THE TAX INSTITUTE

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Written by:

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

BROWN WRIGHT STEIN LAWYERS

Brown Wright Stein tax partners:

Andrew Noolan	E: ajn@bwslawyers.com.au	P: 02 9394 1087
Geoff Stein	E: gds@bwslawyers.com.au	P: 02 9394 1021
Matthew McKee	E: mpm@bwslawyers.com.au	P: 02 9394 1032
Michael Malanos	E: mlm@bwslawyers.com.au	P: 02 9394 1024

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

BROWN WRIGHT STEIN
LAWYERS

Our tax training notes are edited by Gillian Tam and Marianne Dakhoul and prepared by members of our team:

Suzie Boulous	Rachel Vijayaraj	Amanda Comelli
Eleanor Arthurson	Rose McEvoy	Alice Kwan
Indeya Canvin	Jane Harris	

About Brown Wright Stein

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

- Tax
- Dispute Resolution
- Corporate & Commercial
- Franchising
- Property
- Employment
- Estate Planning
- Elder Law
- Intellectual Property
- Corporate Governance
- Insolvency & Bankruptcy

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

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

1 Cases

1.1 Belconnen v Lloyd – misleading and deceptive conduct and GST

Facts

In 2007, Belconnen Lakeview Pty Ltd as trustee of the Belconnen Lakeview Unit Trust purchased the unexpired term of a Crown lease for a land in the suburb of Belconnen, ACT. John Hindmarsh and Gerald Ryan were officers of the trustee company.

In 2009, development approval was granted in relation to the development of the 'Altitude Apartments' on the Belconnen land. Belconnen carried out the development of the 'Altitude Apartments' in the ACT.

From 2010, Belconnen entered into contracts to sell the unexpired term of the then unregistered leases for the residential units to purchasers.

In May 2010, the Full Federal Court held, in *Federal Commissioner of Taxation v Gloxinia Investments Ltd* [2010] FCAFC 46 that a developer selling strata lot leases with respect to residential premises were input taxed supplies for GST purposes. Subsequent to *Gloxinia*, legislation was passed so that subject to transitional provisions or exceptions, sales of newly constructed residential premises that were the subject of a development lease arrangement would be taxable supplies.

On 8 February 2013, Belconnen lodged a private ruling application that an exception applied to supplies of the unexpired term of leases of residential units in the Altitude Apartments development, with the effect that the supplies were input taxed supplies.

On 2 March 2013, a favourable private ruling was issued by the ATO. Belconnen prepared later BASs on an input taxed basis, and also amended prior BASs and repaid all relevant input tax credits previously claimed in relation to the Altitude Apartments development.

On 10 March 2015, Belconnen entered into a contract in relation to the leasehold interest in Unit 202 of the Altitude Apartments with Susan Lloyd for $554,900. The contract of sale was prepared by Belconnen and adopted the standard Law Society of the ACT Contract for Sale. The schedule set out that the sale was a taxable supply, with the GST to be worked out under the margin scheme. Standard Clause 24.5 provided that '[i]f this Contract says that the Buyer and Seller agree that the margin scheme applies to the supply of the Property, the Seller warrants that it can use the margin scheme and promises that it will'. Special Conditions 52 provided that the price payable under the contract is inclusive of GST, and that any GST Belconnen is liable to pay on the supply of the unit to Susan would be calculated under the margin scheme provisions of the GST Act.

The contract settled on 7 April 2015.

Belconnen did not disclose to Susan that Belconnen had obtained the favourable private ruling, and that GST was not payable in respect of the sale of the unexpired term of the lease for the relevant residential unit.

In 2019, Susan commenced proceedings in the Federal Court against Belconnen, John and Gerald, on the basis that Belconnen had engaged in misleading or deceptive conduct in contravention of section 18 of the *Australian Consumer Law*, and that John and Gerald were knowingly involved in the contravention. Susan also sought the recovery of money of approximately $46,000, being the GST that would have applied to the sale of the unit had the supply been a taxable supply and subject to the margin scheme (her restitution case).

In the first instance, the primary judge noted while that the contract was prepared on the basis that the supply would be a taxable supply subject to the margin scheme, this was merely the anticipated nature of the supply. However, the primary judge was satisfied that Belconnen had made continuing post-ruling representations and omissions to Susan in relation to the GST treatment of the supply of Unit 202 until completion, and its conduct was misleading and deceptive. The primary judge held that the misleading and deceptive conduct cost Susan a commercial opportunity to negotiate a discount, and valued the opportunity at 50% of the GST amount, that is, compensation of approximately $23,000 for the loss of this opportunity.

The primary judge rejected Susan's case against John and Gerald and her restitution case. In reaching this decision, the primary judge did not agree that it could be found that John and Gerald had knowingly been involved in the deception. The restitution case was rejected on the basis that the warranty provided under standard clause 24.5 was a contractual promise which could result in common law damages, such that no restitution remedy was available.

Belconnen filed a notice of appeal and Susan filed a notice of cross-appeal.

Belconnen contended that the primary judge erred in holding that the terms of the contract conveyed continuing representations, that those representations were misleading and deceptive, that the representations caused loss, or that the damages should be assessed by reference to the amount of the purchase price referable to the GST.

Belconnen submitted that although contractual promises may amount to a representation, the contractual promise that the price was GST inclusive was not the same as saying that the supply on completion would necessarily be a taxable supply, or that GST would necessarily be payable following the supply, and is nothing more than the undertaking of an obligation to pay GST if any was payable.

Susan contended that the primary judge erred in finding that there was a contractual remedy available to Susan in respect of GST treatment of the sale, and ought to have ordered Belconnen to account to Susan for money had and received in an amount equivalent to the full amount of the GST payable by Susan under the contract.

Susan relied on the failure of consideration in her claim for money. She contended that a distinct and severable portion of the purchase price paid by her to Belconnen was referrable to GST, and that there was a failure of consideration in that Belconnen was not liable to pay GST.

Issues

1. Whether the primary judge erred in finding that Belconnen had engaged in misleading or deceptive conduct in contravention of section 18 of the *Australian Consumer Law*, such that the conduct was causative of loss, and also erred in the assessment of any loss or damage?
2. Whether the primary judge erred in rejecting Susan's restitution case?

Decision

The Full Federal Court upheld the primary judge's decision that the contract of sale executed by Belconnen constituted deceptive and misleading conduct by Belconnen. However, the Full Court agreed that the primary judge erred in concluding that Susan lost an opportunity of non-negligible value. In circumstances where Susan, as a private purchaser of a residential unit, could not claim an input tax credit for any GST payable on the supply, it made no financial difference to Susan whether or not the supply was subject to GST, given the purchase price was inclusive of GST.

The Full Federal Court upheld the primary judge's decision on the restitution case as there was no severable component of the consideration referrable to GST that could be identified in the contract or any other contemporaneous documents. This is due to the fact that the contract was prepared on the basis that margin scheme was applicable to the supply, and not the ordinary case where GST was 1/11th of the value of the supply. The GST amount, being 1/11th of the margin, was later agreed between the parties for the purposes of the proceedings to be approximately $46,000, but there was no suggestion that the amount could be known to Susan at the time of contracting.

COMMENT – although this case awarded Ms Lloyd no amount as a result of her restitution argument, it appears that the decision may have been different if the sale in this case was a fully taxable supply.

Citation *Belconnen Lakeview Pty Ltd v Lloyd* [2021] FCAFC 187 (Griffiths, Davies and Moshinsky JJ, New South Wales)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2021/187.html

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1.2 Global Citizen – Public Benevolent Institution

Facts

Global Citizen Limited is a not-for-profit entity that is registered as a charity by the Australian Charities and Not-for-profits Commission. The stated aim of Global Citizen is to end extreme global poverty by the year 2030.

It is part of a global network, which operates in the USA, United Kingdom, Canada, South Africa and Nigeria.

Global Citizen was founded by 3 individuals who met in 2003 while working at Oaktree Foundation Australia, a youth-run international development organisation focussed on raising funds for projects in the developing world. The 3 individuals, through their involvement with Oaktree helped to stage the 'Make Poverty History Concert' in 2006 in collaboration with a number of organisations such as World Vision Australia, Oxfam Australia, UNICEF Australia, Caritas Australia Limited and Plan International.

Following the concert's successful response, the co-founders saw an opportunity to use the model to bring together informed individuals and high-profile artists with the aim of securing specific commitments from government, large corporations and wealthy philanthropists to projects to eradicate poverty.

Global Citizen was incorporated as a company limited by guarantee on 14 April 2010.

The constitution of Global Citizen provided as follows:

'*The principal object of the company is to provide benevolent relief of poverty, sickness, destitution, distress, suffering and helplessness to persons in need with a particular emphasis on bringing an end to extreme poverty globally by 2030, in particular by:*

(a) *providing funding for, cooperating and collaborating with other bodies and organisations both in Australia and globally having objects in whole or in part similar to the objects of the company; and*
(b) *educating and empowering communities to help effect change to international policies and systems and raise global awareness of the issues and matters affecting persons living in extreme poverty;*
(c) *helping members inform themselves on global and domestic poverty issues and their solutions, human rights and helping members build skills to communicate effectively with decision makers and members of the public;*
(d) *mobilising resources for research and development;*
(e) *providing grants and scholarships to individuals who are working to end extreme poverty;*
(f) *providing financial support and facilitating youth advocate programs, symposiums, workshops and conferences which train young people to take action in their communities to relieve extreme poverty;*
(g) *advocating for development assistance for programs that promote the end of global poverty; and*
(h) *conducting and funding strategic media and public awareness raising activities to educate members of the broader community*.'

In 2011, Global Citizen started work on a campaign to end the spread of polio. Building on the model developed by Oaktree, Global Citizen organised the End of Polio Concert, on the eve of the Commonwealth Heads of Government Meeting in Perth in October 2011.

It was in about 2012 that the co-founders expanded the operations of the global citizen model internationally.

In 2015 the United Nations launched the Sustainable Development Goals (SDGs). Entities within the Global Citizen Network, including Global Citizen, publicly embraced the SDGs (referred to on their website as the Global Goals) as a framework for action directed towards elimination of extreme poverty by 2030.

The entities within the Global Citizen Network work together in collaboration with other non-governmental organisations directed to securing commitments, primarily financial commitments, from governments and wealthy philanthropists, to international organisations that carry out the projects to relieve poverty. The Global Citizen Network does this by running campaigns and building on previous campaigns to raise awareness.

Global Citizen engaged in 2 other major campaigns, being the vaccination campaign in support of Gavi, the Vaccine Alliance and the fight against infectious diseases campaign in support of The Global Fund to Fight AIDS, tuberculosis and malaria.

The vaccination campaign involved co-hosting an online parliamentary briefing for members of Parliament and senators calling for continued assistance of Gavi.

The fight against infectious diseases campaign involved a partnership with The Global Fund to host a concert in Montreal, making various submissions to government and circulating a petition to the Australian government to increase its commitment to The Global Fund, and co-authoring a letter to the Prime Minister and the ministers for Foreign Affairs, Health and International Development and the Pacific seeking increased contributions.

Global Citizen submitted in evidence that examples of activities it conducts includes:

- providing information by social media and email and holding grassroots events;
- working with the Global Citizen Network and other private foundations to facilitate grants;
- communicating with government and philanthropists by making parliamentary submissions;
- hosting concerts and other events in support of campaigns together with other entities in the Global Citizen Network; and
- working with other entities in the Global Citizen Network to track commitments made and ensure accountability.

Global Citizen was registered under the *Australian Charities and Not-for-Profits Commission Act* 2012 (Cth) with the subtype of advancing education. Its registration as a charity enabled it to be exempt from income tax.

On 3 August 2018, Global Citizen applied to the ACNC to change its charitable subtype to be registered with the subtype of a public benevolent institution, which would entitle it to obtain deductible gift recipient status.

Division 30 of the ITAA 97 sets out various categories of DGRs in the table in section 30-15(2). A PBI is a type of entity which may be eligible to be registered as an Item 1 DGR.

The key reason for seeking DGR status was so that Global Citizen could apply for grants from ancillary funds that are also DGRs. This is because ancillary funds are only entitled to make grants to Item 1 DGRs.

The ACNC Commissioner refused the application on 6 September 2019. Global Citizen objected to the original decision on 5 November 2019. The objection was disallowed by the ACNC Commissioner on 27 February 2020.

