or deemed dividends arising. However, in example 4, there is a clear breach of s 109E, which automatically triggers a deemed Div 7A dividend of $49,916 to Ron.

Second, as practitioners, we know (or ought to know) that this outcome arises. Strictly speaking, preparing and signing off on Ron's tax return as tax agent, knowing that it omits an amount of assessable income, risks breaching the Code of Professional Conduct in Pt 3 of the *Tax Agent Services Act 2009* (Cth). The deemed dividend is also a required disclosure on the company's tax return.

Again, what's the risk?

The flawed approach in example 4 has been widely applied for over two decades, and yet the Commissioner of Taxation seems not to have made an issue of it. Accordingly, you might be excused for thinking that the ineffective round-robin of "payments" in the example 4 scenario does not seem to matter in practice. That is, despite the annual minimum repayment not actually being made, Div 7A is being complied with on paper at least, there is no revenue leakage, Ron will pay his top-up tax on the dividend appointed to him each year, and the provisions are achieving their policy objectives. Therefore, why would the Commissioner disrupt this longstanding objective-achieving, albeit flawed, practice?

Well, in situations no more complicated than example 4, it seems that, on the quiet, the Commissioner probably won't. However, that is not the end of the matter, for two reasons. First, it takes only a slight variation to example 4 to create a revenue risk which the Commissioner will, entirely justifiably, seek to redress. And second, outside of the world of tax, example 4 creates commercial risks for our clients, in particular, compromised asset protection.

Let's consider each of these.

Variation to example 4

Former ATO technical director Vincent Licciardi recently drew attention to the fact that the mere posting of journal entries does not execute payments or a transaction. Here's the case example he cited (see Diagram 10):

The start point is that XYZ Pty Ltd made a $2m loan to Mr A (which, presumably, was subject to Div 7A). XYZ Pty Ltd then declared a dividend, and XYZ Trust appointed the dividend to Mr A's father (a foreign resident). What then purportedly happened was the following round-robin of payments:

1. XYZ Pty Ltd paid the dividend to XYZ Trust;
2. XYZ Trust paid out the present entitlement owing to Mr A's father; and
3. Mr A's father repaid the initial company loan on Mr A's behalf.

Mr Licciardi pointed out that the above payments were reflected only by way of posting journal entries. There were no transfers of money, and no documentation. Further, Mr A's father was unaware of his trust entitlement or the broader series of purported payments.

The journal entries posted in XYZ Pty Ltd's accounts probably looked something like those set out in Table 5.

Table 5. Company journal entries

XYZ Pty Ltd			
Date	Account	DR $	CR $
30 June	Dividend paid	2,000,000	
	Dividend payable to XYZ Trust		2,000,000
30 June	Dividend payable to XYZ Trust	2,000,000	
	Loan to Mr A (Div 7A)		2,000,000

Mr Licciardi did not specifically mention any particular anti-avoidance rules that the lack of effective payments would enliven, but the situation is a textbook "reimbursement agreement" under s 100A ITAA36. Broadly, s 100A is designed to combat the apparent conferral of a present entitlement to one person, but another person in fact benefits from it. In the above case, Mr A is the one who really benefits from a purported conferral of trust income to his father.[2]

If not for the s 100A anti-avoidance provisions, there would be revenue leakage, as the dividend — presumably franked — is appointed to a foreign resident. That would mean it is exempt from non-resident withholding, and it is not assessable in Australia. In other words, an Australian resident is who really benefits from the trust distribution, but no top-up tax is collected. The effect of s 100A is to shift the assessing of the trust distribution to Mr A, being the person who actually benefited from it.[3]

The result of that round-robin of "payments" not being legally effective leads to the consequences under Div 7A. Under the false belief of the loan having been repaid, Mr A and XYZ Pty Ltd presumably did not execute a complying Div 7A loan agreement. Therefore, as Mr A's loan was not in fact repaid by the lodgment day, that would have triggered a Div 7A deemed dividend.

Compromised asset protection

The second issue arising in example 4 relates to asset protection. A common feature of asset protection strategies is to shield personal and non-business assets from exposure to business risk. The $285,000 loan that Benson Pty Ltd made to Ron in example 4 is an asset of the company and is thus exposed to the risk of claims against the company, whether by creditors or by a litigant. That could result in the loan being called in, exposing Ron's personal assets, such as his family home.

As the loan to Ron is purportedly repaid over time while, on paper, complying with Div 7A, it is not being replaced by another asset. The reason is that the other side of the reducing loan asset in Benson Pty Ltd's balance sheet is the extraction of retained profits due to the dividend declared

each year. However, the ineffectiveness of journalising the round-robin of "payments" each year means that Benson Pty Ltd's balance sheet misrepresents reality. Despite it showing no liability owing to Ron's Trust, the company has in fact maintained an accumulating liability owing to the trust — because it never actually paid down the liability. But more importantly, the company's balance sheet showing a declining debit loan balance to Ron is wrong. The company in fact continues to have a full $285,000 receivable asset plus accrued interest — again, because Ron never actually made any repayments to the company.

In the event of a claim against the company, it is there for a creditor/litigant to determine through the discovery process that Benson Pty Ltd's assets are in fact greater than the balance sheet suggests, ie the full $285,000 loan to Ron plus accrued interest is still an asset. And that means Ron's family home and other personally held assets are exposed.

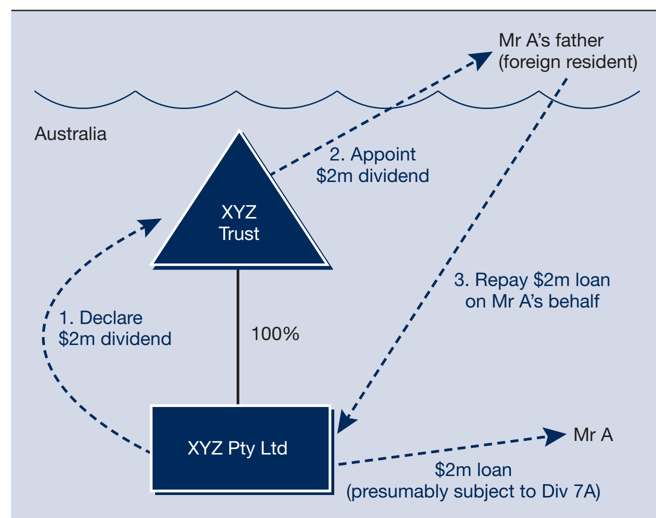
This, of course, would come as a complete shock to Ron. He trusted his tax agent all these years to manage his taxation affairs and asset protection planning, and this claim against his business could now cost him far more than it otherwise would.

Solution?

The Commissioner would almost certainly utilise s 100A or other anti-avoidance means to challenge the effectiveness of the purported round-robin of payments in a Diagram 10 situation, with the resulting re-assessing of the trust distribution and the Div 7A consequences. However, there is no guarantee that he would not do so in the more benign Diagram 9 situation in example 4, although experience tells us that the risk is very low. Aside from that, there is the asset protection failure arising from the fact that the full amount of the $285,000 loan to Ron plus accrued interest is still an asset of the company.

So, is there a practical solution to the Diagram 9 situation in example 4? (We know paying money is virtually never an option.) There may be other solutions, but the author poses two, one for each of the following:

Diagram 10. Loan repaid by someone else



1. future loans made by Benson Pty Ltd; and
2. existing Div 7A loans made by Benson Pty Ltd.

The different solutions for existing loans and future loans will put a cap on the amount of work involved, and the cost to your client.

Future loans

The purpose of this solution is to ensure that, for future loans, the situation of a loan directly between the company and Ron (as illustrated in Diagram 8) simply does not arise in the first place. This also means that future loans are not dealt with by progressing to the problematic Diagram 9 situation. Rather, an alternate pathway to Diagrams 8 and 9 is taken. This is achieved by Benson Pty Ltd and the trustee of Ron's Trust each passing a resolution to the effect that any future payment that Benson Pty Ltd makes to Ron, unless specifically treated otherwise (eg payment of salary), is:

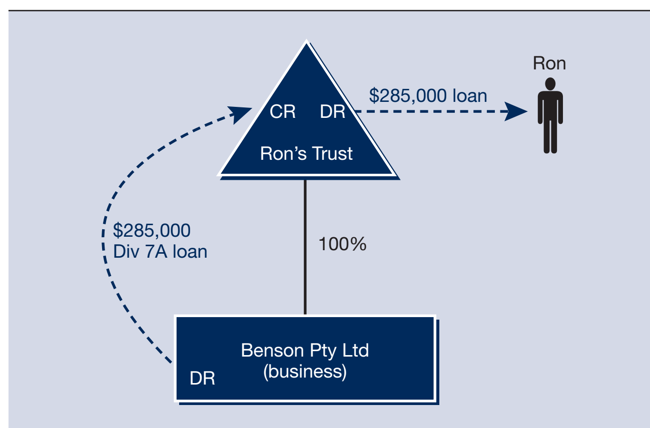
– a constructive advancement of a loan by Benson Pty Ltd to Ron's Trust; and
– a subsequent constructive advancement of a loan by Ron's Trust to Ron.

The concept of making constructive payments is well-established, provided the intent to make such payments is clear. The above will cause the nature of future drawings from Benson Pty Ltd to differ from that in Diagram 8, and will instead effect the situation set out in Diagram 11.

Diagram 11 is similar to Diagram 4 in part 1 of this artricle, but differs in two critical respects. First, Benson Pty Ltd's loan to Ron's Trust will need to be placed under a complying Div 7A loan agreement, otherwise a deemed dividend will arise. Just like in Diagram 3 in part 1, Benson Pty Ltd can declare a dividend to effect the minimum annual repayment by way of set-off.

Second, as there is no UPE owing by Ron's Trust to Benson Pty Ltd, the loan by Ron's Trust to Ron is not subject to Subdiv EA of Div 7A (like in example 3 in part 1). Further, on the basis that Benson Pty Ltd's loan to Ron's Trust is placed under a complying Div 7A loan agreement, the Commissioner's view is that the notional interposed loan that can be taken to arise between Benson Pty Ltd and Ron is reduced to nil.[4] This means that the loan by Ron's Trust to

Diagram 11. Constructive on-lend



Ron can be left as it is, with no consequences under Div 7A. In other words, Div 7A does not wield its deemed dividend stick over that loan, and thus Ron's Trust is not compelled to charge interest and Ron is not compelled to make any repayments.

In summary, the loan by Ron's Trust to Ron can be left as is with no Div 7A consequences, and Benson Pty Ltd's loan to Ron's Trust can be made Div 7A compliant, and minimum annual repayments effected by way of set-off against dividends declared.

The result is that example 4's Div 7A breaches and asset protection failure do not arise, and Div 7A can be complied with in a way that is effective.

Interest deductible?

There is, however, the matter of whether the interest that Ron's Trust incurs on its Div 7A loan from Benson Pty Ltd is an allowable deduction under s 8-1 ITAA97. Broadly, when determining the deductibility of interest, we must look to the purpose of the borrowed funds and the use to which the borrowed money has been put.

The constructive payments make it clear that the use to which Ron's Trust has put the borrowed funds is to make its loan to Ron. If Ron's Trust does not charge interest on that loan to Ron, it is open to conclude that the trust has put its borrowed funds to a use other than deriving assessable income. The consequence of such a conclusion is that the interest incurred by Ron's Trust on the loan from Benson Pty Ltd is not deductible. This may be an acceptable outcome if Ron uses his borrowed funds for private purposes. As he would not be entitled to a deduction for interest charged by Ron's Trust in any case, the outcome is effectively tax neutral (ie the taxable income of Ron's Trust will be higher, either because of adding back the non-deductible interest, or earning assessable interest income on the loan to Ron).

Alternatively, if Ron uses his borrowed funds for an income-producing purpose, the sensible course would be for Ron's Trust to charge interest. This would result in symmetrical tax outcomes overall — assessable interest income in Benson Pty Ltd, deductible interest expense for Ron, and neutral for Ron's Trust (deductible interest expense, assessable interest income). While a Div 7A loan agreement between Ron's Trust and Ron is not required, and the loan can be interest-only, it is preferable to document the terms in writing.[5] Demonstrating a profit motive under the on-lend arrangement assists the case for the interest Ron's Trust incurs on its loan from Benson Pty Ltd being deductible. This can be achieved by Ron's Trust charging Ron an interest rate that is higher (even if only by 0.1%) than the Div 7A benchmark interest rate it is incurring.

Existing Div 7A loans

Existing loans directly between the company and Ron as illustrated in Diagram 8 are already in place, and attempting to redirect them by journal entry into a Diagram 11 on-lend scenario is of course ineffective. These existing loans will generally need to be dealt with as they are. That means undertaking the typical dividend declaration and appointment of trust income that lead to Diagram 9.

However, this solution then requires the doing of one additional thing on 30 June each year after declaring the dividend and appointing the trust income as per Diagram 9:

– Ron's Trust assigns its $50,000 receivable (owed by Benson Pty Ltd) to Ron.

This has the effect of the trust paying down the UPE that it owes to Ron. Instead of doing so by paying $50,000 in money, the trust is simply doing so by handing over $50,000 worth of property.

Looking back at Diagram 9, the assignment will then produce the outcome set out in Diagram 12.

Ron's Trust no longer has a $50,000 receivable owed to it by Benson Pty Ltd (because the trust assigned it to Ron), and it no longer has a $50,000 UPE liability owing to Ron (because the assignment paid it down). Also, Ron no longer has the $50,000 UPE owing to him because the trust paid it out by giving him an asset worth $50,000, being the receivable owed by Benson Pty Ltd. This situation does not involve any debt parking, and it is presumed that the assigned $50,000 receivable is worth its face value. That also means Ron's Trust is disposing of its asset receivable with a cost base of $50,000 for capital proceeds of an equal amount. Accordingly, no capital gain or loss arises to Ron's Trust.

Now we have the required mutually opposing obligations between the company and Ron to make legally effective payments by way of set-off. Benson Pty Ltd owes Ron $50,000, and Ron owes $285,000 to Benson Pty Ltd. These obligations can be set off to the extent of the lower of the two amounts, being $50,000. This will effect payment covering the $49,916 minimum annual repayment under the complying Div 7A loan agreement on 30 June. The payments by set-off are now essentially no different to example 1 in part 1 of this article.

The above legally effected transactions and payments would be subsequently recorded in Benson Pty Ltd's accounts as set out in Table 6.

The above approach can be undertaken each year for all existing loans, and they will be repaid come the end of their respective loan terms. Accordingly, if the suggested

Diagram 12. Trust assigns receivable

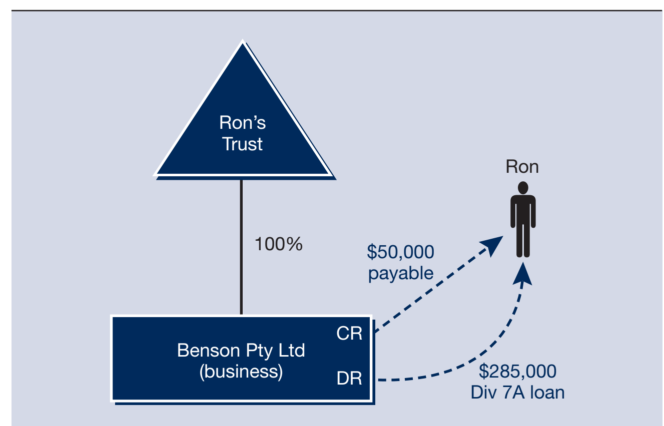


Table 6. Company journal entries

Benson Pty Ltd				
Records this transaction	**Date**	**Account**	**DR $**	**CR $**
Liability owing to trust assigned to Ron Benson	30 June 2020	Dividend payable to Ron's Trust	50,000	
		Liability owing to Ron Benson		50,000
Set-off of mutually opposing obligations	30 June 2020	Liability owing to Ron Benson	50,000	
		Interest income		15,297
		Loan to Ron Benson (Div 7A)		34,703

approach for future loans is adopted, the need for having to do the above effecting payments by assignment will come to an end on the most recent existing loan being fully repaid.

Shareholder not a trust

Where the shareholder in Diagram 8 is not conveniently a discretionary trust, the above approach is not available. For example, if the shareholder were another individual, achieving the required mutually opposing obligations between the company and the borrower will require a different pathway again.

Example 5. Non-trust shareholder

Let's assume the same circumstances as in Diagram 8, except that the shareholder is another individual. The borrower similarly needs to make a minimum annual repayment of $49,916 to the company. This could be achieved by undertaking the following:

1. the company declares a $50,000 dividend, and this is crystallised as owing to the shareholder;
2. the shareholder lends $50,000 to the borrower; and
3. the shareholder advances the above loan, not by paying $50,000 in money, but by assigning to the borrower its $50,000 asset receivable.

The crystallising of the dividend payable to the shareholder by name reflects an implied agreement to constructively pay the dividend, and the shareholder to constructively advance a loan to the company.

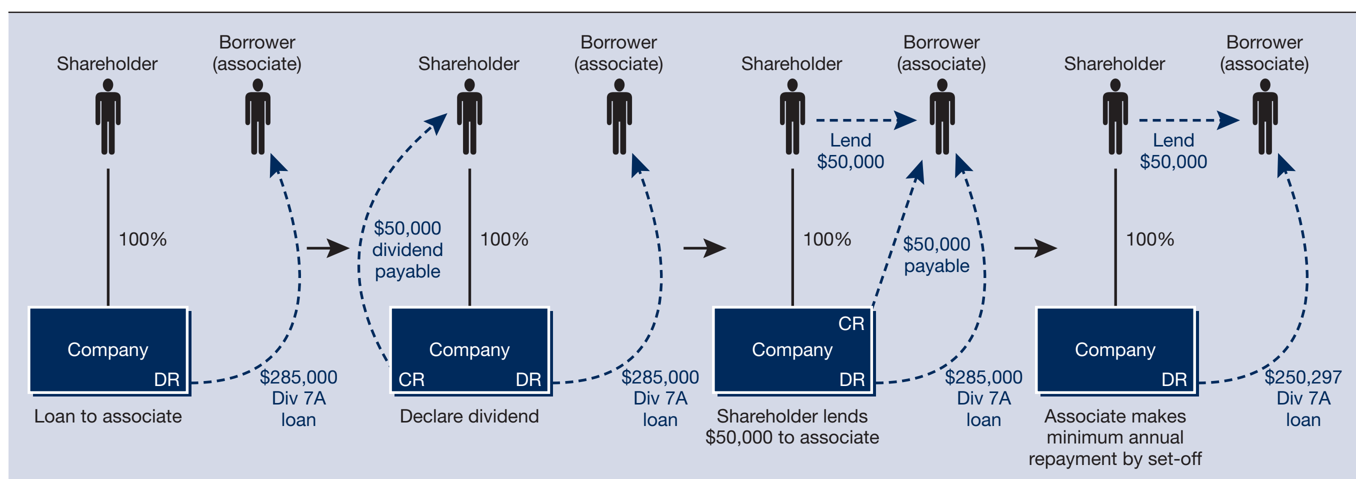
The above results in the borrower owing $50,000 to the shareholder. Further, the asset that the borrower now has, funded by that loan from the shareholder, is the asset receivable owed by the company. The borrower and the company will now have mutually opposing obligations, just like in Diagram 12. Payments can then be made by way of set-off. This process is illustrated in Diagram 13.