The ACNC Commissioner did not dispute that Global Citizen was an institution or whether it is public. However, the ACNC Commissioner considered that Global Citizen was not benevolent in the relevant sense and not eligible to be registered as a PBI on the basis that:

- Global Citizen had an independent purpose, or purposes, of education and/or advocacy that prevented it from being a PBI; and
- Global Citizen did not provide relief directly, or through related entities, to those in need and this prevented it from being a PBI.

In respect of the independent purpose, the ACNC Commissioner argued the test for determining whether an entity is a PBI is whether the entity has a main purpose of relief of poverty or need. The ACNC Commissioner argued that if the entity has any other purposes, those purposes may only be incidental or ancillary to the main purpose. Global Citizen failed this test because it had several independent purposes, including education and/or advocacy.

In respect of the second issue, the ACNC Commissioner considered the provision of relief as ‘too abstract’ and ‘too remote’ because there was no evidence of a causal link between the activities of Global Citizen and the provision of benevolent relief.

Global Citizen appealed to the Tribunal.

Issues

1. Whether Global Citizen has a benevolent purpose?
2. Whether the activities of Global Citizen provided for the relief of poverty, directly or indirectly?

Decision

The Tribunal determined that Global Citizen was entitled to be registered as a charity with the subtype 'Public benevolent institution' in Item 14, s 25-5 of the ACNC Act.

Issue 1: Whether Global Citizen has a benevolent purpose?

The Tribunal held the ordinary meaning of 'main' in relation to an object or purpose does not preclude an entity from having other objects or purposes, provided the benevolent purpose was predominant purpose.

The Global Citizen Model was designed to create public awareness, through high profile events, but it was also concerned with mobilising that awareness to put pressure on governments and major philanthropists to make specific and targeted financial commitments to various identified aid projects. The campaigns undertaken by Global Citizen since its incorporation were all concerned with improving health outcomes in the developing world as part of the mission to eliminate extreme poverty by 2030.

The Tribunal was satisfied on the evidence that the educational and advocacy activities of Global Citizen were the means by which Global Citizen achieved its purpose of relieving poverty. On that basis, Global Citizen had only one purpose being the relief of global poverty and that it engaged in educational and advocacy activities to achieve that purpose.

Issue 2: Whether the activities of Global Citizen provided for the relief of poverty, directly or indirectly?

The Tribunal relied on *Federal Commissioner of Taxation v The Hunger Project Australia* (2014) 221 FCR 302 as clear authority for the proposition that relief could be provided by a PBI indirectly. In the Hunger Project case, Hunger Project Australia was part of a worldwide group of entities operating under the name 'The Hunger Project'. Hunger Project Australia did not provide direct relief but was engaged in fundraising where funds were used by other entities in the group to relieve poverty. The Full Federal Court held that the test for a PBI did not require it to provide direct relief. The case law did not suggest it was necessary to require proof of the link between the activities of the entity and the provision of relief. The case law also did not establish any prescriptive criteria about the relationship between the relevant entities.

The Tribunal noted it needed to adopt a contemporary meaning of the notion of PBI in the context of international aid and assistance. The uncontested evidence at the Tribunal suggested that advocacy, awareness-raising and educational activities are common methods employed by entities tackling the issue of global poverty and other global issues. The evidence established that most large PBIs engaged with the political process as a regular and indispensable part of their work because governments are key players in delivering the relief that is sought.

The Tribunal considered it was clear that the activities of Global Citizen went beyond mere advocacy for policy change, and were directed to seeking specific financial commitments from government and philanthropists to particular projects. In particular, it undertook a range of activities, in collaboration with the Global Citizen Network and other entities both in Australia and overseas, so that funds were directed to international organisations involved in the direct delivery of aid and assistance in the relief of poverty. That was sufficient to satisfy the nexus of providing relief of poverty. On that basis, the Tribunal was satisfied that Global Citizen was organised for the purpose of relieving poverty. It was therefore entitled to be registered as a charity with the subtype PBI under section 25-5(5) of the ACNC Act.

Citation *Global Citizen Ltd and ACNC Commissioner of the Australian Charities and Not-for-profits Commission* [2021] AATA 3313 (DP McCabe, Melbourne)
w http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2021/3313.html?query=

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1.3 Driscoll – non-complying superannuation fund

Facts

The Driscoll Superannuation Fund (**Fund**) was established on 23 January 2009. The Fund was a self-managed superannuation fund. Mr Driscoll was the sole member of the Fund. Mr Driscoll was also a director of the corporate trustee of the Fund.

On 12 March 2009, Mr Driscoll deposited $18,000 into the Fund's bank account. On 8 May 2009, Mr Driscoll deposited a further $2,700 to the Fund's bank account. In both instances, the monies came from Mr Driscoll's MLC Masterkey Superannuation Account.

In March 2009, Mr Driscoll attended a course conducted by the Church of Scientology called 'Havingness Rundown'. The course cost about $6959. The course had nothing to do with superannuation funds or managing superannuation funds but appeared on evidence to have something to do with making money. Mr Driscoll gave evidence regarding the purpose of him attending the course was 'My idea to get out and make money and pump money into super'. Mr Driscoll was focussed on making money because he was in difficult financial circumstances and described himself as being 'on the bones of his arse.'

On or about 19 March 2009, Mr Driscoll purchased a 'Signature Collection' of books which were described as Limited Edition 18 volume set of 'The Basics of Dianetics and Scientology' by Ron L Hubbard. The cost of the books was about $11,000. Mr Driscoll purchased the books with his credit card because the Fund had no credit card. Mr Driscoll regarded the books as an investment by the Fund. The Books were shown in the accounts of the Fund for 2009 as 'other investment'. He left the books in their original packaging and kept them in his bedroom.

From about May 2009 to June 2009, there were a series of withdrawals from the Fund which suggested that Mr Driscoll was using the fund's bank account for personal purposes.

The trustee of the Fund failed to lodge the Fund's annual return for 2009 and 2010 on time. On 9 September 2011, the ATO wrote to the trustee of the Fund requiring the annual returns for 2009 and 2010 be lodged by 21 October 2011. The letter referred to penalties that would apply if the Fund failed to lodge the annual returns by 21 October 2011.

Mr Driscoll contacted the ATO and spoke to an employee at the ATO about his personal problems (including that his partner had left him and taken his children overseas). Mr Driscoll said that the ATO employee told him to deal with his personal problems and not be concerned about lodging the Fund's returns until his personal matters were resolved. Mr Driscoll was unable to give the time, date or name of the ATO employee he spoke to.

The Fund lodged its annual return for 2009 on 19 December 2011 and the annual return for 2010 on 16 January 2012.

Following the lodgement of the annual returns, the ATO issued contravention reports for the Fund for the 2009 and 2010 years. The ATO also carried out an audit of the Fund and issued amended notices of assessments to the Fund for the 2009 and 2010 years.

On 17 May 2013, Mr Driscoll lodged an objection to each notice of amended assessment.

On 31 October 2013, the ATO allowed Mr Driscoll's objection in part, but found that the amounts of $18,000 and $2,700 withdrawn from the MLC Masterkey Superannuation Account and deposited into the Fund's bank account did not satisfy the definition of rollover because the Fund was not a complying superannuation fund.

On 15 November 2019 the ATO told Mr Driscoll that the ATO would not issue a notice of compliance for the Fund for the 2009 year.

Mr Driscoll asked the ATO to review its decision not to issue the notice of compliance for the 2009 year. The ATO failed to make a decision not to issue the notice of compliance.

Mr Driscoll applied to the Administrative Appeals Tribunal seeking a review of the ATO's deemed decision not to issue a notice of compliance for the 2009 year.

Issue

Whether the ATO's decision refusing to issue a notice of compliance for the Fund in respect of the 2009 year was the correct decision.

Decision

In considering the key issue, the AAT also considered indirect issues such as whether the purchase of 'The Basics of Dianetics and Scientology' by Ron L Hubbard was an investment of the Fund and whether the course attended by Mr Driscoll was for the purpose of the Fund or for personal purposes.

The AAT held that in determining whether or not the Commissioner should exercise a discretion to issue a Notice of Compliance under the SIS Act, particular attention was directed to the tax consequences if the Fund were treated as non-compliant and the seriousness of the contraventions.

It is relevant that the object of the Act is to make '…provision for the prudent management of superannuation funds. Using superannuation funds for personal matters and to confer benefits extraneous to their objective, namely providing retirement benefits and death benefits, is antithetical to that object.' The AAT also found that regard should generally be had to the 'need to deter, specifically and generally, people from using superannuation monies for personal purposes'.

Notwithstanding the fact the Scientology books were purchased with a personal credit card and kept in Mr Driscoll's room, the AAT was inclined to find that the Scientology books were an investment of the Fund (mainly because they were leather bound, a limited edition and kept in their original packaging).

However, the course conducted by the Church of Scientology was more likely undertaken by Mr Driscoll for personal purposes associated with him making money, so to deliver him an immediate benefit, and not much at all to do with the Fund, other than he made contributions to it.

On the facts, the AAT held that, not only did the Fund fail to lodge its annual returns within the prescribed time, but significant parts of the Fund's assets were used to confer personal benefits to Mr Driscoll. In particular, the use the of the Fund's bank account between May 2009 to June 2009 as a personal bank account 'is particularly egregious because it completely ignored the very purpose of the Fund'.

The AAT held that the discretion to issue a Notice of Compliance in respect of the Fund for the 2009 year should not be exercised.

Citation *Driscoll and Commissioner of Taxation (Taxation)* [2021] AATA 3892 (M Reitano, Sydney)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2021/3892.html

1.4 Southern Cross Community Healthcare – NSW payroll tax

Facts

Southern Cross Community Health Care Pty Ltd operates a business which arranges support workers or attendant care workers (**Support Workers**) to provide in-home attendant care services (**Care Services**) for the disabled, frail and aged (**Participants**).

These arrangements are made by Southern Cross at the request of various authorities (**Funders**) who pay Southern Cross for the provision of the services under contractual arrangements between Southern Cross and the Funders. The Support Workers are then paid by Southern Cross and the Support Workers have no contractual arrangement with the Funders or Participants.

Generally, after a Participant received hospital care, and his or her condition had stabilised, and a hospital or Local Health District wished to discharge the Participant into the community, the Participant would be discharged to Southern Cross or some other health care provider.

Before the Participants were discharged from the hospital, the Support Worker attended the hospital and was trained by hospital staff in caring for the particular Participant. Once trained, the Support Worker provided care for the Participant in hospital and, after discharge, provided care similar to the care provided in hospital but modified for the home environment of the particular Participant. High needs Participants continued to have contact with the specialist medical teams throughout their life and receive ongoing assessments of their care needs.

The Support Workers performed a range of services for Participants, generally in the residences of the Participants. The services included clinical care services (maintaining mechanical ventilation and wound management), personal care assistance (help with showering), and domestic assistance (household cleaning). Ultimately, the Support Workers performed the tasks which had been determined by the Funder and the medical team as being necessary to ensure continuity of care for the particular Participant.

Most of the Funders were government agencies including Lifetime Care and Support Authority of New South Wales (a statutory corporation), NSW Health, FACS, and the NSW Trustee and Guardian. To a lesser extent the Funders also included commercial insurers and non-commercial entities such as the National Disability Insurance Agency, individual hospitals, and charities. Southern Cross entered into separate agreements with each Funder.

Once a Funder engaged Southern Cross to procure services for a Participant, Southern Cross identified relevant Support Workers who had the requisite experience and qualifications to meet the needs of the Participant. Once a Support Worker expressed interest in accepting an engagement, Southern Cross and the Funder would arrange a meeting between the Support Worker and the Participant, at which it was rare for Southern Cross to have an employee present. The Participant would either approve or not approve the involvement of the Support Worker in question. In the case of higher needs Participants, the Support Worker would receive training from the Participant's doctors and treating team, often at a hospital prior to the discharge of the Participant.

Southern Cross's Service Delivery Team was responsible for the recruitment of Support Workers and co-ordinated the rostering of Support Workers. Where a new Support Worker joined a team, the Community Support Co-ordinator 'signed off on' the Support Worker to confirm that he or she could perform the appropriate services, which included the Community Support Co-ordinator observing the Support Worker on their shifts for 4-6 weeks.

The Support Worker was provided with an Acknowledgment, Code of Conduct, Standards and Conduct sheet, and information manual. By the Acknowledgment, the Support Worker acknowledged he or she was a self-employed qualified carer, and that Southern Cross may refer clients to the Support Worker whom they were to provide services to. Further, the Support Worker could nominate his or her hours for providing services and could reserve the right to accept or reject referrals according to the convenience of the Support Worker. Southern Cross allocated shifts to the Support Worker, provided them with a Southern Cross identification card, and undertook training and periodic reviews.