The result is that the borrower has fulfilled the requirement to make the minimum annual repayment to the company.[6] The final outcome is similar to Diagram 2 in part 1 of this article. The difference here is that the shareholder and the borrower are two different people, "bridged" by the $50,000 loan between them.[7]

Assignment deed

Effecting the above assignments in Diagrams 12 and 13 requires executing legal documentation. The assignment deed is a legal document that must be drafted by a legal practitioner. Ideally, all three parties should be signatories. The author suggests that tax agents adopt the same approach as generally taken with Div 7A loan agreements referred to in part 1. That is, engage a legal practitioner

Diagram 13. Assignment by non-trust shareholder



to prepare a template assignment deed under terms that permit re-use over and over with different clients. As the tax agent entering the client's details into the template deed is merely the performance of an execution service, there is no authoring involved, and thus no legal service is provided. Again, this is no different to the common approach with Div 7A template loan agreements. Where the shareholder is a trust (ie Diagram 12), minutes can also be prepared to document the trustee's decision to pay down the UPE owing to the borrower by way of assigning the receivable owed by the company.

The above can be a standard annual practice conducted in June each year. The amount of the minimum annual repayment is known almost a year in advance. Accordingly, the minimum amount of receivable that the trust or other shareholder needs to assign — equal to the minimum amount of dividend needed to be declared — is also known at that advance time. Where there are multiple Div 7A loans to a particular borrower, only one assignment is required, covering the total of minimum annual repayments required. This would not be overly administratively burdensome and would redress the compromised asset protection issue. The sleep-well-at-night benefit is the value provided to clients — and to practitioners.

"The value proposition to the client is the sleep-well-at-night factor ..."

General anti-avoidance

A detailed examination of Pt IVA is beyond the scope of this article, and it is always difficult to consider and apply Pt IVA in the abstract as it is heavily fact-dependent and needs to be considered with any and every fact scenario. Nonetheless, it is worth making some general observations.

Under s 177C(2) ITAA36, certain actions that result in an amount of assessable income not arising are not regarded as the obtaining of a tax benefit. However, undertaking actions that will result in no Div 7A deemed dividend arising is not one of them.

Accordingly, we would need to consider the eight factors in s 177D(2) to which regard must be given when considering the objective test of whether a scheme was carried out for the dominant, but not incidental, purpose of obtaining a tax benefit. It can be said that all that the above examples do is demonstrate alternative ways of making legally effective payments, the purpose of which is to comply with contractual obligations under a lending agreement. Further, complying Div 7A loans are transparent and relatively uncomplicated, they bring form and substance into alignment, and the results under the tax Acts are as intended. Accordingly, it is arguable that the consequence of a Div 7A deemed dividend not arising is an incidental outcome of the lending arrangement. All things considered, it is highly unlikely that the Commissioner would seek to apply Pt IVA to any of the above suggested solutions.

Systematic approach across client base

The above scenarios present a value-added consulting opportunity among our clients. One way to capture this value across a client base is to note the clients who are in the kind of scenarios illustrated in examples 4 and 5 as 2020 compliance work is completed. The issue can be raised in the meeting or discussion following completion of the work. The value proposition to the client is the sleep-well-at-night factor in the knowledge that exposure to Div 7A deemed dividends for existing loans is mitigated, and that the asset protection risk is being managed. If the client agrees, the assignment deed and minutes can be completed the following June, and the same each year thereafter until existing loans are all repaid.

On the other hand, if a client hears what you say, but decides to do nothing further, so be it. Document on file that you made the client aware of the risks, tax and commercial. While this is not entirely satisfactory under the Code of Professional Conduct in the *Tax Agent Services Act 2009*, experience again informs us that this is another low-risk scenario, for the practitioner this time. It is at least an improved situation over that of the client being unaware.

Reform of Div 7A

The long-awaited reforms to Div 7A continue to elude us. Whatever reforms might eventually be implemented, the requirement to make repayments against Div 7A loans will continue to be a key feature of the regime.

Conclusion

Division 7A and its s 108 ITAA36 predecessor are necessary while there is a wide enough gap between the company tax rate and the top personal rate plus Medicare levy. In living memory, this has been the situation for all but a two-year period in the mid-1980s.

As discussed in part 1 of this article, most Div 7A loan repayments are made by way of set-off against a dividend declared by the company. The key issue there is that the dividend is validly declared. In part 2, we moved on to scenarios where round-robin payments are not effective, and additional steps are required to validly effect cashless repayments. Examples 4 and 5 illustrate very real taxation and commercial risks, for both clients and practitioners. They are thus worthy of our attention, and worthy of educating clients and offering a solution. For those clients who embrace your solution, the consulting value is there to be captured.

David Montani, CTA
National Tax Director
Nexia Australia

Acknowledgment

The assistance of Wayne Rogers, Director, Nexia Perth, in the preparation of this article is gratefully acknowledged.

References

1 The requirements in Subdiv 207-B of the *Income Tax Assessment Act 1997* (Cth) (ITAA97) for streaming dividends via specific entitlement may need to be observed.

2 The Commissioner could in fact begin by taking the view that the arrangement is an inherently ineffective sham transaction, which would then not require applying s 100A. If the arrangement were found not be a sham, he could then seek to apply s 100A, and if that failed, he could then resort to applying Pt IVA ITAA36.

3 Under the ATO's advice under development program, a draft ruling is in progress that will set out the Commissioner's preliminary views on reimbursement agreements under s 100A. See www.ato.gov.au/General/ATO-advice-and-guidance/Advice-under-development-program/Advice-under-development---trust-specific-issues.

4 See ss 109T and 109W ITAA36, and TD 2011/16.

5 There are providers of simple loan agreements for on-lending situations, via a streamlined online process, that are quick and inexpensive.

6 The shareholder has essentially taken the $50,000 dividend received and invested the entire amount into a new asset, being the loan advanced to the borrower. Therefore, any top-up tax liability will need to be funded from other sources. As the company has made a payment to the shareholder that is an assessable dividend, it is unlikely that the Commissioner would determine that the company made any notional payment to the borrower under s 109V ITAA36. Further, as the shareholder is an individual, the loan advanced to the borrower is not subject to Div 7A. However, if the shareholder were a company, the $50,000 loan may be subject to Div 7A.

7 The borrower must be genuinely indebted to the shareholder in order for the assignment, and thus creation of the mutually opposing obligations between the borrower and the company, to be effective. However, if the shareholder and borrower are spouses, the indebtedness could be regarded as subsequently repaid without any further actions. This may be so if the couple's financial affairs are structured such that it could be said that both the loan advanced and liability owing arise out of a co-mingled pool of marital funds.

THE TAX INSTITUTE

2020 National Resources Tax Conference

Australia's leading tax conference focused entirely on the mining and oil & gas industries

As the premier event covering the tax issues impacting the resources sector today, you will gain access to a host of the industry's leading experts and commentators.

Conference highlights:

- 12 sessions delivered virtually over 3 weeks
- Interactive panel sessions
- 19 expert presenters from around Australia.

11–25 November 2020
Online AEDT
11 CPD hours

Register now
taxinstitute.com.au/nrtc

0184WA_10/20

Fifty shades of Greig: the spectrum of taxpayers in share trading

by Michael Bearman, CTA, Barrister, and
Piotr Klank, CTA, Barrister, Victorian Bar

***Greig v FCT* is the latest in a long line of cases considering the taxation of share trading by reference to a wide survey and exact scrutiny of the facts and circumstances relevant to each decision. The authors consider the consequential development of the law by reference to the characteristics of the spectrum of some of the participants in share trading, which they have termed "gamblers", "long-term investors", "speculators" and "share traders".**

Introduction

The proper characterisation of gains and losses arising from trading in publicly listed shares invokes the fundamental distinction inherent in the income tax law between those gains and losses falling onto revenue account and those falling onto capital account. Unsurprisingly, courts have approached the distinction on "a wide survey and an exact scrutiny"[1] of each taxpayer's activities as established by the evidence on a case-by-case basis in the development of settled principles.

The approach is illustrated by the most recent appellate decision concerning the taxation of share trading, *Greig v FCT*.[2] The court there stressed that it was a "well-established" proposition that "a gain will constitute income if the property generating that gain was acquired in a 'business operation or commercial transaction' for the purpose of profit-making by the means giving rise to the profit", notwithstanding that "[p]revious authorities … tended to focus on the existence of the required profit-making purpose rather than upon the need for there to be a 'business operation or commercial transaction'".[3]

This article proposes an alternative consideration of the application of the tax law by reference to the characteristics of a spectrum of participants in share trading, with the attributes resulting in the tax consequences of their activities being seen as a consequence of their characterisation on that spectrum rather than the individual facts and circumstances of each case. With increasing trading activity in the share markets due to growth in the accessibility and sophistication of financial instruments and trading platforms, it is unsurprising that this spectrum and the unique characteristics and circumstances are wide and varied, ranging from natural persons making singular transactions in the nature of a bet to complex transactions by institutional investors.[4] This article focuses on four types of taxpayers from that spectrum who may be termed "gamblers", "long-term investors", "speculators" and "share traders".

The "gambler"

A gambling or wagering contract, strictly speaking, would result in no tax consequences, as: (1) any gain would arise solely as a windfall;[5] (2) no loss would have the requisite purpose to give rise to an allowable deduction;[6] and (3) the capital gains tax (CGT) consequences would be disregarded.[7]

The nature of a gambling contract at common law is governed by the celebrated case of *Carlill v Carbolic Smoke Ball Co*,[8] where the essential characteristic of a wager was defined to be that each party might win or lose depending on the issue of an event, and the outcome of which thereby remained uncertain until that issue was known. That definition excludes any true acquisition and sale of shares from comprising a gambling contract. Accordingly, although a taxpayer may acquire shares for the mere chance of a gain and, in that economic sense, the circumstances would be no different to a bet placed with a bookmaker on the value of the share at a future time, the mere form of the transaction would engage different principles.

Nevertheless, in many ways the same economic substance of share trading may be achieved without any underlying acquisition of shares. For example, in addition to a true bet on an outcome, in TR 2005/15, the Commissioner accepted the possibility that gains and losses from the execution of financial instruments may be the product of gambling. The ruling considers the circumstances where a gain or loss from a financial contract for differences may be the product of gambling. Drawing on horse race betting cases, the ruling observed that: (1) gains that are dependent on a significant element of skill in contradistinction to chance are more likely to have tax consequences than gambling on merely random events; and (2) the more closely an activity is identified as being undertaken for private or recreational purposes, in contradistinction to commercial purposes, the less likely it is that it will have tax consequences.[9]

In *Case* X85,[10] the Commissioner contended before the Administrative Appeals Tribunal that a loss suffered by a research scientist in an "isolated adventure" of trading share price index futures was the product of gambling and therefore not deductible. The tribunal rejected the contention on the basis that the activity in issue was essentially commercial, in the sense that it comprised buying and selling assets as part of a productive process.[11] But the reasoning of the tribunal suggests that a different decision may have resulted if the transaction involved a contract for differences or some other type of arrangement outside of the ordinary "productive financial system".[12] To the same end, in TR 2005/15, the Commissioner considered but rejected an "alternative view" that tax consequences of cash-settled

financial derivatives more broadly may be disregarded unless a business is carried on.[13]

The more difficult question for a gambler on the share markets is why a true bet (placed, for example, with a bookmaker by reference to a particular price (or range of prices) of identified publicly listed shares at a specified future time) should be treated any differently to an acquisition of shares merely because of the form of the transaction. The authors suggest that it should not, and that the true criterion for characterising a taxpayer as a "gambler" turns on whether the taxpayer's conduct may be identified as an inherently rational means of deriving profits (at the risk of losses), or whether the nature of the conduct was truly derived from the psychological thrill of pursuing wins in an irrational context. That would result in a distinction for tax purposes between two main categories of shareholders. First, taxpayers betting (or equivalent) in circumstances where the odds payable on successful bets were controlled by the bookmaker (or equivalent), thereby suggesting that, with sufficient bets over a course of time, the odds would dictate that the gambler ultimately loses. Second, sophisticated taxpayers (say, a merchant bank) making bets on the stock market where the sophistication and size of the taxpayers enabled them to obtain control of the specific outcome in some way — whether by an underlying economic manipulation of the odds, by preferential industry advantage placing the taxpayers on a more level playing field with the bookmaker, by the odds being taken into account as part of the taxpayers' wider activities (eg hedging foreign investment gains and losses), or otherwise — thereby rendering the betting as inherently rational conduct. Being carried out in a systematic business-like manner,[14] those factors would tend to substantiate that a gain or loss was not of a private or recreational nature, but instead has the character of a business or commercial deal.[15]

The "long-term investor"

The long-term investor describes a taxpayer who has acquired publicly listed shares with the expressed purpose of holding them for dividend returns over the long term, and with the prospect of expanding capital wealth by the increasing value of a share portfolio over time. Given the steady increase in the value of the share markets over the past decades, the associated tax benefits arising for such taxpayers encourage this classification. That remains so notwithstanding complexities which may arise in some situations, such as in the case of the acquisition of shares listed on overseas stock markets, which may require a taxpayer to consider several matters, such as the application of double tax treaties and entitlement to foreign tax offsets. Those complexities were recently illustrated by *Burton v FCT*,[16] where the Federal Court held that, consistently with art 22(2) of the Australia–US tax convention, Div 770 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97) only applied to that portion of a capital gain included in the taxpayer's assessable income after the 50% CGT discount was applied to the gain.[17]

Nevertheless, in general terms, interest on borrowings would have the requisite income-producing purpose (ie the derivation of dividends) for it to be an allowable deduction, thereby enabling the scope for negative gearing, although it should be borne in mind that an enquiry into the purpose of borrowings is always permissible wherever allowable deductions for the borrowings exceed assessable income from the dividends.[18]

In addition, the 50% CGT discount would also be available for relevant taxpaying entities who hold shares.[19] As such, the classic distinction between taxable revenue gains and formerly tax-free capital gains remains of significant ongoing relevance to taxpayers. The distinction is particularly relevant when it comes to circumstances where shares are sold either to maintain or rebalance a portfolio, and whether the way in which this is carried out (eg on a regular basis) causes the gain to be on revenue rather than capital account. That is especially so because the minimum 12-month period prior to the availability of the CGT discount[20] is commonly misapplied as a sufficient, rather than necessary, entitlement to characterise shares as held on capital account. To put it another way, the considerations in relation to the classic distinction are relevant, and need to be considered, regardless of whether shares have been held for 12 months or more. For example, the decision in *London Australia Investment Co Ltd v FCT*[21] continues to be relevant. In that case, although a taxpayer's business was investing in shares with a primary purpose of obtaining income by way of dividends, the conduct of the business required that the portfolio should be given regular consideration and that shares should be sold when the dividend yield dropped below specified levels which, for practical purposes, was when the shares increased in value. The High Court held that a sale of the shares was a normal operation in the course of carrying on the business of investing for profit. It was not a mere realisation or change of investment. If the CGT discount had applied to the taxpayer in this case, any share that was held for 12 months or more would not have affected the characterisation of the profit as assessable on revenue account. As Steward J noted in *Greig's* case:[22]

> "In *Whitfords Beach*,[23] the profit-making plan commenced in late 1967 and assessable profits were made from 1971 over a period of years. It is not antithetical to a profit-making undertaking for a taxpayer to wait for the profit to become realisable, so long as that was the profit the taxpayer planned to secure. Waiting, without more, will not convert the profit eventually realised into an affair of capital."

The "speculator"

The "long-term investor" has been characterised in contradistinction to the "speculator", being a taxpayer who exercises skill and judgment in acquiring shares by way of a commercial transaction, with a profit-making purpose or intention. A key issue for the speculator is whether gains and losses should be brought to account under a "gross receipts method" (often referred to as the "basic approach") or by "net profit accounting". Under the former method, an allowable deduction is claimed when a share is acquired and income is recognised when it is sold. Under the latter, only the net profit or loss arising at the end of the transaction is recognised. Generally, the gross receipts method applies if a taxpayer carries on a business, and net profit accounting applies if the taxpayer engages in something less than that, namely, a profit-making undertaking, and the CGT rules do not apply.[24]

On a more cynical view, taxpayers making gains seek to be characterised as long-term investors in order to obtain

the tax reductions from that characterisation (as in *London Australia Investments*), whereas those with losses seek to be characterised as speculators to obtain the allowable deduction. An example of the latter is *Case* X85, discussed above. The tribunal there, in allowing the claimed losses, stressed the commercial nature of the activities under the *Myer Emporium* principle.[25]

Greig's case is another example. In that case, the taxpayer purchased shares in an ASX-listed company on 64 occasions over a 25-month period, at a total cost of $11.85m. He also expended $507,198 on legal costs in court proceedings whereby he contested a deed of company arrangement which otherwise compelled him to transfer the shares to a third party for nil consideration. Having lost that case, he incurred a loss of $11.85m on the disposal of his shares. His litigation with the Commissioner concerned the deductibility of that loss and of his legal expenses. It is of note that the parties conducted the case on the common footing that that deductibility was governed by the application of the *Myer Emporium* principle to the share acquisitions, notwithstanding that the principle concerned the assessment of gains.

The Full Federal Court[26] found, on that footing, that the shares were acquired with a view that they be sold at a profit in the short term in a "business operation or commercial transaction" because: (1) the profit would have been the result of the implementation of an intention or a purpose existing at the time of the acquisition of each share of profit-making from their sale; (2) the realisation of profit formed part of the taxpayer's overall sophisticated plan to generate cash profits prior to his retirement within four to five years; (3) the shares were acquired in a systematic fashion on 64 occasions; (4) of the taxpayer's participation, either personally or through the agency of his adviser, in a plan to crystallise indirectly what the taxpayer perceived was the true value of the underlying asset owned by the company in which the shares were acquired; (5) the taxpayer used his business knowledge and experience, which was applied on each occasion he decided to buy shares; and (6) the taxpayer relevantly acted as a "business person".[27]

On one hand, these expressions of the test reflect that the threshold for gains and losses to be on revenue account is not high, yet still requires a certain degree of sophistication. On the other hand, it is difficult to see that the majority was not influenced by the scale of the taxpayer's conduct, and in his persistence in pursuing the shares for his view of their potential value through complex and expensive litigation challenging the deed of company arrangement. So much was apparent by the comment of Steward J that, notwithstanding the taxpayer's statements to the contrary, the shares in issue were not acquired "in a meaningfully different way" from 218 other share purchases of the taxpayer who held upwards of 44 different stocks during the period in issue. As Steward J found, he "made gains as well as losses".[28]

The "share trader"

A share trader's dealings take the character of a continuing business enterprise. The tax treatment of a share trader is more complex, as a share trader is also likely to be engaged in other sophisticated trading activities involving more complex financial instruments (eg options and other derivative instruments). The trading stock provisions would normally apply. More sophisticated traders may seek to apply the specialised provisions for the taxation of financial arrangements under Div 230 ITAA97. On the other hand, trading losses of high-wealth natural person share traders, with taxable incomes above the $250,000 threshold for the application of Div 35 ITAA97,[29] may not be deductible against non-share trading income due to the operation of that Division.

The question of whether a taxpayer is carrying on a business of share trading involves the general indicia of conducting a business, among many others, including: (1) repetition and regularity in the buying and selling of shares; (2) whether the taxpayer is operating to a plan, setting budgets and targets, and keeping records; (3) maintaining an office; (4) accounting for the share transactions on a gross receipts basis; and (5) whether the taxpayer is engaged in another full-time profession.[30]

The threshold to establish whether a taxpayer is carrying on a share trading business tends to be high. The cases are littered with taxpayers who have unsuccessfully contended that they were share traders seeking to claim allowable deductions for their losses. Examples include a retired engineer trading the market with his superannuation and a $600,000 investment loan,[31] a council employee trading shares worth between $385,938 and $934,575 in an income year,[32] and a dentist who claimed that he studied the share market in a business-like manner.[33]

On the other hand, in *Case* X31,[34] a taxpayer established that she was carrying on a business of dealing in silver, albeit in a small way. In that case, she acquired several kilograms of silver in three separate transactions between January 1980 and September 1981. Her success was founded on the regularity and repetitiveness of her transactions, and a finding that each purchase was a commercial decision, carefully made after regular analysis of the market by the taxpayer. Moreover, as Steward J noted in *Greig's* case,[35] the cases indicate that it is unnecessary for taxpayers to personally conduct the activities, resulting in the finding that a business was being conducted; it was sufficient for the activities to be conducted by an agent.[36] Hence, Steward J stated that:[37]

> "… the fact that the taxpayer engaged a stockbroker to undertake his share trading, is of no moment. It may be accepted that the taxpayer was enormously busy and relied in large part on the services of [an agent] to undertake research, to meet company representatives and to undertake the trades. It is also accepted that much of the taxpayer's own physical activity was limited to meetings with [the agent], monitoring his investments and undertaking some research."

Concluding remarks

The title of this article was intended (wordplay aside) to highlight the spectrum of participants in the share market, and to prompt thinking about how an issue that has vexed many for more than a century[38] might be approached in a different way. It goes without saying that care must always be taken not to supplant statutory requirements by simply referring to settled principles and judicial guidance from other cases. Furthermore, even settled principles require considered application to the particular facts in each case. However, for specific activities, such as the share trading considered here, the authors suggest that descriptive characterisations arising from a reverse-engineered consideration of the judicial process may assist in a

perspicacious understanding of the apposite issues, and how they may be approached, in a more enlightened way.

Michael Bearman, CTA
Barrister
Victorian Bar

Piotr Klank, CTA
Barrister
Victorian Bar

References

1 *FCT v Stone* [2005] HCA 21 at [19], citing *FCT v Montgomery* [1999] HCA 34 and *Western Gold Mines NL v FCT (WA)* [1938] HCA 5.
2 [2020] FCAFC 25.
3 *Greig* [2020] FCAFC 25 at [227] per Steward J (with whom Kenny J agreed, Derrington J dissenting), referring to *FCT v Myer Emporium Ltd* (1987) 163 CLR 199 at 209-210.
4 Institutional investors, such as banks, insurers and hedge funds, are generally subject to specialised rules (see, for example, Div 230 ITAA97) and are beyond the scope of this article.
5 RW Parsons, *Income taxation in Australia: principles of income, deductibility and tax accounting*, Lawbook Co, 1985, paras 1.71 and 2.158. See also *Greig* [2020] FCAFC 25 at [245].
6 S 8-1 ITAA97.
7 S 118-37(1)(c) ITAA97.
8 [1892] 2 QB 484 (affirmed on appeal, [1893] 1 QB 256).
9 Para 43 of TR 2005/15.
10 *Case* X85, 90 ATC 615.
11 *Case* X85, 90 ATC 615 at [22].
12 This is a term coined by the authors, having regard to the reasons in *Case* X85. The emphasis on "productive" relates to whether the traded instruments form part of the day-to-day commercial transactions, such as futures contracts, which are used as hedging instruments.
13 Paras 46-73 of TR 2005/15.
14 For example, see *Brajkovich v FCT* [1989] FCA 454.
15 *McLelland v FCT* (1970) 120 CLR 487 at 494-495. See also TR 2005/15 which recognises that there may be rare situations where these factors are present and determinative.
16 *Burton v FCT* [2019] FCAFC 141.
17 It should be noted that, given the ever-expanding range of available financial investments as alternatives to shares, for example, options or instalment warrants, long-term investors must also concern themselves with the particular rules that are applicable to those instruments.
18 *Fletcher v FCT* [1991] HCA 42 (cf TD 2004/1 which considers the deductibility of outgoings where the purpose of an investment is solely long-term capital growth).
19 S 115-10 ITAA97.
20 S 115-25 ITAA97.
21 *London Australia Investment Co Ltd v FCT* [1977] HCA 50.
22 *Greig* [2020] FCAFC 25 at [246].
23 *FCT v Whitfords Beach Pty Ltd* [1982] HCA 8.
24 *FCT v Montgomery* [1999] HCA 34 at [111]-[112]. See also paras 67-69 of TR 96/4.
25 *Case* X85, 90 ATC 615 at [22]. For a more in-depth discussion of the *Myer Emporium* principle, see D Boccabella, "Myer isolated transactions doctrine (first strand) at 33-year anniversary", (2020) 24(1) *The Tax Specialist* 15.
26 Kenny and Steward JJ, Derrington J dissenting.
27 *Greig* [2020] FCAFC 25 at [245].
28 *Greig* [2020] FCAFC 25 at [250]-[252].
29 This is due to the operation of s 35-10(2E) ITAA97.
30 *Hill and FCT* [2019] AATA 1723 at [17].
31 *Hill and FCT* [2019] AATA 1723.
32 *Hartley and FCT* [2013] AATA 601.
33 *Case* 6297 (1990) 21 ATR 3747.
34 *Case* 5770 (1990) 21 ATR 3291; *Case* X31, 90 ATC 296.
35 *Greig* [2020] FCAFC 25 at [247].
36 See, for example, *Ferguson v FCT* [1979] FCA 29, *FCT v Lau* [1984] FCA 401 and *Puzey v FCT* [2003] FCAFC 197.
37 *Greig* [2020] FCAFC 25 at [247].
38 See, for example, *Californian Copper Syndicate v Harris* (1904) 5 TC 159.

THE TAX INSTITUTE

Obtain specialist knowledge, learn new skills in tax.

Download our information pack today

taxinstitute.com.au/education

A Matter of Trusts

by Sam Campbell, ATI, Sladen Legal

Rectifying mistakes in trust deeds

This article discusses the challenges of rectifying mistakes in trust deeds by way of a deed of rectification, particularly in the context of tax disputes involving revenue authorities.

Unfortunately, it is not uncommon for trust deeds to contain mistakes.

While a deed of rectification noting and correcting the mistake is one common solution, the Full Federal Court decision in *FCT v The Trustee for the Michael Hayes Family Trust*[1] illustrates the challenges of seeking to rectify mistakes in this way, particularly in the context of tax disputes involving the Commissioner of Taxation.

Briefly, the relevant facts of *Hayes* are as follows.

Relevant facts

On 24 February 2010, two new trusts were created, namely, the MJH Fixed Trust (fixed trust) and the MJH Trading Trust (trading trust). The purpose of the structure was to ensure that the trading trust would be a public trading trust for the purposes of Div 6C of the *Income Tax Assessment Act 1936* (Cth) (ITAA36). To be a public trading trust, a trust must have been a "public unit trust" as that term was defined by s 102P ITAA36 which required, relevantly, that an "exempt entity" held not less than a 20% beneficial interest in the income or property of the trust or had the right to acquire such an interest.

The trading trust was established with 20% of the units issued being allocated to the fixed trust, and the other 80% to the Michael Hayes Family Trust (family trust). The fixed trust was established with two absolute beneficiaries: (1) the "second absolute beneficiary" which was defined as the MJH Superannuation Fund (superannuation fund) (an "exempt entity") which held a 5% share in the trust fund of the fixed trust; and (2) the "first absolute beneficiary" being the family trust which held a 95% share. The trust deed of the fixed trust purported to give the superannuation fund an option to acquire any asset forming part of the trust fund of the fixed trust.

The issue was that the second absolute beneficiary was incorrectly identified in the schedule to the trust deed of the fixed trust as "Grawlex Pty Ltd ACN 080 401 092 as trustee of the MJH Superannuation Fund". Grawlex had ceased to be trustee of the superannuation fund on 1 July 2007 and been replaced by an entity called Ragem Pty Ltd.

Parties' contentions

It was the Commissioner's contention that no "exempt entity" had an entitlement of the kind required by s 102P, and accordingly, the trading trust was not a "public trading trust".

The taxpayer responded to this issue by drafting a deed of rectification of the trading trust, seeking to correctly identify the trustee of the superannuation fund as Ragem Pty Ltd (deed of rectification).

Decision of the Full Court

The court (Griffiths, Derrington and Steward JJ agreeing) first determined whether the error in the trust deed of the fixed trust was a mistake that could be effectively remedied by the principle of construction (that is, the trust deed of the fixed trust could be constructed to refer to the current trustee of the superannuation fund).

The Commissioner submitted that the definition of the second absolute beneficiary was not ambiguous. Grawlex Pty Ltd had been trustee of the superannuation fund and could assume that capacity again in the future. The Commissioner submitted that any ambiguity only arose because of the surrounding circumstances which led to the conclusion that Ragem Pty Ltd was in fact trustee. However, in the court's view:[2]

> "… this case is not really concerned with ambiguity in an instrument (whether patent or latent). In my view, this is a case about mistake. The parties mistakenly referred to Grawlex instead of Ragem. This is a mistake which can be cured by construing the reference to Grawlex to be a reference to the correct trustee of the MJH Superannuation Fund, namely Ragem."

After consideration of whether a mistake had been made, the court concluded:[3]

> "On the facts and circumstances here, and applying the two-step test articulated by Leeming J.A. in *Seymour Whyte*, I am amply satisfied:
>
> (a) that applying the literal meaning of the named Second Absolute Beneficiary is an absurdity. It is an absurdity because Grawlex was not, at the time of the settlement of the MJH Fixed Trust, the trustee of the MJH Superannuation Fund and because the parties intended to create a structure whereby an exempt entity, being that Fund, would be a beneficiary of the MJH Fixed Trust; and
>
> (b) that it is self-evident that in those circumstances the objective intention was to refer to the actual trustee, namely Ragem."

The court then went on to consider whether the deed of rectification was in fact binding. After considering the terms of the deed of rectification (noting that no other evidence was led from any witness concerning the subjective intention of the settlor of the fixed trust), the court concluded that it could be received into evidence (and was legally binding between the parties to the deed, including the trustee and the beneficiaries) and was otherwise able to be relied on by the taxpayer as evidence of the mistake that had been made about the identity of the trustee of the superannuation fund.

However, the court also found that the deed of rectification could not bind the Commissioner:[4]

> "The Commissioner can only assess taxpayers by applying the 1936 and 1997 Acts to the 'taxable facts' which apply in each year of income, to use the language of Barwick C.J. in *Bailey v Federal Commissioner of Taxation* [1977] HCA 11; (1977) 136 CLR 214. The

> Deed of Rectification, executed in 2018, in and of itself cannot change or alter those taxable facts."

The court then quoted the High Court's decision in *FCT v Thomas*[5] which rejected the taxpayer's submission in that case that directions obtained by the taxpayer from the Supreme Court of Queensland as to the construction of resolutions made by the trustee to distribute note income comprising, among other things, certain franking credits:[6]

> "[the earlier High Court decision in *Executor Trustee and Agency Co of South Australia Ltd v Deputy Federal Commissioner of Taxes (SA)* [1939] HCA 35] is authority for the proposition that the general law rights of trustee and beneficiary inter se, to the extent that they are defined by a decision made in duly constituted proceedings, are defined as against the Commissioner unless the decision is set aside. In *Executor Trustee*, the earlier proceedings had determined rights inter se. There was no question of res judicata or of issue estoppel, and the separate declaration did not generate rights *in rem* against third parties. And, importantly, the earlier proceedings did not determine the application of the taxation law to those rights.
>
> It follows that *Executor Trustee* is not authority for the proposition that the Commissioner, or a court under Pt IVC, should determine the application of the taxing acts otherwise than according to law. 'When the revenue authorities come to impose a tax in relation to such rights [defined by order of the court], they must … take them as they in fact actually exist *between the parties*' (emphasis added). But directions made under the equivalent of s 96 of the *Trusts Act* do not bind the Commissioner in the *application of the taxation laws*."

However, the court did also state (noting that the observations of Hill J in *Davis v FCT*[7] about the potential effectiveness of a deed of rectification in a tax matter were not necessarily inconsistent with *Thomas*) that such deeds may still operate in certain circumstances:[8]

> "… a deed of rectification in relation to an agreement is effective in a tax appeal if all it does is 'record that agreement as it always was'. In other words, it will be efficacious if the taxpayer otherwise proves that it confirms a taxable fact which had not been correctly recorded."

Conclusion

Ultimately, the court found that the deed of rectification did not, and could not, retrospectively alter taxable facts established in previous income years nor bind the Commissioner except to the extent that it correctly declared inter partes rights between the parties to the trust deed of the fixed trust (*Executor Trustee*).

The court's decision in *Hayes* provides that a deed of rectification seeking to correct a mistake about a fact underlying an agreement may still be effective, even where that fact is a taxable fact if the outcome is that it proves a taxable fact which has otherwise not been correctly recorded (*Davis*).

Although no other evidence was led by the taxpayer of the settlor's subjective intention and the deed of rectification did not in itself provide sufficient proof of this intention, the court found that the deed of rectification was admissible as evidence of the intention of the parties to the trust deed (and potentially the trustee and beneficiaries of the fixed trust even though they were not technically parties) and to their mutual mistake as to the identity of the trustee of the superannuation fund.

Hayes shows that care needs to be taken in the use of deeds of rectification and that they are not, and should not be, treated as a panacea for all scenarios involving tax disputes where mistakes have been made in trust deeds.

Sam Campbell, ATI
Senior Associate
Sladen Legal

References

1 *FCT v The Trustee for the Michael Hayes Family Trust* [2019] FCAFC 226.
2 *Hayes* at [33]
3 *Hayes* at [40]
4 *Hayes* at [49]
5 [2018] HCA 31 at [54]-[55].
6 *Hayes* at [50].
7 [2000] FCA 44 at [57].
8 *Hayes* at [52].

THE TAX INSTITUTE

Let's talk tax...

Community is a space for you to ...

... ask questions

... find answers

... ignite your curiosity

... spark inspiration

Welcome to the home of tax.
Welcome to Community.

Join the conversation, debate and discuss hot topics from across all areas of the profession with fellow practitioners.

Find out more

community.taxinstitute.com.au

Superannuation

by Daniel Butler, CTA, and William Fettes, DBA Lawyers

Six-member SMSFs: the pros and cons

Naturally, there are a range of advantages and disadvantages that need to be carefully considered before adding additional members to an SMSF.

Overview

The prospect of six-member SMSFs has moved a step further with the recent introduction of the Treasury Laws Amendment (Self-Managed Superannuation Funds) Bill 2020 (the Bill) into parliament. If the Bill is finalised as law in November, the increase to the maximum allowable number of members in an SMSF could commence as early as 1 January 2021.

Interestingly, the ATO's latest statistics show that only around 7% of the total number of SMSFs (currently, that total is approximately 600,000) have more than two members (ie around 42,000 SMSFs). The ATO statistics also confirm that around 23% of SMSFs only have one member and 70% have two members. Given these numbers, there may not be a large uptake of funds seeking to increase their member numbers above the current maximum cap of four members.

The Bill proposes to amend various Acts, including the *Superannuation Industry (Supervision) Act 1993* (Cth) (SISA93), to increase the maximum number of allowable members in an SMSF from four to six.

Naturally, there are a range of advantages and disadvantages that need to be carefully considered before adding additional members to an SMSF.

Accounts and statements

The Bill amends the current requirement for signing off an SMSF's accounts and statements each financial year. The amendment provides that, when there are more than two directors of a corporate trustee, the accounts and statements must be signed off by at least half of the directors of a corporate trustee or, if there are individual trustees, at least half the number of individual trustees. For example, if there were six members in an SMSF, the annual financial statements should, subject to any stricter criteria specified in the SMSF deed, be signed off by at least three members (in their trustee/director capacity).

For this reason, the quality of the constitution for a corporate trustee and the quality of the SMSF deed become far more important when an SMSF can have up to six members. For example, some SMSF deeds give the power to appoint or remove trustees either to the majority of trustees or the majority of members by headcount. An example is outlined below where headcount may be inappropriate as, typically, in a family fund, mum and dad have the largest account balances.

The authors strongly recommend that a corporate trustee be used due to the many advantages that a special purpose company provides. Thus, for simplicity, this article will refer to directors of an SMSF trustee company from now on, rather than also referring to individual trustees as well.

Quality of documentation

As noted above, careful consideration should be given to the quality of the documentation used. In particular, clients should check to ensure that all decision-making powers and other rules are designed appropriately to reflect additional persons being admitted to an SMSF.

The trustee/member rules in s 17A SISA93 generally require that all members are also directors of the corporate trustee and vice versa. Therefore, typically, admitting new members will require these members to be appointed as directors of the trustee company first, provided they have attained 18 years of age. For a child under 18 years, their parent or guardian represents them at the trustee level until they are 18 years old and are then eligible to be appointed as a director.

However, some families prefer that the parents remain in control of the SMSF, and that they remain as the only directors of the corporate trustee and their children do not become directors. To achieve this, adult children may appoint their parents as their attorney under an enduring power of attorney to represent them at the trustee level. This allows the child to be admitted as a member (or, if they have recently attained 18 years, to remain as a member) without the onerous responsibility and associated risks of being an SMSF trustee/director.

Not all families agree with this philosophy and some like to empower their children, getting them more involved and taking greater responsibility, and consider it better to appoint their children as directors to have an appropriate level of input.

Naturally, the addition of new members who are also appointed as a director may complicate decision-making and paperwork at the trustee level. For example, decision-making in many standard SMSF deeds and company constitutions depends on a majority-based headcount of directors. This may provide a member with a low account balance with an equal vote.

In contrast, members with large account balances generally prefer decision-making to reflect the members' respective account balances in the fund as a proportion of the total fund balance.

Example

Mum and dad between them may hold in excess of 90% of the fund balance and their four children may only hold 10% of the fund balance. If the voting reflected the number of members, the four children could outvote mum and dad. However, if the voting reflects account balances, mum and dad would have 90% of the vote and could not be outvoted by their children who only hold 10% of the fund's total fund balance.

Certain SMSF deeds obtained from quality suppliers, such as an SMSF law firm, reflect member account balances in relation to trustee decisions. Moreover, where a corporate trustee is appointed, which is strongly recommended, the constitution is the relevant document that governs the decision-making process. This is where a quality constitution is essential, as special provisions are required to ensure that the directors' votes are not simply a function of headcount. Careful consideration is also required as to whether a new member is provided any shares in the trustee company. Further, the class of shares and the rights and obligations relating to each share class should be carefully considered to provide the mum and dad clients (discussed in the example above) the ability, if desired, to control 90% of each directors' and shareholders' decisions. Certain constitutions obtained from quality suppliers facilitate the ability to provide this type of control and some include a guardian share that provides a right of veto in relation to each director and shareholder decision.

Alternatively, as discussed above, adult children may consider appointing their parents as their attorneys to represent them at the trustee level via their enduring powers of attorney. This may assist in ensuring that the parents maintain greater control of the fund and alleviates the children from administrative and other responsibilities.

Advantages of larger member funds

Having additional members in an SMSF may provide for greater flexibility in terms of investments, ie by enlarging the fund's investment pool. This may be an advantage where the parents have attained their $1.6m total superannuation balance and are precluded from making further non-concessional contributions.

At times, SMSFs need extra cash flow but the $1.6m total superannuation balance limit precludes members from making more non-concessional contributions. Admitting further members may provide much-needed cash flow to the fund to make improvements on property owned by that SMSF or to take advantage of other investment opportunities that are available to that SMSF.

Larger families may also welcome the increased limit, as six members would allow mum, dad and up to four children to be involved in the same SMSF. In contrast, the current limit only allows up to two children in addition to mum and dad.

With added members, there is also the potential to accumulate more in superannuation overall, as each member also obtains their own contribution limits.

While there are some advantages to the ability of having a larger fund, naturally, on the flip side, there are some disadvantages.

Disadvantages of larger member funds

Self-managed superannuation funds can work well when all members agree and get along. However, the SMSF structure is not always suitable for managing conflict, and admitting additional members to an SMSF gives rise to a significant risk of there being more disputes and conflicts over time.