The arrangements between Southern Cross and Participants were evidenced by a Service User Information Booklet in which Participants were referred to as 'service users'. The Booklet confirmed that Southern Cross was funded for various programmes by different organisations and government departments. The Participants could also choose to buy additional services from Southern Cross.

The Commissioner assessed Southern Cross for payroll tax on the basis that the remuneration paid by Southern Cross to the Support Workers in the financial years ended 30 June 2012, 2013, 2014, 2015 and 2016 (**Relevant Years**) were subject to payroll tax. The Commissioner contended that the Support Workers were common law employees of Southern Cross, and the remuneration paid to them was wages. The Commissioner considered that 'the overall substance, look and feel' of the relationship between Southern Cross and Support Workers was that of employer and employee. The Commissioner had regard to Southern Cross' website which (among other matters) posed the question to potential Support Workers: 'Why work with Southern Cross?'.

On 11 July 2017, Southern Cross received payroll tax assessments in respect of payments made to Support Workers during the Relevant Years (**Assessments**). The Assessments amounted to $6,234,619, which comprised of $6,184,685 in payroll tax and $867,731 in interest. As at 30 April 2021, the total interest (market and premium interest) claimed by the Commissioner amounted to $2,931,967.

On 9 October 2017, Southern Cross lodged objections to the Assessments. Southern Cross contended that some or all of the payments made by it to the Support Workers in the Relevant Tax Years were not subject to payroll tax

because they were made in relation to employment agency contracts and were exempt under section 40 and clause 8 to Schedule 2 of the *Payroll Tax Act 2007* (NSW).

Under section 37 of the PTA, an employment agency contract is a contract under which a person (an employment agent) procures the services of another person (a service provider) for a client of the employment agent.

Under section 40(1) of the PTA, any amount paid or payable in connection with an employment agency contract is deemed to be wages, unless the benefit or payment is exempt from payroll tax under Part 4, had the service provider been paid by the client as an employee (section 40(2) of the PTA). Section 40(2) of the PTA only applies if the client has given to the employment agent a declaration to that effect and in the form approved by the Commissioner.

One of the exemptions in Part 4 of the PTA deals with health care service providers. A 'health care service provider' is a public hospital or a hospital that is carried on by a society or association otherwise than for the purpose of profit or gain to the individual members of the society or association. Broadly, the exemption applies if:

1. the wages are paid or payable for work of a kind ordinarily performed in connection with the conduct of a health care service provider; and
2. the wages are paid or payable to a person engaged exclusively in that kind of work.

Southern Cross contended that its arrangements with Support Workers constituted a contract under which Southern Cross, as employment agent, procured the services of a Support Worker, as service provider, for a Funder, as a client. However, the Commissioner contended that Southern Cross procured the services of a Support Worker for a Participant, as the client (rather than the Funder as the client).

In the alternative, Southern Cross contended that if its arrangements with the Support Workers were not employment agency contracts and not exempt under the PTA, some of the payments fell within the relevant contract exemption in section 32(2)(b)(iii) of the PTA (i.e., the 90-day rule).

On 18 April 2018, the Commissioner disallowed the objections.

Southern Cross applied to the Supreme Court seeking a review of the Commissioner's Assessments.

Issues

The issues the Court considered were as follows:

1. Whether the arrangements between Southern Cross and the Support Workers are employment agency contracts under section 37(1) of the PTA.
2. If the arrangements between Southern Cross and the Support Workers are employment agency contracts, whether the exemption in clause 8 to Schedule 2 of the PTA applies.
3. If the arrangements between Southern Cross and the Support Workers are not employment agency contracts, whether the Support Workers are ‘employees’ of Southern Cross by reference to the common law meaning of employees.
4. If the arrangements between Southern Cross and the Support Workers are not employment agency contracts and the Support Workers are not common law employees, did the payments to the Support Workers satisfy the 90-day exemption in section 32(2)(b)(iii) of the PTA.
5. If Southern Cross is liable to pay payroll tax, whether any amount of interest should be remitted, in whole or in part, under section 25 of the *Taxation Administration Act 1996* (NSW).

Decision

<u>Issues 1 and 2 – Employment Agency Contracts</u>

The Court considered it was necessary to identify who was the client of Southern Cross for the employment agency provisions, noting that it was person who retained Southern Cross to procure the services of the Support Worker. The Court conclude that, as Southern Cross procured the care services to be provided to the Participant under the contractual obligation that Southern Cross had undertaken to the Funder, the Funder was the client of Southern Cross.

The Court next considered whether the services provided by the Support Worker were 'in and for the conduct of the business' of the Funder. The Court had regard to the fact that Southern Cross provided the Support Workers with an identification card, controlled their roster and training, provided periodic reviews, the Support Worker held themselves out to be associated with Southern Cross (not the Funder) and that the Support Worker reported to Southern Cross with any issues (not the Funder).

The Court considered that Southern Cross was effectively acting as a barrier between the Support Worker and the Funder, such that the Support Worker was not in an employee-like relationship with the Funder. The Court stated that the connections between the Funder and the Support Worker were, at most, indirect and characterised as financial and prudential rather than employee-like. While Southern Cross, the Support Worker and the Funder were working towards a common goal, namely the best outcome for the Participant, the Court was not satisfied that the requirements of section 37 of the PTA had been met.

The Court also considered whether the exemption in clause 8 to Schedule 2 of the PTA applies. Southern Cross contended that because 99% of the payments to Support Workers in the Relevant Years was for work having a sufficient connection to a public hospital or Local Health District, the requirements in clause 8 were satisfied.

The Court was not satisfied that the exemption was met. The Court stated that Southern Cross had failed to show that the work undertaken by the Support Workers was 'work of a kind ordinarily performed in connection with the conduct of a health care service provider'. The Court determined that the work ordinarily undertaken in a public hospital or by a Local Health District was materially and qualitatively different from the work undertaken by Support Workers in the home or residence of a Participant. Where hospitals were focussed on acute care and medical emergencies, where the purpose was to diagnose, treat and stabilise the condition of a patient so that the patient could be discharged, the evidence indicated that the aged care and disability services provided involved activities such as assistance with transport, shopping for groceries and managing money or paying bills.

The Court also considered the issue of whether a declaration had been made by the Funders such that the exemption in section 40(2) of the PTA was enlivened. The Court found that Southern Cross did not obtain declarations at the time of entering into the arrangements with the Funders or at any time during the Relevant Years. Rather, Southern Cross waited until between two and nine years after the end of the last of the Relevant Years before requesting a declaration from Funders. Given that the Funders were not parties to the proceedings, the Court was not prepared to make any declarations that would facilitate the provision of declarations by the Funders.

Issue 3 – Employee or Independent Contractor

The Court concluded that Southern Cross's relationship with Support Workers lacked the elements necessary for the relationship to be characterised as an employment relationship at common law. The Court had regard to the following factors:

1. the physical recipient of the services provided by Support Workers was the Participant. The Participant was the ultimate controller of the Support Worker;
2. the Participant could refuse the services of any Support Worker, either at the outset or after the Support Worker had commenced providing care and was not required to justify such a decision or give notice;
3. the Support Worker could refuse to provide care to any Participant, either at the outset, or after the Support Worker had commenced providing care and was not required to justify the decision or give notice;
4. the Participant could ask the Funder, at any time, that Southern Cross no longer be engaged to provide care;
5. Southern Cross could stop offering engagements to a Support Worker at any time;
6. a Support Worker had the absolute discretion to determine how many hours and on which days he or she wished to perform work and for which Participants he or she was to provide services;
7. the duties plan prepared by Southern Cross was merely a guide, and the Support Worker was free to control how he or she performed the care tasks that were required;
8. a Support Worker was free to provide care through other agencies or directly to other Participants and could build goodwill through his or her relationship with a Participant;
9. Support Workers were not directly supervised by Southern Cross in the performance of their work. While Southern Cross conducted 6-monthly and 12-monthly reviews to ensure the Participant was satisfied with the care programme, the Support Worker was not necessarily present at the meetings; and
10. training was provided by Southern Cross and also the treating doctors and medical staff.

Issue 4 – 90-day Exemption

Where there is no employment agency arrangement, and the Support Workers are not employees, it followed that the payments made to the Support Workers were made under relevant contracts under section 32(1) of the PTA.

A relevant contract does not include a contract under which the designated person during a financial year in the course of a business carried on by the designated person is supplied with services for or in relation to the performance of work where those services are provided for a period that did not exceed 90 days in that financial year.

Southern Cross contended that the provisions should be construed such that the prerequisites of section 32(2)(b)(iii) will be satisfied by reference to numbers of hours worked by Support Workers in a year rather than by reference to the number of days on which a particular Support Worker worked during a year and that 8 hours worked is equivalent to one day. For example, it contended that working 720 hours during the year approximates to 90 days' work and that the exemption ought to apply on this basis.

Although the word 'day' is not defined in the PTA, the Court rejected the construction contended by Southern Cross on the basis that the exemption is concerned with the regularity and continuity of the relationship between the contractor and the employer. The interpretation preferred by Southern Cross did not meet this object.

Issue 4 – Interest

In relation to market component of interest, the Court was not persuaded there was any basis for remitting the market rate component of the interest. There was no evidence to suggest that it was not a fair reflection of the value of money and Southern Cross had the benefit of the use of the funds.

In relation to the premium component of interest, the Court remitted the premium rate of interest from 8% to 4% on the basis that significant contentions advanced on behalf of Southern Cross were accepted by the Court (notably, that the Support Workers were not employees).

COMMENT – it appears that in this case the 90 day exclusion was unable to be met on the basis of days worked. Where the 90 day exclusion is to apply it is important that evidence is kept to show the exclusion is available. Note that there is a 'replacement method' that Revenue NSW will accept in determining whether the 90 day requirement is met, it is not clear why it was not argued in this case https://www.revenue.nsw.gov.au/help-centre/resources-library/rulings/payroll/pta035v2

Citation *Southern Cross Community Healthcare Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 1317 (Emmett AJA, Sydney)
w http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2021/1317.html

1.5 XQDX – R&D claims by company or trust?

Facts

XQDX is the trustee of a trust. CJB is the sole director and shareholder of XQDX.

The business carried on by XQDX was the development and manufacture of various commercial and residential shade solutions ('off the shelf' products). Customers were able to request custom façade shading solutions tailored to their specific needs, and this according to XQDX, required research and development (**R&D**).

The business was initially commenced and carried on by CJB's father, JB, through a company as trustee of the B Family Trust. XQDX acquired the business on 31 December 2008.

LMB, CJB's wife, is the administration manager of XQDX.

James Loaring of Loaring Consulting was engaged by XQDX to assist with preparation and lodgement of XQDX's registration of R&D activities and determination of its R&D tax claims for the 2010, 2011, 2012 and 2013 financial years.

In the financial years ended 2012 and 2013, XQDX claimed notional deductions for R&D expenses connected with production of façade sun shading solutions for residential and commercial buildings for the general public, architects, designers and builders. This resulted in XDDX claiming refundable tax offsets of $624,805 in the 2012 year, and $548,338 in the 2013 year.

The tax offsets claimed by XQDX were disallowed by the Commissioner in a comprehensive risk review and audit. As a result of the audit, on 26 July 2016 the Commissioner issued XQDX with an amended assessment and assessed XQDX for shortfall penalties of $156,201 for 2012 and $137,084 for 2013.

On 23 September 2016, XQDX objected to the amended assessments and penalty assessments.

On 19 December 2018, the Commissioner disallowed the objection in full.

On 8 February 2019, XQDX applied to the AAT for review of the objection decision.

Under the ITAA 1997, an R&D entity is entitled to a tax offset for notional deductions between $20,000 and $150,000,000. It is entitled to deduct expenditure it incurs during that year to the extent that the expenditure is incurred on one or more R&D activities, for which the R&D entity is registered under section 29A of the *Industry Research and Development Act 1986*.

Under the ITAA 1997 an 'R&D entity' must be a body corporate and, therefore, it would not have been sufficient for the Trust to have incurred the expenditure. It was necessary that the expenditure was incurred by XQDX.

LMB provided a statement that:

1. the R&D activities were conducted by XQDX in its own right;
2. XQDX in its own right and as the trustee of the Trust operates a MYOB accounting system covering off-the-shelf contracts and R&D activities;
3. XQDX in its own right and as trustee of the Trust are grouped for GST purposes which results in the filing of a single BAS statement;
4. expenditure incurred by the Trust including salaries and wages of its employees and some overheads which relate to R&D activities are apportioned in the tax accounting records between the XQDX in its own right and the Trust;
5. XQDX reimbursed the Trust for expenditure incurred in respect of staff and overhead costs properly attributable to R&D activities by means of a loan account set up for that purpose (**Loan**). The R&D offsets to which the XQDX became entitled were accounted for via the loan account being credited by way of set off.

Martin Langridge, a specialist principal in the forensic practice of Deloitte, provided a report to the AAT that, in his opinion, the accounting of the R&D activities had been properly recorded in XQDX's financial statements, notwithstanding the existence of a loan due to the Trust, the repayment of which had been deferred and was dependent on future tax refunds being received by XQDX and future sale or licencing of the IP of the products.

In respect of the Loan, partial repayments of the Loan were made using the tax refunds relating to the R&D claims, however a significant balance still remained with no formal agreement in place to determine the method of repayment of the balance of the Loan.

In carrying out its activities, XQDX engaged subcontractors to undertake work under its direction and control. Employees of the Trust also undertook such work as required. Common employees used for both R&D activities and non-R&D activities were simultaneously tracked by the accounting system, for live and accurate costings of all projects.

The Commissioner contended that XQDX was not the benefactor of the R&D activities. It submitted that the contractors and suppliers generally included the Trust's ABN on their invoices for services performed or goods provided, and therefore considered the Trust as the benefactor of the R&D activities. Further, neither XQDX nor the Trust held any patents or trademarks in relation to the R&D activities.

Issues

1. In each of the relevant years, was the amount claimed by XQDX as a notional deduction incurred by XQDX in undertaking eligible R&D activity conducted 'for' XQDX?
2. Has XQDX proved that the assessments issued by the Commissioner and penalties imposed were excessive?
3. Was XQDX entitled to claim a notional deduction for the 2012 and 2013 financial years, respectively, as a validly claimed tax offset?

Decision

Issue 1: Were the amounts claimed incurred by XQDX?

An amount is 'incurred' by a taxpayer if they have a presently existing liability to which they are definitively committed and completely subjected. This does not include a loss or expenditure which is no more than impending, threatened or expected or an obligation which is contingent.

The AAT had regard to the following in determining whether XQDX *incurred* the claimed amounts:

1. the Trust purchased, owned and ran the business, and its employees undertook the R&D work;
2. the R&D activities were conducted to assist the business owned by the Trust;
3. the Trust received all income from the business in the relevant years, and XQDX did not declare any income for the relevant years;
4. the Trust was the major benefactor from the R&D activities and not XQDX;
5. invoices in relation to expenditure were made out to the Trust's ABN;
6. the Trust received payment from the customers for a completed R&D job;
7. the Trust paid withholding tax for the employees and the Trust leased the relevant premises;
8. the Loan evidenced that it was the Trust and not XQDX that funded the R&D activities, and the lack of obligation to pay the Loan undermined the contention that the expenditure had been incurred;
9. there was no evidence that XQDX owned or owns the IP arising out of the R&D activities;

Therefore, the AAT concluded that XQDX did not incur the expenditure on the R&D activities, it was the Trust that incurred this expenditure. Therefore, XQDX could not notionally deduct the expenditure under section 355-205 of the ITAA 1997 as it did not incur the expenditure in its own right.

Penalties

Taxpayers are liable for a shortfall penalty if they make a statement which is not reasonably arguable. The AAT was not satisfied that the claims for notional deductions made by XQDX were reasonably arguable, as the Trust purchased, owned and operated the business, the Trust employed and supervised the personnel who undertook the R&D work, and all the funds actually used for the R&D work came from the Trust.

The choice of XQDX to purchase and operate the business through a trust structure, was presumably due to the taxation or liability advantages in doing so. By making claims for R&D deductions in the circumstances that it did, XQDX had failed to take reasonable care to ensure that it had a proper basis for doing so.

Therefore, the AAT was not satisfied the XQDX had discharged its onus of proof under section 14ZZK of the TAA that the penalties were excessive.

In respect of the remission of the penalty, the AAT found that CJB and LMB had acted on and put in place structures based on relevant professional advice. Further, the AAT considered that XQDX may struggle to survive if it was required to pay the full amount of the tax shortfalls, penalties and the interest.

The AAT determined that a partial remission of penalties was appropriate. Whilst it chose the advantages of a trust for taxation purposes, it also had the disadvantages of not being able to claim R&D tax deductions. On balance of these factors, the AAT reduced the penalty from 25% to 15%.

Citation *XQDX and Commissioner of Taxation* (Taxation) [2021] AATA 4070 (DP Boyle, Perth)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2021/4070.html

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1.6 Carvell – taxpayer burden to prove correct taxable income

Facts

John Carvell failed to lodge tax returns for the 2015, 2016 and 2017 years. As a result the Commissioner carried out an audit of John's tax affairs.

There were a number of bank deposits for which John could not provide a satisfactory explanation.

John, in most cases, contended that the deposits were repayments of loans or the proceeds of a sale of a 'hot rod' that he refurbished and sold. John had no records of the registration of the car or the sale of the car.

The Commissioner assessed John on the basis that the unproven deposits were assessable income. The Commissioner also assessed John to a default assessment penalty of 75%.

John objected to the assessments.

On 18 March 2019, the Commissioner allowed the objection in part, for the 2015 and 2017 years. However, the Commissioner disallowed the objection to the assessment for the 2016 year and the imposition of penalties.

On 22 March 2019, John applied to the AAT for a review of the objection decision in relation to each of the income years, the penalties and interest charged.

John made no attempt to prove his income for each of the income years. John only made attempts to disprove that the unidentified deposits were income.

John submitted at the hearing that he earned no income in any of the years. However, this was quickly disproved when the court pointed to interest income earned, and an amount deposited into his bank account labelled '*CBA Wages*'.

In relation to the remission of penalties, John submitted that a breakdown of his marriage affected his mental state and that he had heart surgery in 1999.

Issues

1. Whether John proved what his taxable income was in respect of each of the 2015, 2016 and 2017 years?
2. Whether any of the penalties should be remitted?

Decision

Whether John has proved primary assessments were excessive?

Member Reitano in the AAT commented as follows:

> *2. This case demonstrates the difficulties that confront a taxpayer who has for whatever reason, failed to lodge a tax return and has left it to the Commissioner to assess their taxable income for himself, an assessment with which the taxpayer may ultimately disagree.*
>
> *3. It also illustrates the common misunderstanding that the Commissioner's default assessment, based on the amounts of undisclosed deposits, is not an 'in fact' or 'actual' assessment which a taxpayer can overturn in whole or in part upon review by proving that some or all of deposits have an explanation. The Commissioner may or may not adopt that approach in making his decision, but it has no part in the review process before this Tribunal. The position is more complex as I explain below.*

Consistent with the above comments, Member Reitano made it clear that John had to prove what his income was for each of the 2015, 2016 and 2017 years and that it was not sufficient for him to disprove that the unidentified deposits were income.

Member Reitano determined that John did not prove what his income was, as there was no attempt made to set this out in either his Statement of Facts, Issues and Contentions nor any supplementary evidence what his actual income was. Accordingly, John had not discharged his onus to prove the assessments were excessive.

Whether the penalty assessments were excessive?

Member Reitano noted that the Commissioner has a power under section 298-20 of Schedule 1 of the *Taxation Administration Act 1953* (Cth) to remit administrative penalties. PS LA 2014/4 provides guidance as to how the Commissioner considers this discretion should be exercised. Relevant considerations include: whether the taxpayer has a genuine, yet mistaken belief that the lodgment was not required; that the taxpayer understood his obligations to lodge, but circumstances beyond his ability affected his ability to lodge; or whether the penalty imposed caused an unjust result for the taxpayer.

Member Reitano concluded that there was no basis for remitting the penalty tax. Member Reitano acknowledged the mental and physical difficulties experienced by John, but held that John failed to demonstrate how these events affected his ability to lodge tax returns in the relevant years.

COMMENT – a taxpayer's requirement to meet a burden of proof that requires them to prove their actual income was explored in detail recently in *Sibai v Commissioner of Taxation* [2021] FCA 1353 - http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2021/1353.html

Citation *Carvell and Commissioner of Taxation (Taxation)* [2021] AATA 3627 (Member R Reitano, Brisbane)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2021/3627.html

1.7 ASZ21 – cryptocurrency and declaratory relief in tax matters

Facts

ASZ21 is an individual who purchased cryptocurrency known as etherium (ETH). During the income year 2021, ASZ21 made two disposals of ETH. It was assumed, for the purposes of the hearing, that ASZ21 held the ETH on capital account, rather than revenue account.

The first disposal was made to purchase a non-fungible token (NFT) on the Ethereum blockchain. The NFT is part of a virtual collection that is displayed in ASZ21's virtual house.

The second disposal was via an online marketplace to third parties for a certain amount of Australian dollars.

On 23 December 2020, before lodging his income tax return for the year ended 30 June 2021, ASZ21 filed an application in the Federal Court requesting the Court to exercise its discretion to make a declaration that the ETH is a personal use asset and that the capital gains on the disposals should be disregarded under section 118-10(3) of the ITAA 1997. Section 118-10(3) provides that capital gains on personal use assets are disregarded when the cost base of the asset $10,000 or less.

On 19 February 2021 the Commissioner filed an interlocutory application seeking summary dismissal of the proceedings on the basis that:

1. ASZ21 has no reasonable prospect of successfully obtaining the declaratory relief sought; and/or
2. the proceeding is an abuse of the process of the Court.

No reasonable prospects

The Court is able to give judgment for one party against another where the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding. The case does not need to be 'hopeless' or 'bound to fail' for it to have 'no reasonable prospect of success'.

The Commissioner submitted that summary dismissal was appropriate because ASZ21 had not made use of the assessment, objection and review procedures available to him under Part IVC of the TAA. The Commissioner argued that the proceedings had no real prospect of success, because even if ASZ21 proved the facts in relation to his claim, the Court would exercise its discretion to decline to grant any declaratory relief.

Abuse of process

The Commissioner also submitted that the proceeding was an abuse of process in the sense that the wrong process was being used. That is, a declaratory proceeding, rather than a proceeding under Part IVC of the TAA.

On 15 April 2021 there was a hearing in relation to the interlocutory application. ASZ21 made submissions that his primary objective was to have the issues determined expeditiously. The Commissioner made submissions that the assessment and objection process under Part IVC of the TAA was a more appropriate vehicle to determine the issues raised by the proceeding. Following the hearing the parties agreed to consent orders, which set out a timetable of steps relating to the assessment and objection processes under Part IVC. The consent orders stated that the parties had agreed to use 'reasonable endeavours' to comply with the timetable. It was ordered that the further hearing of the Commissioner's interlocutory application seeking summary dismissal be adjourned.

The Commissioner accepted in written submissions that the existence of the Part IVC procedures did not prevent a taxpayer from seeking declaratory relief. It was therefore necessary for the Commissioner to establish something about the specific facts that made the proceedings an abuse of process. ASZ21 explained that the reason for commencing proceedings was to obtain an early determination of the issues, in the hopes that it would be more expedient than the Part IVC process.

The Commissioner also submitted that the declaratory relief application would have no use following the issue of a tax assessment. If declaratory relief were granted before an assessment was made, those declarations (unless set aside on appeal) would be binding on the Commissioner. Once a notice of assessment is issued, the assessment can only be challenged in Part IVC proceedings.

After ASZ21 filed his income tax return for the 2021 income year, the Commissioner took the view that it was not possible to comply with the timetable. In the Commissioner's view, ASZ21's income tax return for the 2021 income year, as well as his income tax returns for the 2016-2020 income years, which were only filed recently, raised issues that required review or investigation.

The Commissioner considered that the information contained in ASZ21's income tax returns for the 2016 to 2021 income years posed a question about whether the cryptocurrency was held on capital or revenue account. The Commissioner contended that there would be no point resolving whether the ETH was a personal use asset, if the ETH was not held on capital account.

The Commissioner refused to provide a commitment to refrain from making an assessment and issuing a notice of assessment to ASZ21 for the 2021 income year until the resolution of the declaratory relief proceeding.

Issues

1. Does ASZ21 have no reasonable prospect of successfully obtaining the declaratory relief sought?
2. Is the proceeding an abuse of the process of the Court?

Decision

No reasonable prospect of success

Moshinsky J rejected the Commissioner's argument. Moshinsky J held that the question whether the Court would, in the exercise of its discretion, decline to grant the declaratory relief was a matter that needed to be considered at a final hearing in the context of a full consideration of the facts and circumstances of the matter.