Separation and family law risk is also an important consideration. With the divorce rate in Australia being well above 40%, many families may experience separation or divorce where the retirement savings in the SMSF are more likely to become entangled in messy legal disputes in the context of new members being admitted.

One of the authors has, for example, been involved in a family law dispute where the parents' SMSF included their two sons, one of whom was going through the divorce process. The soon to be ex-daughter-in-law was claiming a proportionate share of the $1m plus reserves in the fund, in addition to a substantial share of the son's account balance. The son had only recently been admitted to the fund and his balance had not contributed towards the fund's reserves. After some negotiation, the ex-daughter-in-law ended up getting a share of the reserves. The poor-quality documentation in this case did not assist the family's cause.

Additionally, in recent years, the authors have witnessed an increasing number of death benefit disputes in relation to who should be paid the deceased member's death benefit. Unless a death benefit is carefully managed, this could easily become problematic as families and relationships become strained and further disputes arise. The increasing number of recent disputes has highlighted that, even if there is a binding death benefit nomination (BDBN) in place, there might be a vexatious litigant and several recent BDBN disputes related to matters such as whether the change of trustee was effective[1] or whether an attorney acting under an enduring power of attorney could make or change a BDBN.[2]

Naturally, succession planning and the future control of an SMSF become ever more important as more people become involved in fund management. Making sure a person's wishes are properly documented becomes critical for those who do not have confidence in trusting the remaining directors who control the fund. In this regard, certain company constitutions provide for a successor director to help manage this risk in relation to loss of capacity and death.

Before admitting any member, you should always check whether they are a disqualified person. Any person previously convicted of an offence involving dishonesty is disqualified, wherever and whenever that offence was committed. It is surprising how many people have a "black sheep" in their family.

Other considerations

Most states and territories, including New South Wales, Victoria, the Australian Capital Territory, Western Australia and Queensland, only allow for up to four individual trustees. Accordingly, a corporate trustee is mandatory for funds that seek to have more than four members in these jurisdictions. As discussed above, a corporate trustee for an SMSF is strongly recommended in any event and for every jurisdiction in Australia.

Further, some SMSF deeds are hard-wired and only allow a maximum of four members and will need varying before more than four members can be allowed.

Conditional member provisions in an SMSF deed

Some SMSF deeds help to overcome a range of other issues that may be faced by SMSFs seeking to admit additional members. For example, some SMSF deeds contains express provision to admit members on a conditional basis. This allows a "conditional" member to be rolled over to another superannuation fund or paid out (if they have satisfied a relevant condition of release) on the occurrence of a specific event or at a specified time, eg if there is a material dispute or a member divorces or separates from their spouse. For SMSFs that may include members with a second spouse and blended families, the ability to remove a member on certain specified events minimises unnecessary disputes.

The Federal Court in *Kafataris v DCT*[3] counted at least 21 beneficiaries of a single member fund. Having power to exclude potential beneficiaries can also assist in minimising the risk of paying out a death benefit payment where there is no BDBN.

Non-family members

Self-managed superannuation funds are generally only for a member, their spouse and children. However, SMSFs are not appropriate for others to share a fund, such as friends and colleagues etc. If a member runs a business, that member generally cannot have non-family employees join their SMSF. It is generally advisable to have them join a public offer fund or to set up their own SMSF, rather than joining the business owner's SMSF. This limits the circumstances in which conflicts may occur between employees and the family

Conclusion

On balance, the ability to have up to six members in an SMSF enhances flexibility. However, in the absence of appropriate succession planning and having the right documentation in place, it could result in increased risk of major problems occurring, eg due to dysfunctional decision-making, disputes, and family law risk. Accordingly, expert advice should be sought to ensure that the SMSF trustees/directors and members are informed and aware of the advantages and disadvantages before proceeding.

Daniel Butler, CTA
Director
DBA Lawyers

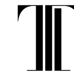
William Fettes
Senior Associate
DBA Lawyers

References

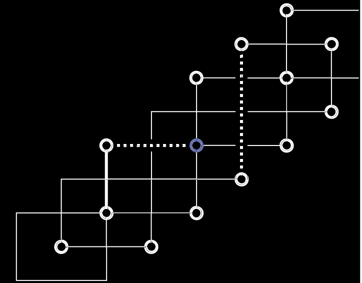
1 *Perry v Nicholson* [2017] QSC 163.

2 *Re Narumon Pty Ltd* [2018] QSC 185.

3 [2008] FCA 1454.



THE TAX INSTITUTE



Estate and Succession Planning Series

Not to be missed by all those advising clients on estate succession planning!

Our presenters will be focusing their presentations on the latest developments in this space and address practical issues and solutions.

- 4 sessions over 2 days
- Series or individual ticket options available
- Attend the live webinars or replay at a time that suits you.

9–16 November 2020
Online AEDT
4 CPD hours

Register now
taxinstitute.com.au/2020estate

0713NAT_10/20

Alternative Assets Insights

by Nick Rogaris and Angeline Young, PwC

Continuing the build-to-rent conversation in Australia

Recently enacted NSW tax-related measures should remove some barriers to build-to-rent developments in Australia and may invigorate the conversation for reforms to increase the viability of this asset class.

A number of New South Wales tax-related measures in response to the COVID-19 pandemic have recently been enacted, including land tax relief for certain to build-to-rent (BTR) properties, relief for foreign owners from the stamp duty surcharge and land tax surcharge for certain BTR properties, duty concessions for first-home buyers, and payroll tax concessions.

This article discusses the impact of the recent land tax and foreign surcharge amendments to the BTR sector and encourages Australian governments and investors to continue the conversation on BTR properties to assist with addressing housing affordability and easing security pressures facing Australia's future generations.

Overview of Australia's private rental market

Australia currently houses one-third of its population in the rental market — and this statistic is much higher in our capital cities and among younger Australians (for example, 70% of 25 to 34-year-olds in Sydney rent their home). Of this, 40% of overall renters are considered "long-term", holding this status for at least 10 years.

Australia's weak tenancy laws and the fact that most rental homes are owned by individual investors mean that tenure is usually short term, the tenant has very few rights with respect to the aesthetics of the property (inside or out), and under most tenancy contracts, the landlord has the power to evict the tenant on 60 days' notice, without cause. Security of tenure is compromised for such families and individuals, with half of all renters having moved three times and 10% of all renters having moved more than 10 times.

How can BTR housing help?

A strong enabler for rental security and better conditions for tenants would be through tax concessions and other measures that entice institutional investors (eg superannuation funds, insurance companies, and large developers) to build properties to lease directly to families — known as "build to rent" or "multi-family" housing in other parts of the world, such as the United Kingdom and the United States. Very broadly, in these countries, BTR-style projects are structured and taxed in a similar manner to ordinary commercial projects, whereas, as set out below, the tax outcomes for BTR projects in Australia can be quite different to ordinary commercial real estate.

The single ownership of these developments, coupled with the ongoing stable returns derived from consistent rental income, means that greater security of tenure is provided as the owner seeks to retain tenants for as long as possible.

Build-to-rent can provide large-scale housing developments in locations which are accessible to jobs, schools, amenities and services. Well-connected communities in locations which are close to transport and strategic centres provide excellent opportunities for individuals and families to thrive. While BTR is not a complete solution to fixing housing affordability, it can allow people to live in desirable locations where they ordinarily would not be able to afford a mortgage, in particular, the deposit required to secure a mortgage.

Table 1 sets out the current barriers preventing BTR in Australia.

Benefits of BTR for investors and the Australian economy

Commercial property yields for some asset classes are below 5% in Sydney and Melbourne, making a BTR product more viable in comparison, with leading investors willing to accept yields of 4.5% within Greater Sydney (the issue will be in the development yields, which are below development yields for build-to-sell and quite tight for most developers). In addition, the BTR cash-flow profile is more acceptable to institutional investors which are focused on long-term returns, given the stability of cash-flows, the absence of any make-good requirements, reduced re-leasing risk and reductions in commission payable compared to the commercial and industrial asset classes.

The impact of BTR is well demonstrated in other countries, with stabilised BTR asset classes having an overall increase in housing supply and diversity, putting upward pressure on construction and management standards, and providing a more secure form of rental.

Build-to-rent developments also allow for the creation of new jobs, not only through large-scale construction and redevelopment, but also within the day-to-day management of the asset. This includes, for example, property managers, cleaning services, maintenance and landscaping.

NSW land tax reduced by 50% on BTR developments

As noted above, annual land tax is a significant contributor to the high ongoing operating expenses of BTR. On 11 August 2020, in NSW, the State Revenue Legislation Amendment (COVID-19 Housing Response) Bill 2020, which comprised a number of amendments including changes to reduce land tax by 50% for the next 20 years for new BTR housing projects,

Table 1. Current barriers preventing BTR in Australia

Current tax laws	Australia's federal and state/territory laws distinguish between BTR investments and other commercial investments, such as build-to-sell. For example, under current GST laws, BTR developers cannot claim GST credits on the land and construction costs incurred to develop BTR stock, which is available for build-to-sell. Additionally, residential rents are not subject to GST. Therefore, a 10% GST on the costs incurred by BTR developers (except finances) arises on BTR projects. In addition, in most Australian states and territories, the stamp duty and land tax payable on residential land (including BTR) is higher than that for commercial land, increasing the cost of BTR developments. In NSW, stamp duty on acquisition could be as high as 15% of the gross market value of the land (compared to commercial rates of around 5.5%), and the land tax could be over 4% per annum (albeit generally based on unimproved land value), which may make the development uncommercial. Under Australia's current income tax laws, BTR investments may also attract a significantly higher income tax impost for foreign investors than investments in other real estate asset classes if they are not eligible for the 15% managed investment trust (MIT) concessional tax rate (although note that BTR investments that satisfy the affordable housing conditions will benefit from the MIT concessional tax rate).
Construction costs	Australia ranks as one of the most expensive countries in the world when it comes to the cost of construction. Some studies have ranked Sydney as one of the top 10 most expensive cities in the world for both commercial and residential construction. This can be attributed to high labour costs and a lack of collaboration between stakeholders and complex government regulations, including long time frames to obtain development approval.
Cost of land	As BTR developments are suitable for locations which are closer to city centres, effective transport options and amenities, land is generally more expensive than the outer fringes or areas with low accessibility.
Yields and preference for capital gain	Another barrier preventing the emergence of the BTR sector in Australia is that, historically, the potential yield generated by a BTR development is significantly lower than what might be generated from other asset classes. There is currently a clear investor preference for capital gain where investment into the residential market is sought.
Lack of appropriate financing	Banks are inherently risk averse and require historical trends and data to support their underwriting assumptions. Because there is no historical data of BTR in Australia, domestic banks struggle to provide construction financing solely for a BTR product. In contrast, in a build-to-sell development, banks have security in the form of minimum required pre-sales before the commencement of construction (eg 50%). As the units in a BTR development are being rented individually after construction is completed, there are no pre-sales which results in less security and a longer repayment period.
Unclear planning policy around BTR	The planning system does not currently identify BTR as a development type, so there are currently no provisions around this type of land use. There is a need for BTR to be defined within the parameters of planning controls to guide the development of this product. In understanding the BTR product, it may be necessary for planning controls to provide policy specifically pertaining to BTR, addressing where it differs from a standard residential flat building. There is an opportunity for this to be led by the government through clear policy.

was enacted, demonstrating the NSW Government's recognition of the importance of this asset class for Australia.

Under the new rules, a 50% land tax discount is available to NSW developers who invest in eligible BTR schemes, which will go towards making this more acceptable to developers. To be eligible for this concession, an application must be made and the following requirements must be met:

- a building must be situated on the land, and construction of the building must have started on or after 1 July 2020;
- the Chief Commissioner must be satisfied that a significant proportion of the labour force hours spent on the construction of the building involves or involved work performed by persons whom the Chief Commissioner considers belong to any or more of the following classes of worker:
  - apprentices or trainees;
  - long-term unemployed workers;
  - workers requiring upskilling;
  - workers with barriers to employment (such as persons with a disability);
  - Aboriginal jobseekers;
  - graduates; and
- the Chief Commissioner must be satisfied that the building is being used and occupied for a "BTR property" in accordance with guidelines to be approved by the NSW Treasurer. The guidelines may include provisions with respect to (among other things) the minimum lease conditions that must be offered to tenants of the BTR property, and the minimum scale of a building to qualify. While the guidelines are yet to be released, it is expected that a BTR development in metropolitan areas may need to have at least 50 units, with a different threshold for regional areas to be considered, but this will need to be confirmed.

Where only part of a parcel of land is being used and occupied for BTR property, there will be an ability for the land tax reduction to apply on a proportionate basis.

A clawback of the reduced land tax will apply if, within 15 years, the land is subdivided or the ownership of the land is otherwise divided. Reassessment will occur for the year in which the land is subdivided or the ownership of

the land is otherwise divided, as well as for each preceding year in which the land tax was reduced, limited to 15 years preceding.

NSW: foreign surcharge stamp duty and surcharge land tax relief

The new rules also extend to providing an exemption from foreign investor surcharges (an additional 8% for surcharge stamp duty, and an additional 2% for surcharge land tax) until 2040, and integrity measures have been included to ensure that discounts are not used for tax avoidance (similar to those referred to above in the clawback of reduced land tax).

For both of the surcharges, the land must be acquired and held by an Australian corporation (ie incorporated or taken to be incorporated under the *Corporations Act 2001* (Cth)), and the construction of the BTR development must be carried out by that corporation or a related body corporate on or after 1 July 2020.

For the surcharge stamp duty exemption, construction must occur after the land has been transferred to the Australian corporation, and the land must have been transferred on or after 1 July 2020. It is expected that the guidelines will clarify whether the "Australian corporation" requirement is satisfied where a corporate trustee acquires and holds the land in its capacity as trustee of a trust.

Generally, the surcharge stamp duty and the surcharge land tax exemption require the constructed BTR property to be eligible, meaning that the starting assumption under the provisions is that the surcharges would be paid and an application for a refund would be made (within certain time limits set out below):

- surcharge stamp duty: generally requires an application for the refund to be made within 12 months after the owner of the land first became entitled to a reduction in the value of the land for land tax purposes, and no later than 10 years after completion of the transfer of the residential-related property to the Australian corporation; and
- surcharge land tax: generally requires an application for a refund to be made within 12 months after the owner of the land became entitled to the refund, and no later than 10 years after the land tax year concerned.

However, there is the ability for the Chief Commissioner to approve a person as an "exempt transferee"/"exempt person" if the Chief Commissioner is of the opinion that the person is likely to *become* entitled to a refund of the full amount of surcharges.

BTR developments in other Australian states and territories

New South Wales is the first state to have land tax reductions specific to BTR projects. While some states (eg Victoria and Queensland) have ex gratia relief available for certain stamp duty and land tax foreign surcharges, these are not specific to BTR projects, and do not extend to land tax in general (it only applies to surcharge stamp duty and surcharge land tax). At this stage, other Australian states and territories do not have land tax or foreign surcharge relief that could apply to BTR projects.

Table 2 compares the various relief available between the relevant states (subject to satisfying relevant eligibility criteria and successful application).

It should be noted that the Queensland Government has announced a BTR pilot project which involves the government providing a rental subsidy to the developer. The Victorian and Queensland regimes and the Queensland BTR pilot project are discussed below.

Victoria: foreign surcharge stamp duty and surcharge land tax relief

In Victoria, the acquisition of residential property by a foreign purchaser may attract an additional stamp duty surcharge of 8% on the value of the property acquired, and an additional surcharge of 2% in land tax. However, foreign corporations and foreign trusts may be eligible for an exemption from surcharge stamp duty and/or surcharge land tax.

The Victorian Treasurer issued gazetted guidelines on 1 October 2018 outlining the general principles and circumstances which will be considered when deciding whether an exemption should be granted. Build-to-rent developments must meet certain criteria to be eligible, including that the commercial activities of the corporation or trust must significantly add to the supply of housing stock in Victoria, either through new developments or through redevelopment, where such development is primarily residential.

The Victorian surcharge land tax exemption is only available during the period of construction and is not available once construction is completed. Compare this with NSW where the land tax surcharge exemption for BTR developments is generally only available after construction has been completed.

It should also be noted that Victorian foreign surcharge stamp duty may not apply if the sole or primary use of the

Table 2. Relief available between the relevant states

	Land tax relief or reduction	Surcharge land tax relief	Surcharge stamp duty relief
New South Wales	✓ Post-construction only	✓ Post-construction only	✓ Post-construction only
Victoria	✗	✓ During construction only	✓
Queensland	✗	✓ Generally during construction	✓

property is "commercial residential premises" (as defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GSTA99)) and if it is consistent with the guidance released by the Victorian revenue authority for interpreting some premises which are not defined in the GSTA99. This is because such property would not be considered "residential property" and therefore not subject to foreign surcharge stamp duty.

Queensland: foreign surcharge stamp duty and surcharge land tax relief

In Queensland, the acquisition of residential property by a foreign purchaser may attract an additional surcharge stamp duty of 7% on the value of the property acquired (referred to as additional foreign acquirer duty, or AFAD), and an additional 2% of surcharge land tax. However, foreign corporations and foreign trusts may be eligible for an exemption from such surcharges.

Similar to Victoria, rulings have issued providing guidance as to when ex gratia relief will be available. One of the main eligibility criteria for the surcharge land tax relief is that it must make a significant contribution to the Queensland economy and community.

Queensland: BTR pilot project

Under the Queensland BTR pilot project, the government is looking to work with developers, investors and/or consortia to facilitate BTR developments in Queensland. It was recently announced that the project expected to deliver up to three developments, supplying over 750 dwellings in total, with 20 to 40% of these dwellings provided as affordable rental housing The preferred proponent(s) are expected to be announced in late September 2020.

The BTR developments initially will be built on privately owned land at the cost and risk of a successful proponent and, in return, the government will provide a targeted rental subsidy. Unfortunately, there have been delays with the delivery of the BTR pilot project from its initial announcement in 2018, compounded by the effect of COVID-19 on market conditions.

Other matters to consider

BTR as "commercial residential premises"

Build-to-rent investments may be considered "commercial residential premises" as defined in the GSTA99. Factors that support the classification of the BTR investments as "commercial residential premises" for GST purposes include:

- the property is run on a commercial basis;
- the property has the capacity to provide accommodation to several unrelated residents at once;
- accommodation is offered to the public;
- the main purpose of the property is to provide accommodation;
- there is central management to accept reservations, allocate rooms and arrange services for guests;
- the operator of the property supplies accommodation in their own right;
- management provides or arranges services and facilities for guests; and
- the occupants usually have the status of guests.

Where BTR projects qualify as "commercial residential premises", a raft of implications follow, including the ability to obtain credits for GST on construction costs, and MIT benefits for income tax purposes (ie access to the concessionary 15% MIT withholding tax rate). Also, in Victoria, foreign surcharge stamp duty may not apply if the sole or primary use of the property is "commercial residential premises" and if it is consistent with the guidance released by the Victorian revenue authority for interpreting some premises which are not defined in the GSTA99.

As the definition of "commercial residential premises" requires a detailed consideration of the nature and benefits offered by the investment, this would likely require a ruling from the Commissioner of Taxation to confirm the treatment of a BTR investment as "commercial residential premises". Other investments that currently qualify as "commercial residential premises" include some student accommodation and serviced apartments.