Abuse of court process

Moshinsky J did not accept the Commissioner's abuse of process submission.

Moshinsky J noted that he thought that a Part IVC process would be a more appropriate procedural vehicle to determine the issues, but found that the proceeding did not amount to an abuse of process.

Moshinsky J did not accept the Commissioner's submission concerning a lack of utility once an assessment is issued because at the time of the hearing of the interlocutory application, the Commissioner had not yet issued a

notice of assessment to ASZ21 for the income year ended 30 June 2021. Therefore, at the time, the proceedings were not lacking utility on that basis.

Moshinsky J held that the existence of a potential issue as to whether the disposals were on capital account (as was assumed) or on revenue account (as the Commissioner may wish to contend following a thorough review of ASZ21's tax affairs), did not mean that there was no reasonable prospect that the Court would grant the declaratory relief sought or that the proceedings were an abuse of process.

Moshinsky J ordered that the Commissioner's interlocutory application be dismissed.

Citation *ASZ21 v Commissioner of Taxation* [2021] FCA 1304 (Moshinsky J, Melbourne)
w https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2021/2021fca1304

1.8 Dezfoolian – forex gains and losses

Facts

In 2011, Alireza Dezfoolian, an Australian resident, transferred $180,000 from his Australian bank account to an account with Maskan Bank in Iran due to higher interest rates. Maskan Bank periodically credited interest to Alireza's account which was designated in Iranian Rials (**IRR**).

On 21 October 2018, Alireza transferred most of the balance of his account with Maskan Bank to his Australian bank account that was denominated in Australian dollars.

Due to the exchange rate differences between the time of the deposit and when the balance was transferred back, the amount transferred was less in Australian dollars then $180,000.

Alireza considered that he had suffered a loss in relation to the arrangement and, accordingly, did not include the interest credited to his account at Maskan Bank in his Australian income tax returns.

In his income tax returns for the income years ended 30 June 2019 and 2020 Alireza claimed for losses at the *Item 9 Gifts and Donations*. In the income year ended 30 June 2019 the amount claimed was $117.800 but Alireza also claimed carried forward losses of $110,000. When preparing his tax returns, Alireza stated he had called the ATO but the line was busy and he was not able to confirm that he was adopting the correct approach.

Alireza accepted that the losses claimed were not gifts or donations but that this was his way of claiming the loss on the money transferred to and from Maskan Bank. In his tax return, Alireza included a comment: *'Capital loose (sic) (not working)'.*

The Commissioner issued amended assessments for the income years ended 30 June 2016, 30 June 2017 and 30 June 2018 treating the interest credited Alireza's income. The Commissioner calculated the interest derived by converting it to Australian dollars on using a certain exchange rate at the time it was credited to Alireza's account with Maskan Bank.

The Commissioner also corrected Alireza's losses claims in the income years ended 30 June 2019 and 30 June 2020 allowing Alireza a foreign exchange loss of $151,946 in the year ended 30 June 2019, which did not result in any tax shortfall. The adjustment for the income year ended 30 June 2020 resulted in Alireza having a shortfall of $39,935 for that year.

The Commissioner also imposed administrative penalties for the income years ended 30 June 2019 and 30 June 2020 as follows:

1. year ended 30 June 2019: a penalty for a false or misleading statement that did not result in a tax shortfall - $4,500; and
2. year ended 30 June 2020: a penalty of 25% of the shortfall for a failure to exercise reasonable care.

Alireza objected against the assessments and, after his objections were disallowed, applied to the AAT for review of the objection decisions.

During the AAT proceedings, the ATO accepted that the exchange rate that they had used to calculate the interest income in Australian dollars was not the appropriate and instead used a rate that was more favourable for Alireza. They also agreed to treat the interest income as being derived on 31 December each year with it not being clear at what time the interest had been received.

Issues

1. Whether the interest was income of Alireza in the income years ended 30 June 2016, 30 June 2017 and 30 June 2018?
2. Whether the penalties were excessive?

Decision

Interest income

The AAT noted that Alireza did not dispute that interest was credited to his Maskan Bank account and, therefore, there was no legal basis to conclude that the interest as not derived when it was credited his account and the Commissioner was correct to assess Alireza to income tax on that basis.

Penalty assessments

The AAT considered whether Alireza had made false or misleading statements in relation to the claims for losses. The AAT accepted that Alireza had sought to communicate that the losses claims were not for gifts or donations but it did not consider that this comment prevented the statements from being false or misleading.

Accordingly, the penalty of $4,500 for the income year ended 30 June 2019 was appropriately imposed.

The AAT then considered whether Alireza had exercised reasonable care in the income year ended 30 June 2020.

The AAT noted that Aliraza was not an unsophisticated man (he was a software engineer) and did not consider the attempt call to the ATO was sufficient to discharge his burden of proving that he exercised reasonable care.

Accordingly, the AAT found that Alireza did not exercise reasonable care.

The AAT also considered whether it is appropriate in all the circumstances to wholly or partly remit the penalty but, as Alireza did not make any additional arguments on remission, did not consider that it was appropriate to remit the penalties in full or in part.

TRAP – while most individuals are subject to a 2-year time limit for amendment of assessment, in relation to foreign sourced income, the period is 4 years under item 5 of regulation 14 of the *Income Tax Assessment (1936 Act) Regulation 2015*.

Citation *Dezfoolian and Commissioner of Taxation (Taxation)* [2021] AATA 3991 (SM Olding, Sydney)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2021/3991.html

1.9 Buddhist Society of WA – school building fund

Facts

The Buddhist Society of Western Australia Inc was incorporated in 1973 and administers the Bodhinyana Monks Monastery, the Dhammasara Nuns Monastery, the Jhana Grove Meditation Retreat Centre and the Dhammaloka Centre.

The stated objectives of the Society's constitution included the propagation of the teachings of the Buddha and the practice and realisation of Buddhist Principles. Additional objectives were to establish and maintain existing and new teaching facilities to make available the teachings and practices of the Buddha to the general public and to establish, operate and maintain schools and colleges and facilities in the State of Western Australia.

The Society was endorsed as a deductible gift recipient for the operation of the Dhammaloka Buddhist Centre Building Fund under Subdivision 30-BA of the ITAA 1997.

On 17 November 2017, the Commissioner commenced a review of the DGR status of the Society in respect of the funds associated with all four buildings.

The Society provided information to the Commissioner regarding the use of the Dhammaloka Centre. The Dhammaloka Centre was open during normal business hours, and was the main teaching and administrative centre for the Society. The Centre comprised of the Dhamma Hall, library (being Western Australia's largest Buddhist library), meeting room, monks' quarters, offices, existing hall and toilets.

Regular activities in the centre included guided mediation classes, chanting, Dhamma talks by a senior monk and Sunday children's Dhamma classes, Sutta Class or Buddhist Study Group and YouTube live-streaming of talks, meditation lessons, instruction and discussion.

The Commissioner accepted that the Society was entitled to DGR status for the funds associated with the Bodhinyana Monastery, the Dhammasara Monastery and Jhana Grove on the basis that each of those places are schools. The Commissioner did not accept that the fund for the Dhammaloka Centre was a school.

On 4 October 2019, and with effect from that date, the Commissioner revoked the DGR endorsement for the Dhammaloka Buddhist Centre Building Fund, on the ground that the Society was not entitled to be endorsed with DGR status under section 30-125(2) of ITAA 1997 because the Fund did not satisfy the requirements of Item 2.1.10 of the table at section 30-25(1) of ITAA 1997. That item provides DGR status for public funds for buildings used as a school or college.

The Commissioner's reasons in finding that the Dhammaloka Centre was not a building used as a school was because:

a) it was not a 'school' within the ordinary meaning of that word, as it was not a place with the primary function of providing regular, ongoing and systematic instruction in a course of non-recreational education; and
b) any school use was not substantial, with other uses of the building being not for the use as a school.

In making that decision, the Commissioner relied upon *Taxation Ruling TR 2013/2: Income tax: school or college building funds*. Paragraph 32 of TR 2013/2 states that a building will not be regarded as a school building where its non-school use is of such kind, frequency or relative magnitude as to preclude the conclusion that a building has the character of a school building

Other relevant findings made by the Commissioner were that the Society failed to provide any specific curriculum, there was no formal enrolment process other than for the children's Dhamma classes, and no formal assessment or qualification was gained by visitors attending senior monastic teachings at the Centre. On that basis, the Commissioner contended the Dhammaloka Centre did not have the character of a school but rather was a place where Buddhist teachings are made available to the general public.

On 1 November 2019, the Society objected to the revocation decision of the Commissioner.

On 6 April 2020, the Commissioner decided to disallow the objection.

The Society appealed to the Federal Court on two alternative processes:

a) first, on appeal against the objection decision under pursuant to section 14ZZ(1)(a)(ii) of the TAA; and
b) alternatively, an application for review by the Court of the objection decision under section 5 of *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Issue

Whether the Dhammaloka Centre is a school or college for the purpose of Item 2.1.10 of section 30-25(1) of ITAA 1997?

Decision

Appeal

The Commissioner raised a threshold issue against the Society's appeal to the effect that the Society had failed to discharge its evidentiary onus.

The Society tendered at the hearing a bundle of documents purporting to be the information that was provided to the Commissioner in the ATO review. The Society did not attempt to prove the facts asserted in the documents within the trial bundle beyond simply tendering the documents by affidavit evidence or otherwise.

The Commissioner contended that the documents were incapable of proving themselves and, without more, could only be considered as assertion.

The Court agreed with the Commissioner, finding that the Society had not put any material before the Court that was in a form capable of discharging its burden of proof. On the basis that there was no relevant evidence in support of the appeal, the appeal was dismissed.

Review under ADJR Act

Independently of the Part IVC appeal, the Court considered the review brought by the Society under the ADJR Act. The Court considered its task on review was to determine whether the objection decision was an improper exercise of the Commissioner's power and/or involved an error of law.

At hearing, the Society submitted that it was not part of the Buddhist tradition to provide written qualifications or certificates. An experienced abbot or spiritual teacher would be able to assess the mental development of an individual and deem whether that individual had reached an adequate standard of qualification. In addition, a key purpose of the Centre was to convey the considerable detail of the texts found in the Buddhist Pali Cannon, which is comprised of an external set of volumes. The Society further submitted the Dhamma teachings and meditation classes given at the Dhammaloka Centre are to encourage the teaching, practice and realisation of Buddhist principles in accordance with the Society's objectives.

The Society asserted that the Commissioner was incorrect in applying TR 2013/2, which states at paragraph 14 and 18 that:

> '14. In order for there to be a school for the purposes of Item 2.1.10, there must also be an educational organisation which:
>
> - has a distinct identity; and
> - provides regular, ongoing and systematic instruction in a course of non-recreational education.
>
> ...
>
> 18. The presence of the following factors indicate that an organisation is providing instruction as a school for the purposes of Item 2.1.10:

- a set curriculum, instruction or training provided by suitably qualified persons;
- the enrolment of students;
- some form of assessment and correction; and
- the creation of a qualification or status which is recognised outside of the organisation.'

The Society contended that the assertions in TR 2013/2 were inconsistent with the case authorities.

The ordinary definition of 'school', being a place where people come together for the purpose of being instructed in an area of knowledge or of activity was applied in the High Court case of *Cromer Golf Club Ltd v Downs (1973) 47 ALJR 219* and followed in the Federal Court cases of *Commissioner of Taxation (Cth) v Leeuwin Sail Training Foundation Ltd* [1996] FCA 626 and (1996) 68 FCR 197 and *Commissioner of Taxation v Australian Airlines Ltd* [1996] FCA 935; (1996) 71 FCA 446.

The Court noted that *Cromer Golf* and the cases which followed it adopted the ordinary usage of the term 'school' and did not impose additional requirements such as those appearing in TR 2013/2. In particular, none of those cases adopted the phrase 'regular, ongoing and systematic instruction' in considering whether an entity was operating a 'school'.

The Court also considered that the ordinary meaning of 'school' did not require the course of education to be vocational as opposed to recreational, noting that *Cromer Golf* identified schools of recreational education such as ballet or drama. The Court considered that the assertions in TR 2013/2 that a school must satisfy non-recreational or vocational requirements were inconsistent with Australian law, and that 'regular, ongoing and systematic' instruction was an inappropriate assessment tool. In addition, there was no requirement under *Cromer Golf* that the person receiving the education must receive a certificate or some other recognition for completion of a course.