Foreign Investment Review Board

In the context of the Foreign Investment Review Board (FIRB) and investment by foreign persons into BTR projects, it is necessary to distinguish between "commercial land" and "residential land". Residential premises that qualify as "commercial residential premises" (applying the same GSTA99 definition) are treated as "commercial land" for FIRB purposes and therefore normally attract the higher monetary threshold of $275m (or $1,192m for foreign investors from Federal Tax Authority partner countries). Residential land acquisitions normally attract a $0 threshold. However, since 29 March 2020, due to the impact of the coronavirus outbreak, *all* monetary thresholds have been temporarily reduced to $0. These temporary measures are expected to end on 1 January 2021. Investment by foreign persons acquiring a substantial interest in Australian land, such as a BTR project, that meet the relevant thresholds require FIRB approval prior to making that investment. Slightly different tests apply to foreign government investors.

Foreign Investment Review Board application fees are based on the purchase price of the land or premises. On a purchase price of between $9m and $10m, the residential land fee is $106,000. Fees for commercial land are materially lower, starting at $2,100 if the purchase price is $10m or less.

It is also worth noting that, without an applicable exemption, certain changes in the upstream structures for an investor who is a foreign person investing in the BTR project may require FIRB approval before any changes can occur.

Community housing providers

Community housing providers have historically played a role in holding land and providing social and affordable housing. While this form of investment is a different market to the BTR investments discussed in this article (as is National Disability Insurance Scheme housing), it can fall under the broader umbrella of "build-to-rent housing".

Broadly speaking, community housing providers have access to lower taxes and council rates, density bonuses, and even cheaper land through collaborations with government, significantly lowering the cost of entry to BTR investments.

There are many affordable and social housing charities in Australia that are registered as community housing providers. As a result of the lower cost of entry, community housing providers are a natural gateway to stimulate the growth of the BTR sector in Australia, and they can play a role in bringing together private investors into BTR.

BTR momentum in Australia

Despite the current barriers to BTR, it has been the authors' experience that BTR developments have started to gain momentum in Australia, with more than 30 major BTR projects (with an average size of 365 apartments) confirmed over the past 12 months. Recent media coverage indicates that an additional pipeline (estimated at more than 10,000 units) is in due diligence, with further announcements expected later in the year and beyond. Notably, many of the BTR projects in Australia contain social and affordable housing elements and limited investment from offshore institutional investors.

The 50% reduction in land tax in NSW for new BTR projects should further supercharge investment in this asset class in NSW. Also, the relief for foreign owners from the stamp duty surcharge and land tax surcharge for certain BTR properties should mean that foreign developers are on a more equal playing field.

Takeaway

The NSW land tax cut, as well as the relief for foreign owners from the stamp duty surcharge and land tax surcharge for certain BTR properties, are welcome changes for investors and developers considering BTR projects, and a great way to invigorate the conversation on the need for reforms to increase the viability of this asset class. As the BTR investment landscape continues to strengthen, the benefits to the Australian economy from the growth of BTR are clear. It is hoped that there will be further discussion and announcements from the federal government and other state/territory governments that support the move made by NSW.

The authors' vision is that further tax reform can align investment in BTR projects with other commercial investments (eg office, retail and industrial assets), including access to the 15% MIT withholding tax rate for foreign investors, land tax and stamp duty concessions, and full credits for GST incurred on construction costs.

Nick Rogaris
Partner
PwC

Angeline Young
Director
PwC

Events Calendar

November/December 2020

STATE/EVENT	DATE	CPD
New South Wales		
28th Noosa Tax Intensive – Terrigal	12/11/2020	12
Northern Territory		
2020 Darwin Tax Convention	6/11/2020	6.25
Queensland		
28th Noosa Tax Intensive – Noosa	12/11/2020	12
South Australia		
2020 SA Tax Intensive	19/11/2020	9
Western Australia		
Tax Updates Breakfast Series – Session 5	25/11/2020	1.5
2020 In Division 7A, We Trust	26/11/2020	9.25
2020 Rottnest Tax Retreat	4/12/2020	3.5
Online		
2020 Women in Tax Online Series – Part 3: How to increase your AQ – your adaptability quotient	6/11/2020	1
2020 Young Tax Professionals – Part 6: Introduction to GST	9/11/2020	1.5
2020 National Infrastructure Online Conference – Part 5: Issues with the treatment of sovereign wealth funds and pension funds	10/11/2020	1
International Tax Series – Part 6: Takeover: sale to a multinational	11/11/2020	1
2020 National Resources Tax Conference – Part 1: Welcome & keynote address	11/11/2020	0.75
2020 National Resources Tax Conference – Part 2: What directors are looking for from a tax risk management perspective	11/11/2020	0.75
2020 National Resources Tax Conference – Part 3: Labour costs related to the construction or creation of capital assets	11/11/2020	0.75
2020 National Resources Tax Conference – Part 4: Justified trust panel session	11/11/2020	0.75
2020 National Infrastructure Online Conference – Part 6: Keynote address – update on the infrastructure sector	12/11/2020	1
2020 National Resources Tax Conference – Part 5A: Decommissioning offshore petroleum project infrastructure	18/11/2020	1
2020 National Resources Tax Conference – Part 5B: Australia’s anti-hybrid rules for the sector	18/11/2020	1
2020 National Resources Tax Conference – Part 6A: Transfer pricing issues for interest-free loans	18/11/2020	1
2020 National Resources Tax Conference – Part 6B: Australian corporate tax residency	18/11/2020	1
2020 SA Tax Intensive – live streaming option	19/11/2020	9
SA Tax Briefing – Session 6	24/11/2020	1.5
2020 National Resources Tax Conference – Part 7A: Topical issues and developments in M&A	25/11/2020	1
2020 National Resources Tax Conference – Part 7B: Tax transparency	25/11/2020	1
2020 National Resources Tax Conference – Part 8A: The energy transition	25/11/2020	1
2020 National Resources Tax Conference – Part 8B: Baseball playbook – MLI, MAP and mandatory binding arbitration	25/11/2020	1

For more information on upcoming events, visit **taxinstitute.com.au/cpd**.

Cumulative Index

The following cumulative index is for volume 55, issues (1) to (5). Listed below are the pages for each issue:

Vol 55(1): pages 1 to 46
Vol 55(2): pages 47 to 100
Vol 55(3): pages 101 to 156
Vol 55(4): pages 157 to 216
Vol 55(5): pages 217 to 274

50% CGT discount
reform issues....74
183-day test
Australians returning from overseas....128, 130, 131
Commissioner's discretion....166

A

Absolute entitlement....19, 23
Active asset test
small business CGT concessions....228–231
Additional foreign acquirer duty (Qld)....263
Administrative Appeals Tribunal
review of objection decision....172, 224, 225
Administrative overpayments
running balance accounts....238–240
Affiliates
children....61, 63
definition....61
grouping rules....61, 63, 64
small business CGT concessions....61–64
spouses....61, 63
Affordable housing
build-to-rent developments....260–264
Aggregated turnover
affiliates....61
corporate tax issues....81
Agricultural land
fencing assets....54
Amnesty
superannuation guarantee shortfalls....4, 84, 104, 107, 122–126
Appointors
discretionary trusts, identity and powers....86, 87
Arm's length debt test
thin capitalisation....162, 201, 202
Assessments
application to review decisions....224, 225
Asset protection
appointor identity/powers, variation....86, 87
Div 7A loans....244, 245, 248
testamentary capacity....205, 206
trading trusts....34
Assets
full expensing, depreciating assets....220–222
Assignment of rights
options, property transfers (NSW)....32
Assumed controller test....134
ASX-listed companies....53
junior exploration, tax losses....116–119
At-risk rule
JobKeeper, R&D entities....107
Attributable income
controlled foreign companies....134–137
Attribution managed investment trusts
CGT discount for trusts....52
Audits
how to control....234–236
Australia
Australia–Thailand DTA....133, 225, 226
Australia–UK DTA....166, 170
Australia–US DTA....251
Australian resident shareholders....19
foreign resident shareholder, advantage over....81
Australian resident trusts
foreign resident beneficiaries, capital gains....17–23, 165, 166
Australian residents
Australians returning from overseas....128–132
Australian Stock Exchange
ASX-listed companies....53
junior exploration companies, tax losses....116–119
Australian tax system....159
Australian Taxation Office
administratively binding advice....141
audits, how to control....234–236
central management and control, split....25–28
CGT demerger relief....189–193
decision impact statements....143
fact sheets....144
interpretative decisions....142
law administration practice statements....142
law companion rulings....143
media releases and speeches....144
oral rulings....144
practical compliance guidelines....142, 143
private binding rulings....141, 142
public rulings....141
SMSF regulatory bulletins....143, 144
SMSF-specific advice....143
superannuation circulars....143
tailored technical assistance....144
taxation determinations....142
taxpayer alerts....143
website....144
Australian testamentary trust
surcharge land tax (NSW)....58
Australian Treasury
consultation on legislative amendments....84
Tax Institute submission to....84, 159

B

Backpacker tax
appeal....166
Bankruptcy
appointor identity/powers, variation....86, 87
Benchmark interest rate
Div 7A....52
Beneficiaries of trusts — see **Discretionary trusts**
Binding death benefit nominations....258
Bitcoin....53, 54
Blended families
discretionary trust beneficiaries....195, 197
life interest trusts....139, 140
Board of Taxation Review
consolidation rights to future income....73
individual tax residency....83
personal services income....84
small business tax concessions....82, 83
Build-to-rent developments
barriers in Australia....260–264
Business continuity test
ASX-listed junior exploration companies....116–119
"Business operation or commercial transaction"....53, 194
Business tax
reform issues....72–76
Tax Summit: Project Reform....160

C

Calumny....94, 95
Capacity
wills, court-authorised....205–207
Capital account or revenue account
share trading....250–253
Capital assets
full expensing, depreciating assets....220–222
Capital gains tax
Australian trusts
– foreign beneficiaries....17–23, 165, 166
– residency....2
capital/revenue distinction....250
commencing day assets....137
demerger relief....105, 106, 189–193
discount, MITs....52
event E1 to E8....82
event E4....23
foreign income tax offset limit....163, 164
granny flats, exemption....222, 223
multiple entry consolidated groups....163
reform issues....73, 74
Capital raisings
demergers....191, 192
Carrying on a business
land, active asset test....228–231
Cars — see **Motor vehicles**
Central management and control
dual residency....25–28
CGT assets
active asset test....228–231
commencing day assets....137
CGT concessions
reform issues....73, 74
CGT discount
MITs....52
reform issues....74, 81
shareholder....251
Charities
fundraising, restrictions during COVID-19....174, 175
Children
definition of "child"....196
whether affiliates....62, 63
Class action fund
allowable deductions....8, 9
Closely held payees
superannuation guarantee....124
Commercial residential premises
build-to-rent developments....263
Commissioner of Taxation
administrative overpayments....238–240
CGT demerger relief....105, 106
COVID-19 initiative
– Div 7A loan....110–114
– working from home deductions....223
discretionary powers, 183-day test....169–173
double tax agreements....223
environmental protection activities expenditure....107
foreign investment mischaracterisation....5
JobKeeper, R&D entities....107
remedial power for reform....76
superannuation guarantee charge, remission of additional....106, 107
Common law test....128
Community housing
build-to-rent developments....263, 264
Companies
temporary loss carry-back....220, 221
Company losses
ASX-listed junior exploration companies....116–119
tax reform issues....72, 73
Concessional duty (NSW)
SMSFs....31
Consolidated financial statements....91
Consolidated groups
multiple entry, CGT....163
reform issues....73
Consumption taxes
reform....69, 71, 72
Continuity of business test
ASX-listed junior exploration companies....116–119
Contractors
characterising, superannuation guarantee....123, 124
Controlled foreign companies
assumed controller test....134
attributable income....134–137
– acquisition year....135
– CGT events before commencing day....136, 137
– commencing day asset....137
– control tests....134, 135
– functional currency election....136
– pre-acquisition dividends....135, 136
de facto control test....134
strict control test....134
Corporate groups
CGT demerger relief....105, 106, 189–193
reform issues....73
Corporate residency
central management and control....25–28
clarification of test....222
Corporate tax entities
temporary loss carry-back....220, 221
Corporate tax rate
reform issues....81
Cost base
commencing day asset....137
Cost base setting rule
residents of Australia....131, 132

Country-by-country reporting entities 91, 92
Court-authorised wills 205–207
COVID-19 measures 3, 4, 49, 104, 126, 158
Australians returning from overseas 128–132
build-to-rent developments ... 260–264
cars, FBT liability 162
deeds, electronic execution....38–40
depreciating assets, full expensing 220–222
Div 7A loan repayment extension 52, 110–114
FAQs....53
fundraising, GST obligations....174, 175
impetus for reform....79
JobKeeper, R&D entities....107
land tax relief (Qld) 147
small business tax concessions....221
SMSFs, rental income deferral 105, 110
temporary loss carry-back....220, 221
working from home deductions....223
Crisp order 140
Cross-border transactions
hybrid mismatch rules....41–43
mischaracterisation of structures 5
related-party financing arrangements 201–204
Cryptocurrencies 53, 54

D

De facto control test 134
De facto relationships
discretionary trust beneficiaries 195, 196
Death benefits dependant 126
Deceased employees
superannuation, SG amnesty....125, 126
Declarations of trust
property transfers (NSW) 32
Deduction/deduction mismatches 41
Deductions
class action fund....8, 9
discretionary trust, beneficiary's interest on borrowings 108
Div 7A loan interest 246
environmental protection activities expenditure....107
release capital 107, 108
work-related expenses 54, 55, 80, 167, 168
working from home....223
Deeds
electronic execution....38–40
Demergers
capital raisings 191, 192
CGT relief 105, 106, 189–193
Depreciating assets
full expensing 220–222
primary production, fencing....54
Discretionary powers
Commissioner, 183-day test... 169–173
Discretionary trusts
administration issues 11–15
appointors, identity and powers....86, 87
beneficiaries
– deduction, interest on borrowings 108
– definition....195–197
– foreign residents, capital gains....17–23, 165, 166
definition....58
distribution of income, disclaimer 167, 223, 224
surcharge purchaser duty (NSW) 56–59
Discrimination
residency of taxpayer....166, 170
Distribution statements
Div 7A loan repayments 184, 185
Diverted profits tax
general anti-avoidance rules....5
Dividend declarations
Div 7A loan repayments 183–186
Dividend imputation system
reform proposed 70
Division 7A
benchmark interest rate....52
loan repayments 180–187, 242–248
– distribution statements....184, 185
– dividend declarations....183–186
– dividend set-off 181, 182
– extension....52, 110–114
– general anti-avoidance rules....248
– minimum annual repayment....181
– minutes filed late 183, 184, 244
– no dividend set-off 242–247
– non-trust shareholder 247, 248
purpose....180
reform issues....83
tax integrity measures....4, 242
ten-year enterprise tax plan....52
Divorce — see **Relationship breakdown**
Documentation
tax audits 234–236
Domestic relationships
discretionary trust beneficiaries 195, 196
Double tax agreements
Australia–Thailand....133, 225, 226
Australia–UK 166, 170
Australia–US 251
dual residents....131
principal purpose test 223
tie-breaker rules....225, 226
Dual inclusion income
hybrid mismatch rules....41, 42
Dual residency
Australians returning from overseas....131
Australia–Thailand DTA....225, 226
central management and control 25–28
Dutiable transactions
options (NSW)....30–33
Dwelling....57

E

Education
GST reform issues 71, 72
skills training, FBT exemption....221
Employees
superannuation guarantee amnesty
– characterising of workers....123, 124
– deceased 125, 126
– non-residents 125
– work test....125
travel and overtime meal allowances....52, 53
Environmental protection activities
deductions for expenditure....107
Estate planning — see **Succession and estate planning**
Evidence
discretionary trust indebtedness....11, 12
partnership, existence of 6
restructuring of demerger groups 192
tax audits 234–236
wills 95
Ex gratia relief
land tax foreign surcharge (Qld) 147–149, 262
Excess concessional contributions
SG amnesty contributions 124, 125
Excess transfer balance tax
minimising 198, 199
Expenditure
deductibility — see **Deductions**
Expenditure characterisation
share trading 250–253
Exploration companies
ASX-listed, tax losses 116–119

F

Fairness
tax reform....69
Families
blended
– discretionary trust beneficiaries 195, 197
– life interest trusts....139, 140
build-to-rent developments for 260
SMSFs
– additional members 257–259
– superannuation splitting.... 88–90
Family provision claims
blended families....139, 140
Family trusts — see **Discretionary trusts**
Federal Budget 2018-19 236
significant global entities definition....91–93
Federal Budget 2019-20....236
Federal Budget 2020-21....159, 218–220
corporate residency test....222
FBT, compliance and record-keeping....223
full expensing, depreciating assets 220, 221
personal income tax plan 222
temporary loss carry-back....220, 221
Federal Court
appeal against objection decision....172
Fencing assets
primary production land....54
Fifty per cent CGT discount
reform issues....74
shareholder....251
Financial arrangements
taxation of, reform issues....74, 75
Financial services
GST reform issues 72
First aid course
work-related deductions....168
Fixed trusts
non-taxable Australian property, capital gains 22, 23
Food
GST reform issues 72
Foreign companies
controlled — see **Controlled foreign companies**
Foreign currency
Bitcoin....53, 54
Foreign income tax
hybrid mismatch rules....42
offset rules 75, 76, 163, 164
Foreign investment
build-to-rent developments 261–263
land tax surcharge, ex gratia relief....147–149
mischaracterisation of structures 5
tax concessions....75
Foreign Investment Review Board 147, 148
build-to-rent developments 263
Foreign-owned entities
land tax foreign surcharge (Qld)....147–149
Foreign persons
definition....57
surcharge purchaser duty 32, 56–59
Foreign resident beneficiaries
discretionary trusts, capital gains....17–23, 165, 166
Foreign resident shareholders
advantage over shareholders 81
Foreign residents
presently entitled beneficiaries 19
superannuation, SG amnesty....125
Foreign surcharge stamp duty
build-to-rent developments 262, 263
Fraudulent calumny 94, 95
Fringe benefits tax
cars, COVID-19 impact 162
compliance and record-keeping....223
inequities....69
reform issues....77
skills training exemption....221
small business tax concessions 221
Functional currency election 136
Fundraising
GST, restrictions during COVID-19....174, 175

G

Gains and losses
share trading....250–253
Gamblers
gains and losses, characterisation....250, 251
General anti-avoidance rules
Div 7A loan repayments 248
diverted profits tax benefits....5
multiple entry consolidated groups, CGT....163
General purpose financial statements 91, 92
Goods and services tax
administrative overpayments....238, 239
build-to-rent developments 261
education 71, 72
financial services....72
food....72
fundraising, restrictions during COVID-19 ....174, 175
health 72
JobKeeper, payment turnover test....6
reform issues....69, 71, 72
Tax Summit: Project Reform....160
Goodwill 73
Granny flats
CGT exemption 222, 223
Grouping rules
affiliates....61, 63, 64
Groups of companies — see **Consolidated groups**

H

Harmonisation
state/territory/federal tax system....70
Health
GST reform issues 72
Henry review....51, 68, 71, 74, 76
lessons from....80, 84
Home office expenses....55
Housing affordability
build-to-rent developments....260–264
Hybrid mismatch rules
proposed amendments 41–43

I

In-house assets
SMSFs, rental income deferral........105
"In the course of carrying on a business".............................228, 229
Indirect importations
hybrid mismatches...........................43
Indirect taxation
Tax Summit: Project Reform...........160
Individual tax residency
reform issues....................................83
Inheritances — see **Succession and estate planning**
Insolvency
lump sum paid by director, deductibility.......................... 107, 108
Insurance
taxation of, reform issues.................75
Integrity measures — see **Tax integrity measures**
Interest-free loans
cross-border related-party arrangements.......................202, 203
Interest withholding tax
interposed offshore entities 163
International Monetary Fund
income from.....................................55
International tax
Australians returning from overseas................................ 128–132
hybrid mismatch rules................41–43
reform issues..............................75, 76
trusts 2, 19
Interposed offshore entities
interest withholding tax..................163
Investment
build-to-rent developments 260
share trading..........................250–253

J

JobKeeper
payment turnover test..........6, 53, 102
R&D entities 107
Junior exploration companies
ASX-listed, losses 116–119

K

Kerr Commission...............................71

L

Land
active asset test 228–231
Land tax (NSW)
build-to-rent developments.......................260, 261
proposed transition from transfer tax 51
surcharge purchaser duty, discretionary trusts...................56–59
Land tax (Qld)
foreign surcharge.....................147–149
Landholder duty (NSW)
put and call options, uncompleted contracts 33
Legal capacity
wills, court-authorised 205–207
Legal personal representatives
deceased employees, SG shortfalls......................... 125, 126
Life insurance
taxation of, reform issues.................75
Life interest trusts
blended families.....................139, 140
Ligertwood Commission 72
Loan accounts
discretionary trusts 11, 12
Loans
discretionary trust beneficiary, interest..108
Div 7A, repayments
– distribution statements.....184, 185
– dividend declarations.......183–186
– dividend set-off 181, 182
– extension....................52, 110–114
– general anti-avoidance rules...248
– minimum annual repayment..... 181
– minutes filed late 183, 184, 244
– no dividend set-off 242–247
– non-trust shareholder 247, 248
Lodgment day
Div 7A loan repayments 180, 181
Lodgment deferrals 4
Long-term investors
gains and losses, characterisation............................251
Losses
ASX-listed junior exploration companies.............................116–119
in previous years of income 171
non-commercial loss rules...............53
share trading..........................250–253
temporary loss carry-back......220, 221
Low and middle income tax offset..222
Low tax contributed amounts
SG amnesty contributions 124
Low tax lender rule
hybrid mismatches...........................42

M

Managed investment trusts
CGT discount for trusts....................52
Marginal tax rate
reform issues....................................81
Market-linked pensions
excess transfer balance tax...........199
Marriage breakdown — see **Relationship breakdown**
Meal allowances
employees..................................52, 53
Medicare levy 69, 80
Member Profile
Donovan Castelyn............................67
Fiona Stapleton.............................. 178
Mining companies
ASX-listed, tax losses 116–119
Mistakes
administrative overpayments.......................238–240
trust deeds, rectification 254, 255
Motor vehicles
cents per kilometre rate 53
COVID-19 impact, FBT liability........162
work-related deductions 167, 168
Multi-family housing 260
Multinational corporations
significant global entities definition...................................91, 92
Multiple entry consolidated groups
CGT 163
reform issues....................................73

N

Net asset value test
affiliates 61
New South Wales
build-to-rent developments 260, 261
deeds, electronic execution........38–40
real estate transactions, options..................................... 30–33
surcharge purchaser duty, discretionary trusts...................56–59
transfer tax 51
New South Wales Law Reform Commission
oppression remedies 35, 36
Nominal interest component 122
Non-arm's length expenditure
superannuation entities......................5
Non-commercial loss rules..............53
Non-discrimination clause
residency of taxpayer............. 166, 170
Non-residents — see **Foreign persons; Foreign resident beneficiaries**
Non-taxable Australian property
capital gains, fixed trusts...........22, 23

O

Objection decisions.........171, 172, 224, 225, 228–231
One-hundred-and-eighty-three-day test
Australians returning from overseas....................... 128, 130, 131
Commissioner, discretionary powers.................................. 169–173
Online auctions
GST, restrictions during COVID-19..................................... 175
Online fundraising
GST, restrictions during COVID-19..................................... 175
Oppression remedies
trading trusts..............................34–36
Options
NSW duty.................................. 30–33
Overpayments
running balance accounts 238–240
Overtime meal allowances
employees..................................52, 53

P

Partnerships
existence of..6
hybrid mismatch rules......................41
PAYG instalments
small business tax concessions.....221
Payment turnover test
JobKeeper 6, 53, 102
Penalties
superannuation guarantee system...........104, 106, 107, 122–126
Pension funds
transfer balance cap 198, 199
Personal services income
rules 81, 84
unrelated clients test......................165
Personal tax
Personal Income Tax Plan 222
Tax Summit: Project Reform.......... 160
Petroleum resource rent tax............52
Place of abode — see **Residency**
Pre-paid expenditure
small business tax concessions.....221
Presently entitled beneficiaries
foreign residents 19
Primary production land
fencing assets 54
foreign-owned (Qld) 147
Private companies
benchmark interest rate....................52
Div 7A loan repayments 180–187
– extension........................... 52, 110
Private rulings
objection decisions and..........228–231
Public companies
capital raisings 191, 192
Public interest
tax agent deregistration................7, 55
Publicly listed shares
gains and losses, characterisation....................250–253
Put and call options
landholder duty (NSW).....................33
transfer duty (NSW)..........................32

Q

Queensland
build-to-rent developments 263
land tax foreign surcharge 147–149, 263

R

Ralph review 189
R&D
JobKeeper payments..................... 107
tax incentives 4, 222
tax schemes..........................164, 165
Real estate transactions
options 30–33
Record-keeping
FBT compliance 223
Reform — see also **Tax reform**
transfer balance cap system 198, 199
trust law 35
Refunds
running balance account errors....................................238–240
temporary loss carry-back......220, 221
Related-party financing arrangements
cross-border transactions 201–204
Relationship breakdown
SMSFs
– additional members 258
– superannuation splitting...... 88–90
Release capital
lump sum paid by director, deductibility.......................... 107, 108
Rental accommodation
build-to-rent developments ... 260–264
Rental income deferral
SMSFs, COVID-19 impact....... 105, 110
Reporting obligations
significant global entities............91, 92
Residency 169–171
Australians returning from overseas............................... 128–132
backpacker tax 166
central management and control, split residency 25–28
individuals, tax reform issues 83
tie-breaker rules.....................225, 226
trusts, CGT....................................2, 19
UK citizen, working holiday..............55
Resident of Australia
definition.........................166, 169, 170
Residential land.................................56
Residential-related property 56
Residents of Australia
183-day test........................... 130, 131
Australians returning from overseas............................... 128–132
cost base setting rule 131, 132
dual residents................................. 131
implications of becoming................ 131
intention to reside 129, 130
tie-breaker rule............................... 131
Resides test 128
Restructuring businesses
CGT demerger relief......................105, 106, 189–193
definition of "restructuring" 189, 190
trading trusts....................................34
Retirement
Tax Summit: Project Reform...........160
Retraining
FBT exemption 221
Retrospectivity
surcharge purchaser duty (NSW) 56
Rights to future income....................73
Risk assessment
arm's length debt test 202, 203

Risk management
dividend declaration minutes
filed late 183
Royal Commissions on taxation.......71
Running balance accounts
administrative
overpayments.......................238–240

S

Same business test
ASX-listed junior exploration
companies.............................116–119
School fees
GST 72
Second-hand assets
full expensing, depreciating
assets 220, 222
Secondary response rules
hybrid mismatches.....................42, 43
Self-assessment
tax refunds, overpayment 239
Self-managed superannuation funds
additional members 257–259
ATO, SMSF-specific advice 143, 144
concessional duty (NSW).................31
member numbers 162
rental income deferral,
COVID-19 impact 105, 110
superannuation splitting 88–90
transfer balance cap 198, 199
Share trading
gains and losses,
characterisation....................250–253
Shares
"business operation or
commercial transaction" 53, 194
Sheep station
fencing assets 54
Significant global entity
definition expanded 91–93
Similar business test
ASX-listed junior exploration
companies.............................116–119
Simplified trading stock rules
small business tax concessions 221
Skills training
FBT exemption 221
Small business CGT concessions
active asset test 228–231
affiliate relationships....................61–64
reform issues..................73, 74, 82, 83
Small business entities
aggregated turnover 61
Small businesses
full expensing, depreciating
assets 220–222
tax concessions, expanded
access 221
Source of income 19, 21, 23
Speculators
gains and losses,
characterisation.................... 251, 252
Spooner Committee of Inquiry 71
Spouses
definition of "spouse" 195
discretionary trust
beneficiaries 195, 196
surviving, life interest trusts 139 140
whether affiliates 62, 63
Stamp duty
build-to-rent developments 261–263
proposed transition to land
tax (NSW) 51
reform...80
Start-up expenses
small business tax concessions 221
Statement of facts
tax audits 235
Statutory wills..........................205–207
Stay of proceedings
tax agent registration 6–8, 54, 55
Stepchild 196, 197
Strict control test 134
Substituted accounting period.......135
Succession and estate planning
blended families.....................139, 140
fraudulent calumny 94, 95
SMSFs, additional
members 257–259
trading trusts....................................34
wills, court-authorised 205–207
Superannuation
ATO, SMSF-specific advice 143, 144
deeds, electronic execution........38–40
numbers of allowable members 52
splitting, relationship
breakdown 88–90
Superannuation funds — see also
Self-managed superannuation funds
mistakes in trust deeds...........254, 255
non-arm's length income 5
reducing red tape for 52
taxation of 74
transfer balance cap 198, 199
Superannuation guarantee
amnesty for
shortfalls.......4, 84, 104, 107, 122–126
– excess concessional
contributions 124, 125
– low tax contributed amounts ... 124
– nominal interest component 122
– remission of additional
charge 106, 107
reform issues..............................83, 84
Tax Summit: Project Reform...........160
Surcharge land tax
foreign-owned entities
(Qld)...............................147–149, 263
NSW...................................56, 57, 262
Surcharge purchaser duty (NSW)
discretionary trusts 56–59
foreign persons 32

T

Tax administration
reform issues....................................76
Tax advisers
controlling tax audits..............234–236
Tax agents
deregistration, stay of
proceedings 6–8, 54, 55
Div 7A loan agreements 181
running balance account
overpayments.......................238–240
unregistered entity providing
services 108, 109
Tax audits
how to control 234–236
Tax compliance
FBT...223
Tax concessions
small businesses............................221
Tax disputes
controlling tax audits..............234–236
mistakes in trust deeds...........254, 255
Tax education
Advanced Superannuation Dux
Award, study period 1, 2020
– Natalie Talbot 232
Advanced Superannuation Dux
Award, study period 3, 2019
– Melissa Leisavnieks...................65
CommLaw1 Dux Award, study
period 3, 2019
– Pearl Weinberger..................... 120
CommLaw2 Dux Award, study
period 1, 2020
– Lee-Ming Au............................232
CTA2B Advanced Dux Award,
study period 3, 2019
– Anthony Kazamias 65
CTA2B Advanced Tax Dux Award,
study period 1, 2020
– Andrew Fernandes.................. 177
Tax incentives
R&D 4, 164, 165, 222
Tax integrity measures
demergers......................................190
Div 7A 4, 242
MITs, capital gains discount
for trusts 52
Tax losses — see **Losses**
Tax offset
low and middle income..................222
Tax Practitioners Board Forum 158
Tax professionals
COVID-19 responses 4
unregistered entity providing
services 108, 109
Tax reform 79
business tax............................... 72–76
CGT 73
CGT concessions....................... 73, 74
Commissioner's remedial
power 76
company losses 72, 73
complexity..................................76, 77
consolidated groups 73
consultation on legislative
amendments 84
consumption taxes 69, 71, 72
corporate tax rate 81
Div 7A...83
FBT.......................................77, 80, 81
financial arrangements,
taxation of.................................74, 75
GST 71, 72, 79
history 71, 79
insurance tax 75
international tax..........................75, 76
lower taxes.......................................69
marginal tax rate 81
personal services income rules 84
small business CGT
concessions 82, 83
superannuation funds,
taxation of.......................................74
superannuation guarantee..........83, 84
Tax Institute project...............102, 103,
158–160, 218, 219
Tax Institute submissions on 69
top marginal tax rate........................81
trust losses.................................72, 73
trusts 81, 82
Tax refunds
running balance account
errors 238–240
temporary loss carry-back......220, 221
Tax returns
lodgment deferrals.............................4
Tax schemes
R&D claims.............................164, 165
Tax treaties — see **Double tax agreements**
Taxation of financial arrangements
reform issues..............................74, 75
Telephone expenses
work-related deductions 168
Temporary loss carry-back.....220, 221
Ten-year enterprise tax plan............52
Tenants
build-to-rent developments 260
rental income deferral,
COVID-19 impact 105
Testamentary capacity
wills, court-authorised 205–207
Testamentary trusts
Australian, surcharge land tax
(NSW) 58
Thailand
Australia–Thailand DTA ...133, 225, 226
The Tax Institute
Abdalla, Julie..................................102
Australia's tax system, reform of.......68
Caredes, Stephanie 102
COVID-19 responses 3, 49, 126
health and wellbeing seminars 3
Jacobson, Robyn...............................3
Knowledge and Learning team...........2
knowledge sharing...........................48
Mills, Andrew......................................3
submission to Treasury.....84, 103, 159
superannuation guarantee
amnesty................................104, 126
Tax Policy and Advocacy
team 2, 102, 103
Tax Summit: Project Reform..........102,
103, 158–160, 218, 219
volunteers......................................103
Thin capitalisation.............................76
arm's length debt test 162, 201
Tie-breaker rules
Australia–Thailand DTA 225, 226
dual residents................................. 131
Timing issues
application to review
decisions 224, 225
restructuring of demerger
groups 191
trust distributions 14, 15
Top marginal tax rate
reform issues....................................81
Trading trusts
mistakes in trust deeds...........254, 255
oppression remedies 34–36
Transfer balance cap
excess transfer balance
tax...198, 199
Transfer duty (NSW)
certain transactions treated as
transfers 32
proposed transition to land tax.........51
put and call options 32
real estate transactions............. 30–33
Transfer pricing 5
cross-border related-party
arrangements 201
Travel
allowances, employees..............52, 53
work-related expenses........... 167, 168
Trust beneficiaries
foreign residents, capital
gains...19–23
Trust deeds
mistakes, rectification 254, 255
Trust income
distribution resolutions,
disclaimer 167, 223, 224
distributions 12–14
Trust losses
tax reform issues 72, 73
Trustees
appointor identity/powers,
variation 86, 87
Australian discretionary trusts,
foreign capital gains 17–23,
165, 166
foreign persons 57
Trusts
hybrid mismatch rules.......................41
international tax law principles 19
international tax treatment 2
life interest trusts....................139, 140
mistakes in trust deeds...........254, 255
reform...35

taxation, reform issues 81, 82
trading trusts, oppression remedies 34–36

Turnover test
JobKeeper 6

U

Uncompleted contracts 33

United Kingdom
Australia–UK DTA 166, 170

United States
Australia–US DTA 251

Unrelated clients test
personal services income 165

V

Victoria
build-to-rent developments 262, 263
deeds, electronic execution 38–40

Victorian Law Reform Commission
oppression remedies 35

W

Wills
blended families 139, 140
court-authorised 205–207
fraudulent calumny 94, 95

Withholding tax
interest expenses deductions 163

Witnesses
tax audits 235

Witnessing deeds
electronic 38, 39

Work-related deductions
telephone expenses 168

Work-related expenses
construction worker 167, 168
deductions 54, 55, 80

Work test
SG amnesty 125

Workers
characterising, superannuation guarantee 123, 124

Working from home 53, 55

Working from home deductions
COVID-19 measures 223

Working holiday 55, 166, 170

Legislation

A New Tax System (Goods and Services Tax) Act 1999 .... 239, 263
Div 126 226
s 35-5 239
s 35-5(1) 241
s 35-10 241
s 38-270 174
s 40-160 .... 174, 175
s 40-165 174
s 40-165(1)(a) 175
s 40-165(1)(b) 175
s 40-165(1)(c) 175

Acts Interpretation Act 1901 196
s 2(2) 173
s 2CA 195
s 2F 195
s 2F(2) 195
s 33(2A) 173
s 33(3A) 110

Administration Act 1903 (WA)
s 47A 197

Administration and Probate Act 1958 (Vic)
Pt IV 196

Administrative Appeals Tribunal Act 1975
s 28 172
s 29(7) 224
s 35 7
s 43 172
s 44 .... 171, 172

Adoption Act 1984 (Vic) 196
s 53(1) 197

Adoption Act 1994 (WA)
s 75(1)(a) 197

Adoption Act 2000 (NSW)
s 95 197

Adoption Act 2009 (Qld)
s 214(3) 197

Adoption of Children Act 1994 (NT)
s 45(1)(a) 197

Bankruptcy Act 1966 86

Conveyancing Act 1919 (NSW)
s 38A 38

Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 107

Corporations Act 2001 .... 86, 183, 262
Pt 5.1 .... 106, 192
Ch 2F 34
s 53 .... 34, 35
s 127 40
s 180 to 184 107
s 232 34
s 233 34–36
s 251A 183, 184
s 251A(5A) 183
s 251A(6) 184
s 439A(4) 108
s 1305 .... 11, 12, 15
s 1322 13
s 1322(1)(b) 13
s 1322(2) 13
Sch 2
– s 100-5 108
Sch 3 183

Corporations (Coronavirus Economic Response) Determination (No. 1) 2020 40

COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020 (Vic) 38
reg 12(4) 39

Currency Act 1965 54

De Facto Relationships Act 1991 (NT)
s 3A 197

Domestic Partners Property Act 1996 (SA)
s 3 197

Domestic Relationships Act 1994 (ACT)
s 3 197

Duties Act 1997 (NSW) 30, 56
Ch 2 .... 30, 33
Ch 3 32
– Pt 2 .... 32, 60
Ch 4 33
Div 2A 60
s 8 30
s 9B 31
s 9B(1)(c) 31
s 11(1)(a) 33
s 11(1)(k) 33
s 16(1) 33
s 18(2) 31, 32
s 18(3) 31–33
s 21 31
s 32A 33
s 58(1) 33
s 104I(1) 56, 57
s 104I(2) 57
s 104J 57
s 104J(1) 33
s 104JA 58
s 104K 56
s 104L 56
s 104S 56
s 106 to 111 33
s 108(1) 32, 33
s 108(3) 33
s 108(4) 33
s 108A(3) 33
s 146 33
s 148 33
s 158A 33
s 160(1) 33
s 160(3) 33
s 160(3A) 33
Sch 1
– Pt 51 60

Duties Act 2000 (Vic) 111

Duties Act 2008 (WA)
s 45 33

Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020 (NSW) 38

Electronic Transactions Regulation 2017 (NSW)
Sch 1 38

Electronic Transactions (Victoria) Act 2000 (Vic) 38, 39
s 9(1) 38
s 9(1A) 39

Evidence Act 2001
s 68 12

Family Court Act 1997 (WA)
Div 11
– Subdiv 3 197

Family Law Act 1975 88
s 60EA 197
s 90XD 88

Family Law Rules 2004 90

Family Law (Superannuation) Regulations 2001
reg 72 90

Family Relationships Act 1975 (SA)
Pt 2A 197
s 6 197
s 7 197
s 8 197

Foreign Account Tax Compliance Act (US) 74

Foreign Acquisitions and Takeovers Act 1975 57
s 4 57
s 5 57
s 18 57

Fringe Benefits Tax Assessment Act 1986 80

Goods and Services Tax: Frequency of Fund-raising Events Determination (No. 31) 2016 174