For those reasons, the Court found the Commissioner had applied the wrong definition of school, constituting an error of law sufficient to grant relief under section 16 of the ADJR Act. The Court ordered the setting aside of the objection decision and referred the matter back to the Commissioner for further determination in light of the above reasons.

COMMENT – this case raises the interesting question of what level of education needs to be provided at a place for it to be considered a school.

Citation *The Buddhist Society of Western Australia Inc v Commissioner of Taxation (No 2)* [2021] FCA 1363 (McKerracher J, Western Australia)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2021/1363.html

1.10 Aurizon – payroll tax and interest

Facts

Aurizon Operations Limited, Australian Eastern Railroad Pty Ltd and Aurizon Network Pty Ltd (together, **Aurizon Group**) are members of the Aurizon group of companies. The Aurizon Group was a payroll tax group under the *Payroll Tax Act 1971* (Qld).

On 30 June 2017 and 13 March 2018, Aurizon Group requested a reassessment of its payroll tax liability and for the years ended 30 June 2012 to 30 June 2016.

In the payroll tax years ended 30 June 2012 to 30 June 2016, some companies within the Aurizon Group were found to have overpaid payroll tax whereas other companies within the group were found to have underpaid payroll tax. There was a net overpayment of payroll tax on a group basis of $1,886,931.24.

The Commissioner issued separate reassessment notices dated 2 August 2018. The group members found to have underpaid were assessed as liable for interest on unpaid tax pursuant to section 54(1) of the *Taxation Administration Act 2001* (Qld). The Commissioner did not pay interest to the overpaying taxpayers on the overpaid amounts.

The Commissioner granted remission of penalty tax of $1.75 million, but left in place an unpaid tax interest (UTI) amount of approximately $476,000.

Aurizon objected to the imposition of interest on the basis that there was never any payroll tax owing by the entire Aurizon Group as a whole, and in fact a refund of tax was paid.

Aurizon Group contends that for the purposes of calculating liability for UTI, the relevant liability is the net liability of the Aurizon Group as a whole rather than the individual liability of each member of the Aurizon Group.

Section 51A of the *Payroll Tax Act 1971* (Qld) states, that if a member of a group fails to pay an amount, every member of the group is liable jointly and severally to pay the amount, whether or not the member was an employer during the period to which the amount relates.

Section 54 of TAA states a taxpayer must pay UTI, accruing daily at the prescribed rate. Liability for payroll tax arises on the return date of lodgement by an employer of a return. Aurizon Group says there is no action required to be taken by the Commissioner for liability to arise to pay payroll tax on the return date. The liability arises based on the statutory provisions, and not on assessment notice issued by the Commissioner.

The Aurizon Group contended that this meant, as the group members were jointly and severally liable, the payment by one group member was sufficient to pay the liability of another group member and there was no underpayment.

In the alternative, Aurizon Group contended that the Commissioner should exercise the discretion available under section 60 of the TAA and remit the interest.

The Commissioner disallowed the objection and Aurizon applied to the QCAT for review of the decision.

Issues

1. Whether there was any unpaid primary tax owed by Aurizon Group
2. Whether there should be a remission of interest.

Decision

Was there an underpayment?

QCAT did not accept that there was no underpayment.

QCAT considered that the reliance on the overpayments was misplaced as they only became overpayments once the Commissioner reassessed the taxpayer and determined that there had been an overpayment.

Remission of all or part of the UTI

The QCAT noted that the principal error made by the Aurizon Group was identifying the correct taxpayer liable to pay payroll tax. This would be considered a failure to exercise care in administering financial affairs, which weighed against exercising the discretion to remit.

However, the mistaken payments were voluntarily revealed by the taxpayers to the Commissioner after an in-house review of the tax liabilities of the group from external expert advisers and the State having never been out of pocket. QCAT considered these factors weighed in favour of exercising the discretion to remit.

Whilst the tax was paid, albeit by the wrong taxpayer, it exceeded actual liability for tax payable and was paid to the correct State Revenue Office. QCAT also noted that the Commissioner in remitting penalty tax had already accepted the explanation offered by Aurizon Group as to why payroll tax was understated.

On balance, QCAT considered that there should be a remission of the interest.

Citation *Aurizon Operations Limited v Commissioner of State Revenue* [2021] QCAT 338
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCAT/2021/338.html

BROWN WRIGHT STEIN LAWYERS

1.11 Addy – non-discrimination Article in DTAs

Facts

In July 2015, Catherine Addy, a citizen of the UK, obtained a working holiday visa from the Australian Department of Immigration. She obtained a second such visa in July 2016 that extended the time that Catherine was permitted to remain in Australia to 20 August 2017. On 20 August 2015, Catherine entered Australia pursuant to the working holiday visa.

On 1 May 2017 Catherine left Australia to return home to the UK. During her time in Australia, Catherine engaged in casual employment as a waitress during the 2017 income year. The Commissioner issued a notice of assessment to Catherine which assessed her as a 'non-resident taxpayer' for Australian income tax law purposes for the 2017 income year and imposed tax of 15% on her taxable income.

Catherine objected to the assessment on the basis that she was entitled to take the benefit of the tax-free threshold as would an Australian citizen in her position. More specifically, Catherine submitted that she was not required to pay income tax at the rates specified in Part III Schedule 7 of the *Income Tax Rates Act 1986* (Cth) (**Rates Act**) which imposed a tax of 15% on income up to $37,000 in respect of persons who held 'working holiday' visas.

On 14 February 2018, Catherine lodged an objection against the amended assessment on the basis that she was a tax resident of Australia for the whole of the 2017 income year, the amended assessment was excessive because Catherine was entitled to the tax free threshold, and in accordance with Article 25 of the Double Tax Agreement between Australia and the UK, due to the non-discrimination provision in the treated as the 15% rate applied to Catherine's income was 'other or more burdensome' than the taxation imposed on a citizen of Australia who was also an Australian tax resident.

The objection was disallowed and Catherine appealed to the Federal Court of Australia where Logan J, relevantly, held as follows:

1. Catherine was not a resident for the *whole* of the 2017 income year but rather, that Catherine had a part year residency period which commenced on 1 July 2016 and concluded on 30 April 2017 (being one day before she left Australia for the last time to return home to live in the UK);
2. an Australian national 'in the same circumstances' as Catherine would be an Australian national who undertook the same employment she did, who derived the same income, who had the same personal history and who lived at the Earlwood house, *but who did not hold a working holiday visa.* The working holiday visa was closely associated with nationality as to be effectively the same thing as nationality. Therefore, Catherine's visa type (as a defining aspect of nationality) did not need to be shared by an Australian national comparator for Article 25 to be engaged; and
3. imposing the working holiday tax rate would subject Catherine to a tax rate that was more burdensome than the tax free threshold that would have been afforded to Australian nationals in the same circumstances as Catherine. Article 25 of the Australia-UK DTA had the effect of prohibiting Catherine from being taxed at the working holiday rate.

The Commissioner appealed the decision of the Federal Court to the Full Federal Court.

The majority of the Full Federal Court found that Catherine was a resident for the whole of the 2017 income year under the 183-day test as the Commissioner had not formed a view that the exception to that test applied but considered that the Australia-UK DTA did not prevent Part 3, Schedule 7 of the Rates Act applying to the assessment of Catherine's income. The majority stated that the operation of Article 25 of the Australia-UK DTA depended on two matters:

1. the identification of the British national who is 'in the same circumstances, in particular with respect to residence' as an Australian national; and
2. the tax treatment of the British national is 'other or more burdensome' than that imposed on the Australian national.

Catherine submitted to the High Court that Article 25(1) of the Australia-UK DTA was not limited to discriminatory treatment based solely on nationality, on the basis that this could also lead to discriminatory treatment based on ethnicity. Catherine also submitted that Part 3 of Schedule 7 does discriminate according to nationality.

The Commissioner submitted that the purpose of Article 25(1) of the Australia-UK DTA is to impose differential taxation by reason of nationality, but that in Catherine's scenario, the differential taxation rates were imposed because of Catherine's visa type, and not her nationality. The Commissioner also raised the point that the reference in Article 25(1) of the Australia-UK DTA, *'in the circumstances'* to mean *'identical in all matters relevant to the imposition of taxation except nationality'*, because it was not possible for an Australian to hold a working holiday visa, and earn working holiday income.

Issue

Whether the tax burden imposed by Part 3 of Schedule 7 to the *Rates Act* was higher for Catherine due to her nationality in contravention of Article 25(1) of the Australia-UK DTA?

Decision

The High Court considered the tax treaty, and in particular that its interpretation requires that '*courts look to the context, object and purpose of treaty provisions as well as the text ... consistent with the general principle that international instruments should be interpreted in a more liberal manner than would be adopted if the court was required to construe exclusively domestic legislation'.*

The High Court held that Article 25(1) of the Australia-UK DTA requires a comparison to be drawn between a UK resident and an Australian resident, that but for their nationality, would otherwise be in the same circumstances. It was established that Catherine was an Australian resident for tax and, therefore, the relevant comparison was a notional Australian taxpayer, 'in the same circumstances'.

The main consideration for the High Court was to determine what is meant by 'in the same circumstances'. The High Court disregarded the Commissioner's submissions as misguided and, instead, held that it is necessary to acknowledge that the *Rates Act* differentiates between Australian residents who hold different visas, and those who do not hold a visa. The secondary question for the High Court was then whether the more burdensome taxation treatment is imposed on persons holding a working holiday visa, which depends upon being *not* an Australian national, contravenes Article 25(1) of the Australia-UK DTA.

The High Court held that the answer was yes. When compared to the tax treatment of an Australian national earning the same income from the same source, it is clear that the Australian resident would be taxed at lower rates under Part 1 of Schedule 7.

The High Court also considered the OECD Commentaries on Article 25 of the Australia-UK DTA, raising two points to support their interpretation. Firstly, *'whether two persons who are residents of the same State are being treated differently solely by reason of having a different nationality',* and secondly that *'in the same circumstances'* refers to taxpayers, '*from the point of view of the application of the ordinary taxation laws and regulations, in substantially similar circumstances both in law and in fact'.* In other words, the High Court noted that Article 25(1) of the Australia-UK DTA requires *'Australia to accord the same treatment to a national of the United Kingdom'.*

The Court held that the basis of the charge, and the method of assessment was the same for Catherine, but the tax charged was not. The tax rate was more onerous for Catherine than it would be for an Australian national in the same circumstances.

The High Court allowed the appeal by Catherine.

Citation *Addy v Commissioner of Taxation* [2021] HCA 34 (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ, Canberra)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2021/34.html

1.12 Appeal update – Mussalli – revenue v capital

The Taxpayers in this case have applied to the high court for special leave to appeal from the full Federal Court's decision.

In this case, the Federal Court held that certain upfront payments made upon entering into lease and licence agreements of McDonalds franchise restaurants were outgoings of capital or capital in nature.

Citation *Mussalli & Ors v Federal Commissioner of Taxation* [2021] FCAFC 71
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2021/71.html

1.13 Appeal update – Hill – binding death benefit nominations

Zuda, the trustee for the Holly Superannuation Fund has appealed to the High Court for special leave to appeal from a decision of the Court of Appeal of the Supreme Court of Western Australia.

The Court of Appeal of the Supreme Court of Western Australia has dismissed an appeal in which the appellant, Hill, contended a binding death benefit nomination given to a trustee of a self-managed superannuation fund was invalid on the basis that it did not comply with regulation 6.17A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth). The Court of Appeal concluded that regulation 6.17A does not apply to SMSFs.

Citation *Hill v Zuda Pty Ltd* [2021] WASCA 59
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WASCA/2021/59.html

1.14 Appeal update – STNK – GST

The Commissioner has appealed to the Federal Court from the AAT decision in this case.

In this case, the Tribunal found that the 'anti-avoidance' provisions in Division 165 did not apply in relation to claiming related input tax credits for exported gold.

Citation *STNK v Federal Commissioner of Taxation* [2021] AATA 3399
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2021/3399.html

2 Legislation

2.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Corporations Amendment (Meetings and Documents) 2021	20/10				
Treasury Laws Amendment (2020 Measures No. 4) 2020	28/10	25/3	11/5		
Treasury Laws Amendment (2021 Measures No. 5) 2021	24/6	10/8	11/8		
Treasury Laws Amendment (2021 Measures No. 7) 2021	25/8	18/10	19/10		
Treasury Laws Amendment (Enhancing Superannuation Outcomes for Australians and Helping Australian Business Invest) Bill 2021	27/10				

2.2 Treasury laws amendment – superannuation and investments

The *Treasury Laws Amendment (Enhancing Superannuation Outcomes for Australians and Helping Australian Business Invest) Bill 2021* was introduced into Parliament on 27 October 2021.