Income Tax Act 1924 (Qld) 172

Income Tax Assessment Act 1915
s 16 169

Income Tax Assessment Act 1922 170

Income Tax Assessment Act 1930 170

Income Tax Assessment Bill 1996 169

Income Tax (Transitional Provisions) Act 1997 240
Subdiv 67-L 241

Industry Research and Development Act 1986 240
s 27J 241

Inheritance (Family Provision) Act 1972 (SA) 205

Interpretation Act 1984 (WA)
s 13A 197

ITAA36 70
Pt III
– Div 3B 75
– Div 6 .... 15, 17, 20, 81, 82
– Div 6AAA 133
– Div 6C 82, 254
– Div 6D 82
– Div 6E 17, 19, 21, 23
– Div 7A 81, 82, 132, 133, 180, 242
– Subdiv D 180
– Subdiv EA 82, 185
– Subdiv EB 82
– Div 15 75
– Div 16E 74
– Div 16G 76
Pt IVA 5, 82, 84, 163, 169, 234, 236, 248, 249
Pt X 133, 134
s 6(1) 25, 29, 132, 133, 169, 170
s 23AG 83
s 26(a) 193
s 44 180
s 44(1) 163
s 45B 190, 191
s 45B(8)(i) 190
s 46(3) 173
s 47A 132, 133
s 95(1) 20
s 97 .... 15, 82, 224
s 98 .... 19–21, 23, 82
s 98(3) 17
s 98A 21
s 99 82
s 99A 8, 15, 21, 82
s 99B 82, 132, 133
s 100 21
s 100A 81, 82, 244, 245, 249
s 100A(13) 81
s 101 82
s 102P 254
s 108 248
s 109D 180, 181
s 109E 113, 181, 182, 184, 243, 244
s 109E(6) 113, 181, 182
s 109N 52, 113, 181, 185
s 109N(2) 187
s 109N(3) 187
s 109Q 52, 112, 114
s 109R 187
s 109RB 187
s 109RD 52, 110–113, 169
s 109RD(1) 111, 114
s 109RD(1)(b) 110, 111
s 109RD(2) 114
s 109RD(3)(b) 114
s 109T 249
s 109V 249
s 109W 249
s 109Y 187
s 166 241
s 172A 241
s 177C(2) 163, 248
s 177D(2) 248
s 318 187
s 411 to 413 137
Sch 2F 82

ITAA97 73
Pt 3-1 54
Div 35 .... 53, 252
Div 40 137
Div 43 137
Div 115 82
Div 122 82
Div 124 82
Div 125 .... 106, 190–193
Div 152 .... 63, 83, 229
Div 230 .... 75, 252, 253
Div 275 82
Div 276 82
Div 291 125
Div 293 .... 124, 127
Div 320 75
Div 321 75
Div 355 164

Div 770 251
Div 775 .... 53, 75, 133
Div 815 163
Div 820 .... 162, 163
Div 855 .... 17–20, 23, 166
Div 974 .... 74, 75, 163, 203
Subdiv 32-A 76
Subdiv 40-F 54
Subdiv 115-C 17, 19–23, 82, 166
Subdiv 118-B 133
Subdiv 130-D 82
Subdiv 165-CC 119
Subdiv 165-F 82
Subdiv 166-E 119
Subdiv 202-E 184
Subdiv 207-B 82, 187, 248
Subdiv 235-I 82
Subdiv 815-B 204
Subdiv 900-B 52
s 6-5 54
s 6-5(3) 19
s 6-10(5) 19
s 8-1 .... 8, 54, 108, 246, 253
s 8-1(1)(a) 8, 53
s 26-95 123
s 26-95(2) 127
s 28-25(5) 53
s 40-551 54
s 40-755(1) 107
s 86-15(3) 165
s 87-20 165
s 87-20(1)(a) 165
s 87-20(1)(b) 165
s 87-20(2) 165
s 103-25 169
s 106-50 82
s 115-10 253
s 115-25 253
s 115-215 18
s 115-215(3) 17, 21, 166
s 115-220 .... 17, 21, 166
s 115-220(2) 21, 22
s 115-225(1) 21, 22
s 118-37(1)(c) 253
s 118-180 82
s 118-195 139
s 125-70(1) 106, 189–191, 193
s 125-70(1)(a) 190, 193
s 125-70(1)(b) 106, 193
s 125-70(1)(c) 190
s 125-70(1)(h) 193
s 125-70(2) 106, 190, 191, 193
s 126-15 82
s 152-15 63
s 152-40 .... 226, 228, 229
s 152-40(1) 63
s 152-40(1)(a) 229, 230
s 152-40(1)(b) 230
s 152-47 63
s 152-47(1) 63
s 152-47(2) 63
s 152-70 82
s 165-210(2)(a) 119
s 165-210(2)(b) 119
s 202-80 184
s 291-465 125
s 295-550 5
s 302-10 126
s 302-195(1) 126
s 307-5 126
s 307-80 198
s 328-110 61
s 328-115 61
s 328-125 .... 61, 82
s 328-130 61
s 328-130(1) 61
s 328-130(2) 61, 62
s 355-100 107
s 355-405 107
s 770-75 164
s 770-75(4)(a)(i) 164
s 770-75(4)(a)(ii) 163, 164
s 815-130 203
s 820-105 162
s 820-215 162
s 820-980 162
s 855-10 .... 17, 19, 22, 166
s 855-10(1) 17, 22
s 855-15 18
s 855-40 .... 17, 18, 23
s 855-40(1) to (4) 22
s 855-45 .... 131, 132
s 995-1 53
s 995-1(1) 53

Justice Legislation (COVID-19 Emergency Response — Wills and Enduring Documents) Amendment Regulation 2020 (Qld) 38

Justice Legislation (COVID-19 Emergency Response — Wills and Enduring Documents) Regulation 2020 (Qld) 38

Land Tax Act 1956 (NSW) 56
s 2A 57, 60
s 5A 56
s 5D 57
s 5D(3)(b) 58
s 5D(7) 60

Land Tax Management Act 1956 (NSW)
Pt 34 58
s 66 58
s 66(1) 59
s 66(3) 59

New Business Tax System (Capital Gains Tax) Bill 1999 229

New International Tax Arrangements (Managed Funds and Other Measures) Bill 2004 22

Parentage Act 2004 (ACT)
Div 2.2 197
s 11 197
s 39 197

Property (Relationships) Act 1984 (NSW)
s 5 197

Relationships Act 2003 (Tas)
s 4 197

Relationships Act 2008 (Vic) 196
s 35 195

State Revenue Legislation Amendment (Budget Measures) Act 2016 (NSW) 56
s 104S 56, 57

State Revenue Legislation Amendment (COVID-19 Housing Response) Bill 2020 (NSW) 260

State Revenue Legislation Further Amendment Act 2020 (NSW) 56

Status of Children Act 1974 (Tas)
Pt III 197
s 3 197
s 7 197
s 8 197

Status of Children Act 1974 (Vic) 196
s 3(1) 197
s 7 196
s 8 196
s 13 197
s 15 197

Status of Children Act 1978 (NT)
Pt IIIA 197
s 4 197
s 5 197

Status of Children Act 1978 (Qld)
Div 2 197
s 6 197
s 8 197

Status of Children Act 1996 (NSW)
s 5 197
s 10 197
s 14 197

Succession Act 1981 (Qld)
s 18 95
s 21 207

Succession Act 2006 (NSW)
s 8 95
s 18 207

Superannuation (Excess Transfer Balance Tax) Imposition Act 2016
s 5 199

Superannuation Guarantee (Administration) Act 1992 .... 122, 144
Pt 7 .... 104, 106, 107, 123
s 12(1) 123
s 12(3) 123
s 15B 125
s 19 122
s 23(9A) 125, 126
s 23A 123, 125
s 59(1) 106
s 62(4) 123
s 65A 125
s 65AA 125
s 67 .... 125, 126

Superannuation Industry (Supervision) Act 1993 .... 143, 162, 196, 257
s 10 197
s 10(1) 105
s 17A 257
s 71(1) 105
s 71(1)(j) 105
s 82 105
s 83 105

Superannuation Industry (Supervision) Regulations 1994 143
Pt 7A 88
reg 5.01 125
reg 6.22 196
reg 7A.10 90
reg 13.22B 105
reg 13.22C 105
reg 13.22D 105

Superannuation (Unclaimed Money and Lost Members) Act 1999 125

Tax Agent Services Act 2009 248
Pt 3 244
s 30-20(1)(b) 7
s 50-5 108
s 50-5(1) 108, 109

Tax Laws Amendment (2006 Measures No. 4) Act 2006 .... 18, 22

Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013 236

Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 236

Tax Laws Amendment (Small Business) Bill 2007 64

Taxation Administration Act 1953 .... 107, 169
Pt IIA 240
Pt IIB 238–240
Pt III 184
Pt IVC 199
s 8AAZLF(1) 238, 239, 241
s 8AAZLH 238, 239, 241
s 8AAZLH(2) 238, 239
s 8AAZLH(2A) 238
s 8AAZLH(3) 239
s 8AAZLH(5) 238, 239
s 8AAZN 238–241
s 8AAZN(1) 240
s 8AAZN(3) 239
s 8C(1)(a) 184
s 8E 184
s 8Y 184
s 8ZA(4) 187
s 8ZJ 187
s 14ZZ 171
s 14ZZO 172
s 14ZZO(b)(i) 171
s 14ZZP 172
Sch 1
– Div 268 .... 123, 124
– Div 269 124
– Div 290 164
– s 12-175 82
– s 12-180 82
– s 105-5 241
– s 155-15(1) 241
– s 284-75(3) 123
– s 284-90 123
– s 290-50(1) 164
– s 357-105(1) 231
– s 388-70 241
– s 388-75 241

Taxation Laws Amendment Act (No. 3) 1999 240

Trade Marks Act 1995
s 131 111

Treasury Laws Amendment (2017 Enterprise Incentives No. 1) Act 2017 116

Treasury Laws Amendment (2017 Enterprise Incentives No. 1) Bill 2017 119

Treasury Laws Amendment (2018 Superannuation Measures No. 1) Act 2019 5

Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018 122

Treasury Laws Amendment (2019 Measures No. 3) Act 2020
Sch 3
– Pt 2 85

Treasury Laws Amendment (2019 Tax Integrity and Other Measures No. 1) Act 2019 127

Treasury Laws Amendment (2020 Measures No. 1) Act 2020 91

Treasury Laws Amendment (2020 Measures No. 2) Bill 2020 41

Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Bill 2020 .... 221, 222

Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019 122

Treasury Laws Amendment (Research and Development Tax Incentive) Bill 2019 4

Treasury Laws Amendment (Self Managed Superannuation Funds) Bill 2020 162

Trustee Act 1898 (Tas)
s 47 87

Trustee Act 1925 (ACT)
s 81 87

Trustee Act 1925 (NSW)
s 81 87

Trustee Act 1936 (SA)
s 59B 87
s 59C 87

Trustee Act 1958 (Vic) 35
s 48 87
s 63 .... 86, 87
s 63A 86, 87

Trustee Act 2007 (NT)
s 50A 87

Trustees Act 1962 (WA)
s 89 87
s 90 87
Trusts Act 1973 (Qld)
s 94 87
s 95 87
s 96 255
Variation of Trusts Act 1994 (Tas)
s 13 87
s 14 87
Wills Act 1936 (SA)
s 7 ....205, 207
s 7(7) 207
s 7(12) 207
s 12 95
Wills Act 1968 (ACT)
s 11A 95
s 16A 207
Wills Act 1970 (WA)
s 32 95
s 40 207
Wills Act 1997 (Vic)
s 9 95
s 21 207
Wills Act 2000 (NT)
s 10 95
s 19 207
Wills Act 2008 (Tas)
s 10 95
s 22 207

Rulings and other materials

Australian Accounting Standards Board
AASB 10 ....91, 92
Australian Taxation Office
CR 2008/74 193
CR 2010/4 193
CR 2010/33 193
CR 2010/55 193
CR 2011/28 193
CR 2013/23 193
ID 2011/77 196
ID 2015/10 142
IT 328 15
IT 347 16
LCR 2015/1 143
LCR 2019/1 ....117, 118
LCR 2019/D3 ....5, 143
LCR 2020/1 ....6, 53
MT 2050 187
MVE 2020/1 53
PCG 2016/5 143
PCG 2017/4 ....163, 201–203
PCG 2018/9 25–29
PCG 2019/D3 201
PCG 2020/3 ....53, 223
PCG 2020/4 53
PCG 2020/5 5
PCG 2020/7 ....162, 201, 202
PS LA 1998/1 142
PS LA 2003/3 141
PS LA 2005/21 190
PS LA 2007/10 ....122, 127
PS LA 2008/3 144
PS LA 2010/4 ....185, 187
PS LA 2019/D1 127
PS LA 2020/2 223
PS LA 2020/D1 106
QC 24169 125
QC 26343 145
SMSFRB 2020/1 144
SPR 2020/D2 105
Superannuation Circular 2003/1 143
TA 2019/1 163
TA 2020/2 5
TA 2020/3 163
TA 2020/4 163
TD 2004/1 253
TD 2011/16 249
TD 2013/12 126
TD 2013/22 142
TD 2019/7 ....20, 21
TD 2019/10 203
TD 2019/D1 189–193
TD 2019/D6 17–19
TD 2019/D7 ....19, 21
TD 2020/5 52
TD 2020/6 ....106, 189–193
TD 2020/6EC 189, 193
TD 2020/7 163
TD 2020/D1 107
TR 92/3 ....53, 193
TR 92/4 193
TR 92/11 203
TR 93/4 53
TR 96/4 253
TR 98/17 129
TR 1999/9 118
TR 2001/14 53
TR 2003/1 ....162, 201, 202
TR 2004/15 ....26–28, 222
TR 2005/15 ....250, 253
TR 2006/10 141
TR 2010/1 127
TR 2010/3 ....185, 187
TR 2014/6 203
TR 2018/5 25–28
TR 2018/9 25
TR 2019/D2 201
TR 2020/2 107
TR 2020/4 ....162, 201
Double tax agreements
Australia–Thailand
– art 4(3) 133, 226
Australia–UK
– art 25 ....166, 170, 173
Australia–US
– art 11(3)(b) 133
– art 22(2) 251
OECD
Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
– art 7 223
Queensland Government
Public Ruling LTA000.3.1 147
Public Ruling LTA000.4.1 147
Revenue NSW
CPN 003 59
CPN 004 ....57, 59
CPN 004 v2 59
Revenue Ruling DUT 010 v2 33
Revenue Ruling G 009 60
Revenue Ruling G 009 v2 57
Revenue Ruling G 010 v2 57
Revenue Ruling G 011 60
Tax Practitioners Board
Code of Professional Conduct
– s 30-10(9) 54

Cases

A
AB v CB [2009] NSWSC 680 206
ACE Insurance Ltd v Trifunovski [2013] FCAFC 3 124
Addy; FCT v [2020] FCAFC 135 ....130–132, 166, 169, 170, 172
Addy v FCT [2019] FCA 1768 173
AJ & PA McBride Ltd and FCT [2020] AATA 1909 54
ALH Group Property Holdings Pty Ltd v Chief Commr of State Revenue (NSW) (2012) 245 CLR 338 33
Allen v McPherson (1847) 9 ER 727 95
Angus; FCT v [1961] HCA 18 23
Atomic Skifabrik Alois Rohrmoser v Registrar of Trade Marks [1987] FCA 22 111
Auctus Resources Pty Ltd v FCT [2020] FCA 1096 238–241
Australasian Scale Co Ltd v Commr of Taxes (Qld) [1935] HCA 23 173
Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation [1988] HCA 17 240
Australian Air Express Pty Ltd v Langford [2005] NSWCA 9 124
Australian Securities and Investments Commission (In the matter of Richstar Enterprises Pty Ltd) v Carey (No. 6) [2006] FCA 814 86
Australian Securities Commission v Multiple Sclerosis Society (Tas) (1993) 10 ASCR 489 36
Avon Downs Pty Ltd v FCT [1949] HCA 26 ....171, 172
B
Bailey v FCT [1977] HCA 11 254
Bamford; FCT v [2010] HCA 10 ....17, 23, 81
Banks v Goodfellow (1870) LR 5 QB 549 205
Beeson & Spence [2007] FamCA 200 87
Belford; FCT v [1952] HCA 73 23
Bell and FCT [2020] AATA 3194 167
Beneficiary (The) and FCT [2020] AATA 3136 167
Birdseye and Tax Practitioners Board [2020] AATA 1250 6
Bogiatto; FCT v [2020] FCA 1139 164
Boulton v Sanders [2003] VSC 405 207
Boulton v Sanders [2004] VSCA 112 206
Boulton v Sanders (No. 2) [2003] VSC 409 207
Braham v Walker (1961) 104 CLR 366 33
Brajkovich v FCT [1989] FCA 454 253
Brown v FCT [1999] FCA 563 225
Builders Workers' Industrial Union of Australia v Odco Pty Ltd [1991] FCA 87 124
Burton v FCT [2019] FCAFC 141 ....76, 251
Bywater Investments Ltd v FCT [2016] HCA 45 ....25, 222
C
Californian Copper Syndicate v Harris (1904) 5 TC 159 253
Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304 36
Carlill v Carbolic SmokeBall Co [1892] 2 QB 484; [1893] 1 QB 256 250
Carter v FCT [2020] FCAFC 150 223
Case 104, 10 TBRD 299 130
Case 5770 (1990) 21 ATR 3291 253
Case 6297 (1990) 21 ATR 3747 253
Case E47, 73 ATC 385 16
Case X31, 90 ATC 296 253
Case X85, 90 ATC 615 ....250, 252
Cassaniti and FCT [2020] AATA 3447 224
Certain Lloyd's Underwriters v Cross (2012) 248 CLR 378 18
Chadbourne and FCT [2020] AATA 2441 108
Chief Commissioner of State Revenue v Platinum Investment Management Ltd [2011] NSWCA 48 33
Christodoulides v Markou [2017] EWHC 2636 95
Colonial First State Investments Ltd v FCT [2011] FCA 16 16
Commissioner of Inland Revenue v Ward 69 ATC 6050 15
Consolidated Media Holdings Ltd; FCT v [2012] HCA 55 ....17, 18
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2020] FCAFC 122 124
Crisp v Burns Philp Trustee Co Ltd (unreported, Supreme Court of NSW, 18 December 1979) 140
Cross and Tax Practitioners Board [2020] AATA 1471 7
Crown Melbourne Ltd v FCT [2020] FCA 1295 226
Cvek and Tax Practitioners Board [2020] AATA 1422 7
D
Davis v FCT [2000] FCA 44 255
Day; FCT v [2008] HCA 53 108
De Beers Consolidated Mines Ltd v Howe [1906] AC 455 25
Dental Corporation Pty Ltd v Moffet [2020] FCAFC 118 124
Doughan v Straguszi [2013] QSC 295 207
Duncan and FCT [2020] AATA 2540 107
E
Edwards, Re [2007] EWHC 1119 94
Eichmann; FCT v [2019] FCA 2155 ....228, 229
Eichmann and FCT [2019] AATA 162 228
Eichmann v FCT [2020] FCAFC 155 ....226, 228–231
Executor Trustee and Agency Co of South Australia Ltd v DCT (SA) [1939] HCA 35 255
F
Fenwick, Re; Application of JR Fenwick & Re Charles [2009] NSWSC 530 207
Ferguson v FCT [1979] FCA 29 253
Finance Facilities Pty Ltd v FCT [1971] HCA 12 ....114, 173
Fletcher v FCT [1991] HCA 42 253
Fordyce v Ryan; Fordyce v Quinn [2016] QSC 307 86
Fortunatow; FCT v [2020] FCAFC 139 165
G
Greig v FCT [2020] FCAFC 25 ....53, 143, 194, 250–253
Gulbenkian's Settlements (No. 2), Re [1970] Ch 408 16
Gurney and FCT [2020] AATA 3813 226
H
Hafza v Director-General of Social Security [1985] FCA 164 129
Hamilton and FCT [2020] AATA 1812 55
Harding v FCT [2018] FCA 837 ....129, 130
Harding v FCT [2019] FCAFC 29 ....83, 132
Harris v Harris [2011] FamCAFC 245 87
Hartley and FCT [2013] AATA 601 253
Hawkins v Perpetual Trustee Co Ltd [1960] HCA 51 59
Hayward, Re [2016] EWHC 3199 94
Hill and FCT [2019] AATA 1723 253
Hiremani and FCT [2020] AATA 1653 55
Hollis v Vabu Pty Ltd [2001] HCA 44 124
Holman and FCT [2020] AATA 1375 6
Hunter Valley Developments Pty Ltd v Cohen [1984] FCA 176 225
I
Inland Revenue Commissioners v Lysaght [1928] AC 234 129
J
Jamsek v ZG Operations Australia Pty Ltd [2020] FCAFC 119 124

Jiang Shen Cai trading as French Accent v Do Rozario [2011] FWAFB 8307 124

K
Kafataris v DCT [2008] FCA 1454 259
Kaseris v Rasier Pacific VOF [2017] FWC 6610 124
Khoury v Government Insurance Office of NSW [1984] HCA 55 231
Koitaki Para Rubber Estates Ltd v FCT (1940) 64 CLR 15 26–28
Koitaki Para Rubber Estates Ltd v FCT (1941) 64 CLR 241 28
Kolotex Hosiery (Australia) Pty Ltd v FCT [1975] HCA 5 .... 171, 173
Kowalski v Kowalski [2012] QCA 234 140
Kyriacou and Tax Practitioners Board [2020] AATA 1466 7

L
Lake Victoria v Commr of Stamp Duties (1949) 49 SR (NSW) 262 31
Lau; FCT v [1984] FCA 401 253
Lawrie v Hwang [2013] QSC 289 207
Laybutt v Amoco Australia Pty Ltd [1974] HCA 49 30
Levene v Inland Revenue Commrs [1928] UKHL 1 132
Liquidator, Rhodesia Metals Ltd v Taxes Commr [1940] AC 774 23
Livingspring Pty Ltd v Kliger Partners [2008] VSCA 93 11
Lockyer's Settlement, Re [1977] 1 WLR 1323 14
London Australia Investment Co Ltd v FCT [1977] HCA 50 .... 251, 252

M
MacKinnon and FCT [2020] AATA 1647 55
Malayan Shipping Co Ltd v FCT [1946] HCA 7 26
Matsis, Re; Charalambous v Charalambous [2012] QSC 349 206
Mavrokokki and Tax Practitioners Board [2020] AATA 1517 7
McAteer and FCT [2020] AATA 1795 55
McCarthy v Saltwood Pty Ltd [2020] TASSC 19 .... 11, 15
McKay v McKay [2011] QSC 230 207
McLelland v FCT (1970) 120 CLR 487 253
McMahon; FCT v [1997] FCA 1087 231
McNee v Lachlan McNee Family Maintenance Pty Ltd [2020] VSC 273 87
Mililo v Konnecke [2009] NSWCA 109 140
Miller; FCT v [1946] HCA 23 .... 128, 129, 132, 133
Montgomery; FCT v [1999] HCA 34 .... 250, 253
Morgan v 45 Flers Avenue Pty Ltd (1986) 10 ACLR 692 36
Morton & Morton [2012] FamCA 30 87
Mulligan (dec'd), Re [1998] 1 NZLR 481 140
Multiflex Pty Ltd; FCT v [2011] FCAFC 142 239
Murrindindi Bushfire Class Action Settlement Fund v FCT [2020] FCAFC 92 8
MWB Accountants Pty Ltd; DCT v [2019] VCC 1516 238–241
Myer Emporium Ltd; FCT v [1987] HCA 18 .... 53, 194, 252

N
N & M Martin Holdings Pty Ltd v FCT [2020] FCA 1186 165
Narumon Pty Ltd; Re [2018] QSC 185 259
Nathan v FCT [1918] HCA 45 19
Nesbitt v Nicholson; Re Boyes [2013] EWHC 4027 95

O
Olsson v Dyson [1969] HCA 3 33
On Call Interpreters and Translators Agency Pty Ltd v FCT (No. 3) [2011] FCA 366 124
Owners of Shin Kobe Maru v Empire Shipping Co Inc [1994] HCA 54 231

P
Pacific Fair Shopping Centres Pty Ltd v Commr of Stamp Duties (Qld) [1979] Qd R 410 33
Pagano v Ruello [2001] NSWSC 63 140
Pearson v FCT [2006] FCAFC 111 16
Perry v Nicholson [2017] QSC 163 259
Peter Greensill Family Co Pty Ltd (trustee) v FCT [2020] FCA 559 .... 2, 17–23, 77, 166
Pike; FCT v [2020] FCAFC 158 ..... 225, 226
Pike v FCT [2019] FCA 2185 .... 130, 131
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28 241
Public Trustee v Mullane (unreported, Supreme Court of NSW, 12 June 1992) 95
Puzey v FCT [2003] FCAFC 197 253

R
Racing Queensland Board; FCT v [2019] FCAFC 224 124
Rak, Re [2009] SASC 288 206
Ramsden; FCT v [2005] FCAFC 39 16
Rea v Rea [2019] EWHC 2434 95
Richstar: Australian Securities and Investments Commission v Carey (No. 6) [2006] FCA 814 86
Robertson v Smith [1998] 4 VR 165 95
Rouse, Re [2019] VSC 792 196
Roy Morgan Research Pty Ltd v FCT [2011] HCA 35 123
Ryan v Dalton [2017] NSWCA 1007 95

S
Saunders v Pedemont [2012] VSC 574 206
Sayden Pty Ltd v Chief Commr of State Revenue [2013] NSWCA 111 59
SB, Re; Ex parte AC [2020] QSC 139 207
Scone Race Club Ltd; FCT v [2019] FCAFC 225 124
Scott-Mackenzie v Bail [2017] VSCA 108 196
Scottish Co-operative Wholesale Society Ltd v Meyer [1959] AC 324 36
Seribu Pty Ltd and FCT [2020] AATA 1840 53
Shot One Pty Ltd (in liq) v Day [2017] VSC 741 11
Steeves Agnew & Co (Vic) Pty Ltd; FCT v [1951] HCA 26 187
Stevens v Brodribb Sawmilling Co Pty Ltd [1986] HCA 1 124
Stone; FCT v [2005] HCA 21 250
Sydney Futures Exchange Ltd v Australian Stock Exchange Ltd and Australian Securities Commission (1995) 56 FCR 236 33

T
Tax Practitioners Board v Hacker [2020] FCA 1047 108
Tax Practitioners Board v Hacker (No. 2) [2020] FCA 1048 109
Thomas; FCT v [2018] HCA 31 255
Travelex Ltd; FCT v [2020] FCAFC 10 .... 239, 240
Trust Co of Australia Ltd v Commr of State Revenue [2006] VSC 64 111
Trust Co Ltd v Noosa Venture 1 Pty Ltd (2010) 80 ACSR 485 .... 34, 36
Trustee for the Michael Hayes Family Trust; FCT v [2019] FCAFC 226 254
Trustee for the Salvation Army (NSW) Property Trust v Becker [2007] NSWCA 136 95
Trustees of the Estate Mortgage Fighting Fund Trust v FCT [2000] FCA 981 16

U
Union Corporation Ltd v Commrs of Inland Revenue (1952) 1 All ER 646 26–28

V
Vabu Pty Ltd v FCT (1996) 33 ATR 537 124
'VAN' and FCT [2002] AATA 1313 33
VGDW and FCT [2020] AATA 3745 226
Vickery v Woods [1952] HCA 7 31
Vigliaroni v CPS Investment Holdings Pty Ltd [2009] VSC 428 35
Voros v Dick [2013] FWCFB 9339 124

W
Wain v Drapac [2012] VSC 156 35
Waterloo Pastoral Co Ltd v FCT [1946] HCA 30 26
WE Pickering Nominees Pty Ltd v Pickering [2016] VSC 71 .... 86, 87
WE Pickering Nominees Pty Ltd v Pickering [2016] VSCA 273 87
WE Pickering Nominees Pty Ltd v Pickering [2020] VSC 273 87
Western Gold Mines NL v FCT (WA) [1938] HCA 5 250
Whitemore Pty Ltd v OF Gamble Pty Ltd (1991) 6 WAR 110 33
Whitfords Beach Pty Ltd; FCT v [1982] HCA 8 251
Will of Jane, Re [2011] NSWSC 624 207
World Book (Australia) Pty Ltd v FCT 92 ATC 4327 124
Wright v Stevens [2018] NSWSC 548 58

X
XPQZ, KYZC, DHJP and FCT [2020] AATA 1014 194

Y
Yazbek v FCT [2013] FCA 39 58
Yvonne Anderson and Associates Pty Ltd and Tax Practitioners Board [2020] AATA 1881 54

Authors

A
Abdalla, J
Tax Counsel's Report
– Tax Summit: Project Reform 160
Ananda, A
Tax Counsel's Report
– Let logic prevail – extend the amnesty 104

B
Backhaus, S
Superannuation
– Electronic execution of deeds by individuals 38
Baghdasarayan, E
Alternative Assets Insights
– The ALDT and cross-border related-party interest-free loans 201
Bearman, M
Fifty shades of Greig: the spectrum of taxpayers in share trading 250
Bembrick, P
Mid Market Focus
– What is an affiliate, and why is it important? 61
Blackwood, C
Demerger relief rules: what constitutes a "restructuring"? 189
Brandon, G
Mid Market Focus
– ASX-listed junior exploration companies and tax losses: part 2 116
Brumm, L
Alternative Assets Insights
– Expansion of the definition of significant global entity 91
Burns, A
Mid Market Focus
– GST and fundraising during the pandemic 174
Butler, D
Superannuation
– A guide to family law superannuation splitting in an SMSF 88
– Electronic execution of deeds by individuals 38
– Managing the TBC and minimising excess transfer balance tax 198
– Six-member SMSFs: the pros and cons 257
– What ATO publications can be relied on? 141

C
Campbell, S
A Matter of Trusts
– Rectifying mistakes in trust deeds 254
Caredes, S
Reform of Australia's tax system
– Foreword 68
Tax Counsel's Report
– A united front from the tax profession 4
Castelyn, D
Member Profile 67
Colcutt, T
A Matter of Trusts
– Trading trusts and the oppression remedy 34
Collins, P
Alternative Assets Insights
– Expansion of the definition of significant global entity 91
– Hybrid mismatch rules: proposed changes 41
Coyne, C
A Matter of Trusts
– Life interest trusts and their use among blended families 139
Craig, A
Controlling a tax audit 234

D
DeBellis, S
Alternative Assets Insights
– Queensland land tax foreign surcharge: ex gratia relief 147
Deutsch, R
Tax reform in the roaring 20s: some ideas from The Tax Institute 69

Donlan, T
Successful Succession
– Court-authorised wills 205
– Fraudulent calumny: recognition of a growing reality? 94

F

Fantin, J
Alternative Assets Insights
– Queensland land tax foreign surcharge: ex gratia relief 147

Fettes, W
Superannuation
– A guide to family law superannuation splitting in an SMSF 88
– Six-member SMSFs: the pros and cons 257

G

Galloway, Z
Superannuation
– Electronic execution of deeds by individuals 38

Glover, J
Tax agents: beware of “administrative overpayments” added to your RBA 238

Godber, P
President’s Report
– Accepting and embracing change 102
– Engaging in the tax reform community discussion 218
– New delivery models for our trusted events 158
– The new normal and our hope to get there soon 2
– Unlocking value from the knowledge available to you 48

H

Hartanti, W
Acquiring an interest in a CFC during an income year 134

Haskett, A
Demerger relief rules: what constitutes a “restructuring”? 189

Hurst, G
CEO’s Report
– Charting a course to tax reform 159
– Full steam ahead on tax reform 219
– Looking to the future with confidence 49
– Our membership: a force to be reckoned with 103
– We are your biggest fan: advocacy “sans frontières” 3

Hurst, M
Case Note
– Considerations from Greig v FCT 194

J

Jacobson, R
SG amnesty unpacked 122
Tax reform: with 2020 vision 79

Jones, D
Mid Market Focus
– Capital gains and foreign resident beneficiaries 17

K

Klank, P
Fifty shades of Greig: the spectrum of taxpayers in share trading 250

M

Ma, M
Tax Counsel’s Report
– Greater appetite for more 220

Malouf, W
Case Note
– Considerations from Greig v FCT 194

Marcarian, M
Residency in a global pandemic: advising the returning Australian 128

McKenzie, T
Foreign beneficiaries beware of discretionary trusts following Greensill 19

Mills, A
Tax reform: selected issues 71

Monotti, W
A Matter of Trusts
– Defining the beneficiaries of a discretionary trust 195

Montani, D
Division 7A loan repayments: part 1 180
Division 7A loan repayments: part 2 242

Muscat, P
Alternative Assets Insights
– Expansion of the definition of significant global entity 91

N

Nickless, J
Alternative Assets Insights
– The ALDT and cross-border related-party interest-free loans 201

P

Pasternacki, A
Case Note
– Considerations from Greig v FCT 194

Peiros, K
Successful Succession
– Court-authorised wills 205
– Fraudulent calumny: recognition of a growing reality? 94

Pelpola, S
Alternative Assets Insights
– Hybrid mismatch rules: proposed changes 41

Q

Quigley, B
Senior Adviser’s Report
– Transfer duty or land tax? 51

R

Rogaris, N
Alternative Assets Insights
– Continuing the build-to-rent conversation in Australia 260

S

Skilton, E
A Matter of Trusts
– Court variations to the appointor identity and powers 86

Smythe, C
Options and NSW duty: practical considerations 30

Stapleton, F
Member Profile 178

T

TaxCounsel Pty Ltd
Tax News – what happened in tax?
– June 2020 5
– July 2020 52
– August 2020 105
– September 2020 162
– October 2020 221
Tax Tips
– Active asset test 228
– Discretionary trusts: NSW surcharge changes 56
– Discretionary trusts: some practical issues 11
– Division 7A and COVID-19 110
– The Commissioner’s discretions: the court’s role 169

Thring, G
Split central management and control and dual residency 25

Y

Young, A
Alternative Assets Insights
– Continuing the build-to-rent conversation in Australia 260

TAXATION *in Australia*®
ISSN 0494-8343

Publishing House
The Tax Institute
ABN 45 008 392 372

Level 37, 100 Miller Street
North Sydney, NSW 2060

General Manager, Knowledge and Learning
Alexandra Wilson

Managing Editor
Deborah Powell

Content Consultant
Bob Deutsch

Graphic Designers
Mei Lam
Nicole Welch

Typesetter
Midland Typesetters, Australia

Advertising
Business Relationship Manager
Brian Martin 08 6165 6600

© 2020 The Tax Institute
This journal is copyright. Apart from any fair dealing for the purpose of private study, research, criticism or review, as permitted under the Copyright Act, no part may be reproduced by any process without written permission.

Disclaimer
Unless otherwise stated, the opinions published in this journal do not express the official opinion of The Tax Institute. The Tax Institute accepts no responsibility for accuracy of information contained herein. Readers should rely on their own inquiries before making decisions that touch on their own interests.

Giving back to the profession

The Tax Institute would like to thank the following presenters from our October CPD sessions. All of our presenters are volunteers, and we recognise the time that they have taken to prepare for the paper and/or presentation, and greatly appreciate their contribution to educating tax professionals around Australia.

Paul Abbey
Amber Agustin, FTI
Travis Anderson
Chris Annicchiarico
Emma Barns, ATI
Andrew Barrah, FTI
Daniel Butler, CTA
Kelly Canavan
Matt Cavanagh
Mia Clarebrough
Enzo Coia, CTA
Leanne Connor, CTA
Edward Consett, ATI
The Hon. Peter Costello, AC
Liz Cullinan
Brett Curtis, ATI
Michelle de Niese
Les de Wind
Giles Dudley
Melanie Dunn
Matt Ervin
Chris Ferguson
Alan FitzGerald
Jo Flynn
Cameron Forbes
Rosheen Garnon, CTA
James Gould
Leo Gouzenfiter
Graeme Halperin, CTA
Kate Halton
Sara Harrup
Jason Heng
Scott Hes
Frank Hinoporos, CTA
Greg Hocking
Carynne Howitt, CTA
John Ioannou, CTA
Ron Jorgensen, CTA
Ann Kayis-Kumar
Fiona Knight, CTA
Alexis Kokkinos, ATI
Travis Kukura
Shirley Lam
Kai-Chen Lamb
Maryanne Larkin
Nirupa Manoharan
Marg Marshall, CTA
Scott McGill, CTA
Matthew McKee, CTA
Moira Merrick, CTA
Andrew Mills, CTA (Life)
Mark Molesworth, CTA
Dominic Moon, ATI
Aaron Ng
Andrew Noolan, CTA
Jasmine O'Brien
James O'Halloran
Frank O'Loughlin, QC, CTA
Chanmony Om, ATI
Andrew Orme
Shahzeb Panhwar
Kelly Parker
Lucas Patchett, OAM
Matthew Pawson, CTA (Life)
Dioni Perera, FTI
Cindy Perryman
David Plank
Ross Prosper, CTA
Greg Quin
Ian Raspin, CTA
Chris Richardson
David Robertson
Heidi Rodgers
Luigi Romanelli
Marek Rucinski
Camiila Schippa
Ken Schurgott, CTA (Life)
Tracey Scotchbrook, CTA
Shashi Sivayoganathan
Miranda Stewart, CTA
The Hon. Michael Sukkar, MP
Linda Tapiolas, CTA
Jayde Thompson
Tim Tierney
Jerome Tse, CTA
Sylvester Urban
Scott Walker
Cressida Wall
Chris Wallis, CTA
Todd Want, CTA
Grant Wardell-Johnson, CTA
Len Warson
Greg Weickhardt
Mark Wizel
Sandra Wood
Danielle Wood
Nathan Yii, CTA

Contacts

National Council

President
Peter Godber, CTA

Vice President
Jerome Tse, CTA

Treasurer
Stuart Glasgow, CTA

National Councillors
Paul Banister, CTA
David Earl, FTI
Len Hertzman, CTA
Marg Marshall, CTA
Eddy Moussa, CTA
Tim Sandow, CTA
Todd Want, CTA

National Office

CEO: Giles Hurst

Level 37, 100 Miller Street
North Sydney, NSW 2060

Tel: 02 8223 0000
Email: ceo@taxinstitute.com.au

State Offices

New South Wales and ACT

Chair: Rae Ni Corraidh, CTA

Level 37, 100 Miller Street
North Sydney, NSW 2060

Tel: 02 8223 0031
Email: nsw@taxinstitute.com.au

Victoria

Chair: Fiona Knight, CTA

Level 3, 530 Collins Street
Melbourne, VIC 3000

Tel: 03 9603 2000
Email: vic@taxinstitute.com.au

Queensland

Chair: John Ioannou, CTA

Level 11, Emirates Building
167 Eagle Street
Brisbane, QLD 4000

Tel: 07 3225 5200
Email: qld@taxinstitute.com.au

Western Australia

Chair: Bill Keays, CTA

Level 10, Parmelia House
191 St Georges Terrace
Perth, WA 6000

Tel: 08 6165 6600
Email: wa@taxinstitute.com.au

South Australia and Northern Territory

Chair: Peter Slegers, CTA

Ground Floor, 5-7 King William Road
Unley, SA 5061

Tel: 08 8463 9444
Email: sa@taxinstitute.com.au

Tasmania

Chair: Ian Heywood, CTA

Level 3, 530 Collins Street
Melbourne, VIC 3000

Tel: 1800 620 222
Email: tas@taxinstitute.com.au

THE TAX INSTITUTE

0033KNOW_11/20

taxinstitute.com.au