The Bill fulfils a number of Budget commitments made by Government:

1. It removes the $450 monthly threshold for superannuation guarantee contributions from 1 July 2022, otherwise from the start of the first quarter following Royal Assent, if Royal Assent occurs after 1 July 2022.
2. Increasing the maximum releasable amount under the First Home Super Saver Scheme from $30,000 to $50,000 from 1 July 2022.
3. Reducing the eligibility age for downsizer superannuation contributions from age 65 to age 60 for contributions made from 1 July 2022.
4. It partly implements the changes to allow persons aged between 67 and 75 to make non-concessional or salary sacrifice contributions without meeting the work test, but continues the requirement for the work test to be met if a deduction is to be claimed for the contribution. An accompanying measure will allow individuals under age 75 to access the three year bring forward rule for non-concessional contributions. These changes will apply from 1 July 2022.
5. Allowing superannuation funds that have all of their assets supporting superannuation income streams in the retirement phase for only part of an income year to choose between using the segregated method and the proportionate method, in determining their taxable income. These amendments will apply to the 2022 and later income years.
6. Extending the end date for the temporary full expensing measure for depreciable assets to 30 June 2023.

w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6800

2.3 Company meetings and execution of documents

The *Corporations Amendment (Meetings and Documents) Bill 2021* was introduced into Parliament on 20 October 2021. If passed, the Bill provides for permanent amendments to the *Corporations Act 2001* in relation to the execution of documents, sending notices electronically and virtual company meetings.

Execution of documents

The key changes and clarifications proposed by the Bill in relation to the execution of documents by a company are as follows:

- Documents may be signed by companies either electronically or in hardcopy (or using a combination of both methods). This includes deeds, agreements, documents relating to meetings and documents required to be lodged with ASIC under the *Corporations Act*. For valid electronic execution, certain formalities must be met.

- Split execution, that is, where different officers of the same company sign different copies of a document, is valid execution.
- A document may be validly executed even if only the signature page of that document is signed.
- A deed may be executed by an agent on behalf of a company without having to be appointed to do so by deed.
- A sole director company may validly execute a document under section 127 of the *Corporations Act*, even where there is no company secretary appointed.
- A company's signature to a deed need not be witnessed or delivered to be valid.

Sending notices electronically

The Bill proposes that all companies, registered schemes and disclosing entities will be permitted to send company notices electronically, provided that company and scheme members can elect to receive hard copies or elect not to receive certain documents at all. An election to be sent hardcopy documents will not apply where the election is given within 30 days of the date the company or scheme is required or permitted to send the document.

Companies and schemes will be required to give notice of members' rights to make elections and request ad hoc documents at least once a year or by making that information readily available on their website.

Holding on-line meetings

The Bill will allow companies and schemes to hold virtual and hybrid meetings provided that the constitution of the company or schemes allows virtual meetings. The use of technology, time and venue must be reasonable, and members entitled to attend such meetings must be given a reasonable opportunity to participate at the meeting.

The Bill also provides that for listed companies and registered schemes, all resolutions will need to be put to a poll for voting. Any member or members holding at least 5% of the votes may require an independent party to observe and report on the conduct of a poll at the cost of the company or scheme. An auditor or registry service provider may act as the independent party if they are not conflicted on the matters being voted on.

w
https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=0;query=BillId:r6784%20Recstruct:billhome

2.4 Extension of time for DGRs to meet new requirements

On 7 October 2021, the Assistant Treasurer made legislative instrument DGR 2021/1 being the *Treasury Laws Amendment (2021 Measures No. 2) (Deductible Gift Recipients - Extended Application Date) Instrument 2021*.

The purpose of the instrument is to support the core transitional rules in Schedule 1 to the *Treasury Laws Amendment (2021 Measures No. 2) Act 2021* which requires a fund, authority or institution to, be either:

- a registered charity; or
- an Australian government agency; or
- operated by a registered charity or an Australian government agency;

as a precondition for endorsement as a deductible gift recipient. The transitional rules do not apply to ancillary funds and specifically listed entities under the ITAA 1997.

The condition applies generally after 14 December 2021. The practical implication for DGR entities that are charities are that those entities must be registered with the ACNC as a charity to maintain DGR status.

The transitional rules provide that entities that are DGRs, or have applied to the Tax Commissioner to be a DGR, have an additional 12 months after their application date to meet the requirements at Schedule 1. If an entity requires a longer transitional period, it can apply to the Commissioner of Taxation for an extended application date, which is four years after the application date.

The Instrument prescribes the criteria that must be met before the Commissioner of Taxation can grant an extended application date to an entity. The prescribed criteria are that, at the time the application for an extended application date is made to the Commissioner:

- there has been no change in the applicant's circumstances that would affect its entitlement to deductible gift recipient endorsement, but for the amendments made by Schedule 1 to the Act;
- the applicant has never had an application for registration with the ACNC refused or involuntarily revoked.

Additionally, the Tax Commissioner must have regard to the following prescribed matters before making a determination on an application for an extended application date:

- during the period between the application date and the transitional application date, whether the applicant took reasonable steps to:
    - satisfy the requirements for entitlement for registration under the ACNC Act;
    - apply for registration under the ACNC Act; and
    - give information or documents to the ACNC Commissioner if required to do so;
- whether it is reasonably possible that the applicant will be able to satisfy the requirements for entitlement for registration under the ACNC Act by the extended application date;
- if the applicant believes it is unlikely to be able to satisfy the requirements for entitlement for registration under the ACNC Act by the extended application date – whether it is reasonable in the circumstances that the applicant be given additional time to wind-up and distribute surplus assets upon winding-up to another DGR with the same or similar purposes; and
- any views expressed by the ACNC Commissioner about the above matters.

The purpose of the prescribed matters is to ensure that only applicants that reasonably require more time than the transitional application date to comply with the amendments in Schedule 1 to the Act (or to arrange another entity to be set up to comply with those amendments) can access the extended application date. This may be required where some entities need to go through a court process to amend their constitution or restructure their affairs to meet the relevant criteria to be endorsed as a DGR.

DGR 2021/1 Treasury Laws Amendment (2021 Measures No. 2) (Deductible Gift Recipients - Extended Application Date) Instrument 2021
w https://www.ato.gov.au/law/view/view.htm?docid=%22ops%2Fdgr20211%2F00001%22

2.5 Windfall Gains Tax and State Taxation (VIC)

On 12 October 2021, the *Windfall Gains Tax and State Taxation and Other Acts Further Amendment Bill 2021* (Vic) was introduced into Victorian Parliament.

The Bill proposes to impose, from 1 July 2023, a windfall gains tax on the increase in the value of land resulting from a rezoning.

Windfall gains tax applies when the taxable value uplift of all land owned by an owner or group that is rezoned by the same planning scheme amendment is above $100,000. Taxable value uplift is the difference in the capital improved value of the land before and after the rezoning takes effect less any deductions. The former value is drawn from the most recent valuation in force for the land under the *Valuation of Land Act 1960* (Vic) while the latter is determined through a supplementary valuation certified by the Valuer-General.

Where the taxable value uplift is more than $100,000 but is less than $500,000, the rate is 62.5% of that part of the taxable value uplift that exceeds $100,000. Where the taxable value uplift is $500,000 or more, the rate of windfall gains tax is a flat 50% of the taxable value uplift. Grouping and aggregation provisions are applicable so that the $100,000 threshold applies only once to properties owned by the same owner or group of owners and rezoned under the same planning scheme amendment.

Up to 2 hectares of residential land (including primary production land with a residence) will receive an exemption from the windfall gains tax where it is rezoned by the same planning scheme amendment. In addition, charities will not pay any windfall gains tax on land they own that has been rezoned, so long as the land is used and occupied by a charity exclusively for charitable purposes for 15 years after the rezoning. An exemption is also

provided in relation to rezonings to correct obvious or technical errors in the Victoria Planning Provisions or a planning scheme.

The Bill provides for transitional arrangements for certain contracts, option arrangements and proponent-led rezonings that were underway when the windfall gains tax was announced on 15 May 2021.

Owners of land liable to pay the windfall gains tax may defer payment of up to 100% of the tax for up to 30 years or until a dutiable transaction in respect of the land or relevant acquisition occurs, whichever occurs first.

Windfall Gains Tax and State Taxation and Other Acts Further Amendment Bill 2021 (Vic)
w https://www.legislation.vic.gov.au/bills/windfall-gains-tax-and-state-taxation-and-other-acts-further-amendment-bill-2021

2.6 NSW – COVID-19 payroll tax waiver

The *Payroll Tax Amendment (Payroll Tax Waiver) Bill* 2021 amends the *Payroll Tax Act 2007* (NSW) to provide a 50% payroll tax waiver to taxpayers with taxable wages of $10,000,000 or less, and who qualified for the 2021 COVID-19 JobSaver Payment scheme, the 2021 COVID-19 Business Grant scheme administered by Service NSW, or met the 30% or greater decline in turnover test (regardless of applying for the payment or grant).

w https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3904

2.7 Electric vehicle duty changes in NSW

The *Electric Vehicles (Revenue Arrangements) Bill 2021* (NSW) introduced the *Electric Vehicles (Revenue Arrangements) Act 2021* and has become law. The object of the Act is to:

1. exempt zero and low emissions vehicles from duty; and
2. establish a system of distance-related road user charges for taxpayers who use zero and low emissions vehicles.

Duty exemption

The Bill inserted a new section 270D into the *Duties Act* which provides that an exemption for an application to register a battery electric vehicle or hydrogen fuel cell electric vehicle if:

1. an application is made between 1 September 2021 and the relevant date and the vehicle has a dutiable value of not more than $78,000; or
2. an application to register a zero or low emissions vehicle made on or after the relevant date.

The relevant date is the earlier of 1 July 2027 and the date prescribed by the regulations as being the date on which the Minister is reasonably satisfied sales of battery electric vehicles in New South Wales will be 30% of new vehicle sales in New South Wales.

Use charges

The Bill provides that road user charges will be payable in relation to certain zero or low emissions vehicles and certain battery electric vehicles or hydrogen fuel cell electric vehicles where duty was not payable under section 270D of the *Duties Act* from 1 July 2027 or when electric vehicles make up 30 per cent of all new vehicle sales, whichever comes first.

It will be the registered operator of the vehicle that will be liable for the road user charge. A road user charge will be payable for each kilometre for which a relevant zero or low emissions vehicle travels on a road, whether in New South Wales or another State or Territory.

w https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3881

2.8 COVID-19 – NSW SME Economic Recovery Measures

The NSW Government has committed to providing a Summer Holiday Stock Guarantee for all small and medium enterprises (SME Guarantee).

Under the SME Guarantee, eligible businesses with an annual turnover between $75,000 and $50 million will be able to apply for a grant of up to $20,000 to compensate for loss of perishable stock, or claim $10,000 for reduced capacity to sell non-perishable items if a local lockdown occurs and impacts their business.

The SME Guarantee will be available between 1 December 2021 and 31 January 2022.

The NSW Government will also expand the Small Business Fee and Charges rebate from $1,500 to $2,000 for all eligible small businesses for use until 30 June 2022. The rebate is provided in the form of a digital credit which can be drawn down to offset the cost of eligible NSW and local government fees and changes.

w https://www.nsw.gov.au/media-releases/confidence-guaranteed-as-we-get-back-to-work

3 Rulings and determinations

3.1 LCR 2019/5A1 - Addendum

On 20 October 2021, the ATO published an addendum to LCR 2019/5 to clarify the income year that must be used when calculating aggregated turnover for an entity to be a base rate entity is the income year is which the base entity status is being determined, and is to be worked out at the end of the income year. The addendum states that this means that the aggregated turnover of any earlier year is irrelevant for determining base rate entity status.

COMMENT – presumably the addendum was published as eligibility for SBE treatment can be affected by the aggregated turnover of earlier income years.

ATO reference *LCR 2019/5A1*
w https://www.ato.gov.au/law/view/view.htm?docid=%22COG%2FLCR20195A1%2FNAT%2FATO%2F00001%22

3.2 Genuine disposal restrictions in employee share schemes

The ATO has released TD 2021/D5 which sets out when they consider genuine disposal restrictions apply to interests provided under an employee share scheme.

Under Division 83A of ITAA 1997, assessability of amounts relating to discounted ESS interests can be deferred to a later time rather than being included in assessable income in the income year in which the ESS interest is issued. One such deferred taxing point is when a genuine disposal restriction (that was in place when the interest was granted) is removed.

The Commissioner's view under the draft determination is that:

- for a disposal restriction to be genuine, it must be sufficiently identifiable, certain, and legally enforceable, with serious consequences enforced in the event of a breach;
- if an employee is required to apply to their employer or a company to dispose of their share, this in itself does not constitute a genuine disposal restriction;
- a board's unfettered discretion to waive a disposal restriction without clear, fixed and objectively measured criteria may result in no genuine disposal restriction attaching to an ESS interest, even if the discretion is not exercised. However, a disposal restriction may be genuine if it is able to be lifted in exceptional and extraordinary circumstances only, such as serious financial hardship;
- genuine disposal restrictions can be imposed in a number of ways, including through a scheme's governing documentation, documented company policies, an employment contract and any applicable ASX listing rules or restrictions in the *Corporations Act 2001*;
- a deferred taxing point will arise even if a genuine disposal restriction is only temporarily lifted; and
- genuine disposal restrictions can operate for a fixed or variable period, which may be determined by reference to performance or vesting conditions, internal share trading policies or insider trading prohibitions in the *Corporations Act 2001.*

Once finalised, the draft determination is proposed to apply retrospectively. The draft determination is open for comment until 12 November 2021.

ATO reference *Taxation Determination 2021/D5*
w https://www.ato.gov.au/law/view/view.htm?docid=%22DXT%2FTD2021D5%2FNAT%2FATO%2F00001%22

3.3 Superannuation choice shortfall reductions

On 22 October 2021, the ATO finalised its determination *SPR 2021/1 Superannuation Guarantee (Administration) - Choice of Fund - Written Guidelines for the Reduction of an Increase in an Employer's Individual Superannuation Guarantee Shortfall Determination 2021.*

The Determination applies from 1 November 2021.

For employers that do not satisfy the choice of fund requirements under the SGAA, the employer's guarantee shortfall (including nil shortfall) for an employee for a quarter is increased (**choice shortfall**).

The Commissioner has a discretion to reduce the amount of the choice shortfall.

From 1 November 2021 until 31 October 2022 employers will, in the first instance, be provided with help and assistance to comply with stapled fund requirements and will have their shortfall reduced to nil if the choice shortfall arises from lack of knowledge of the choice of fund requirements.

From 1 November 2022, the Commissioner will apply the following table when considering the initial reduction of the choice shortfall based on an employer's attempt to comply with the choice of fund requirements.

Employer's attempt to comply	*Level of reduction*	*Choice shortfall*
The employer made a genuine effort to comply with the choice of fund requirements	*100%*	*0%*
The employer failed to exercise the care that a reasonable ordinary person would exercise to fulfil the choice of fund requirements	*75%*	*25%*
The Employer's actions are careless and show indifference to the choice of fund requirements	*25%*	*75%*
The employer knowingly decides not to comply with the choice of fund requirements	*0%*	*100%*

After making a decision on the initial level of reduction, the Commissioner will consider whether the initial level should be maintained or further reduction is warranted.

New employers, with no previous business experience, will generally have any choice shortfall reduced to nil in their first year of operation unless the non-compliance was due to the employer intentionally not complying.

The Determination replaces and repeals *Superannuation Guarantee (Administration) Act 1992 - Written Guidelines for the Reduction of an Increase in an Employer's Individual Superannuation Guarantee Shortfall* (F2006L01821) registered on 15 June 2006.

w https://www.ato.gov.au/law/view/view.htm?docid=%22SLD%2FSPR20211%2F00001%22

3.4 Stapled fund shortfall reductions

On 22 October 2021, the ATO finalised *SPR 2021/2 Superannuation Guarantee (Administration) - Stapled Fund - Guidelines for the Reduction of an Employer's Individual Superannuation Guarantee Shortfall for Late Contributions Due to Non-Acceptance by Notified Stapled Fund Determination 2021.*

The Determination is effective from 1 November 2021.

The Determination applies to decisions by the Commissioner about whether or not to reduce an Employer's *individual superannuation guarantee shortfall* (**shortfall**) for an employee for a quarter.

From 1 November 2021, the Commissioner may reduce (including to nil) the amount of an Employer's shortfall for an employee for the quarter in accordance with subsection 19(2F) of the SGAA where:

1. the employer, or their agent, was most recently notified by the Commissioner that a fund was a *stapled fund* for an employee following the employer (or their agent) making a request in accordance with section 32R of the SGAA;

2. the employer attempted to make superannuation guarantee contributions to the most recently notified stapled fund for the employee;
3. the fund did not accept contributions from the employer for the employee;
4. the employee did not have a *chosen fund* at the time the employer attempted to make the superannuation guarantee contribution; and
5. the employer subsequently made a superannuation guarantee contribution to a fund on behalf of the employee after the quarterly due date.

The Commissioner will apply a transitional approach to making decisions on whether to reduce the employer's shortfall for a quarter for a period of 12 months from 1 November 2021 until 31 October 2022. During this time, the Commissioner will reduce an employer's shortfall for one or more employees to nil where the circumstances set out in points 1-5 above have been met and the employer has made reasonable attempts to comply with the choice of fund rules when making the late superannuation guarantee contributions.

After the transitional period, the Commissioner may reduce the amount of an employer's shortfall in whole or in part where all of the circumstances set out in points 1-5 above have been met unless the employer has a superannuation guarantee charge (SGC) assessment for the quarter and has chosen to offset the late contributions against the SGC or chosen to carry forward the late contribution and apply it as a pre-payment of a future contribution for the same employee.

In determining the level of reduction to the amount of the employer's shortfall, the Commissioner will have regard to:

- whether the employer made the late superannuation guarantee contributions to a fund that complied with the choice of fund rules when the most recently notified stapled fund did not accept the contributions; and
- other mitigating factors or exceptional circumstances that affected the employer in making the superannuation guarantee contributions or their compliance with the choice of fund rules.

w https://www.ato.gov.au/law/view/view.htm?docid=%22SLD%2FSPR20212%2F00001%22

3.5 State Revenue Victoria – Landholder Duty

Facts

On 13 October 2021, State Revenue Office Victoria issued ruling DA-055v3 'Landholder duty – Obligations on making a relevant acquisition and duty calculation'. This Ruling replaces DA-055v2 insofar as it provides duty calculation to include the new premium rate of duty that took effect from 1 July 2021 for transactions with a dutiable value of more than $2 million.

A liability to pay landholder duty arises when a person makes a relevant acquisition in a landholder.

A landholder is any company or unit trust scheme (whether private or public) that has land holdings in Victoria with an unencumbered value of $1 million or more.

A person makes a relevant acquisition in a landholder if the person acquires an interest in the landholder that:

1. is of itself a significant interest (i.e. an interest of 20% or more in a private unit trust scheme, 50% or more in a private company or a wholesale unit trust scheme, or 90% or more in a listed company or a public unit trust scheme); or
2. when aggregated with other interests acquired by the person, an associated person or any other person in an associated transaction results in an aggregation that amounts to a significant interest in the landholder.

If a relevant acquisition is made, either or both the person(s) who made the relevant acquisition, and the landholder in which the acquisition was made, must prepare and lodge an Acquisition Statement with the Commissioner within 30 days after the date of the relevant acquisition. Duty must also be paid within 30 days after the date of the relevant acquisition, or a tax default will occur.

The value of any leasehold estate must be included in the value of the company or unit trust scheme's land holdings in determining if it is a landholder. However, the Commissioner has determined that duty will not be

calculated with reference to the value of any leasehold estate unless it is a type that is dutiable under Chapter 2 of the *Duties Act*.

Further, from 19 June 2019, the direct and indirect acquisition of an interest in fixtures held separately from the land on which they are located became dutiable under Chapters 2 and 3 of the *Duties Act*. In Chapter 3 of the *Duties Act*, this amendment involved extending the definition of a land holding in section 72(1) of the *Duties Act* to include an interest in such fixtures.

State Revenue Office reference *DA-055v3*
w https://www.sro.vic.gov.au/legislation/landholder-duty-obligations-making-relevant-acquisition-and-duty-calculation

4 Private Binding Rulings

4.1 Section 100AA(4) of the ITAA 1936

Facts

AAA Pty Ltd is Trustee of the AAA Trust.

The AAA Trust is a family discretionary trust.

On XXXX 20XX, the Trustee resolved to distribute $XXXX of its income of the Trust for the year ending 30 June 20XX to beneficiary, B Co. The Trust 20XX Income Tax Return reflects B Co being presently entitled to $XXXX of income.

B Co is a tax exempt entity for the purposes of section 100AA.

On XXXX 20XX the Trustee entered a payment of $XXXX into its online banking software to pay to B Co. On XXXX 20XX this payment was reversed by the bank as the Trustee had entered incorrect bank account details.

The Trustee was not immediately aware the payment had been reversed. On XXXX 20XX, using the correct bank account details, the Trustee successfully paid $XXXX to B Co.

Under the pay or notify rules in section 100AA the trustee can be assessed on the amount if the tax exempt entity has not been paid or notified of its entitlement to the trust distribution within 2 months of the end of the year of income of the trust.

The failure to satisfy the two-month requirement in relation to the $XXXX was initially due to some confusion over the 31 August deadline. The XXXX 20XX fell on a Monday and was the first working day after 31 August, the Trustee thinking that where the due date falls on a weekend, payment could be made on the next business day.

The remaining $XXXX has not been paid by the Trust to B Co.

The Commissioner has not previously applied his discretion under section 100AA(4) to the taxpayer.

Question

Will the Commissioner exercise the discretion in subsection 100AA(4) of the ITAA 1936 to disregard the failure of the Trustee to notify the tax exempt beneficiary of their present entitlement to a share of the trust fund at the end of two months after the end of the relevant income year as required in paragraph 100AA(1)(c) of the ITAA 1936?

Decision and reasons

Yes. The Commissioner exercised its discretion in subsection 100AA(4) of the ITAA 1936 to disregard the failure of the Trustees to notify the tax exempt entity of its present entitlement having regard to the circumstances.

ATO reference *Private Binding Ruling Authorisation Number 1051879912743*
w https://www.ato.gov.au/law/view/document?docid=EV/1051879912743

4.2 Private foreign currency bank account – assessable forex gains

Facts

Individual X is an Australian tax resident. X accepted a job in Country A and made all the arrangements to move to that country. However, due to COVID-19, moving to Country A was no longer a viable option.

As part of the arrangements put in place with the intention of moving to Country A for employment, X transferred an amount of money from his or her Australian bank account (in AUD) to a foreign currency denominated bank account with the intention to use the funds to purchase a house in Country A as their residence.

The account was non-interest-bearing and there were no other transactions in the account, other than the deposit of the funds for purchasing a house.

When the move did not occur, X transferred the money back from the foreign currency denominated bank account to their Australian bank account (in AUD). As a result, X derived a foreign currency exchange gain.

The funds were then used to purchase a house in Australia as a main residence.

Questions

1. Will the realised foreign currency gain on the funds withdrawn from the foreign currency denominated bank account be disregarded under subsection 775-15(2) of ITAA 1997?
2. Will the realised foreign currency gain on the funds withdrawn from the foreign currency denominated bank account bank account be an assessable capital gain under Part 3-1 of the ITAA 1997?

Decision and reasons

Question 1

No, the foreign currency gain will not be disregarded.

The table in subsection 775-15(2)(b) provides that a forex realisation gain may be assessable even if the gain is of a private or domestic nature. Under Item 1 of the table, Forex Realisation Event 2 happens to foreign currency or a right or part of a right to receive foreign currency if the gain from the realisation event would be taken into account for CGT purposes (apart from Forex rules).

Why would the gain be taken into account for CGT purposes?

The foreign currency denominated bank account is a CGT asset. The ATO considered that the bank account is one asset. Each deposit adds to its cost base and reduced cost base whilst each withdrawal constitutes a part ending or part satisfaction of the debt asset. Each withdrawal will constitute CGT event C2 happening to the relevant part of the asset (the amount withdrawn).

Is the bank account a personal use asset?

In this case, the bank account did not earn any interest and was used solely for the purpose of holding funds set aside for purchasing a main residence. Therefore, the ATO considered that the bank account was a personal use asset.

A gain from a personal use asset is disregarded if the first element of the cost base of the asset is $10,000 or less. The original amount deposited into X's foreign currency denominated bank account (which was over AUD $10,000) was the amount that gave rise to the chose in action (the debt owed by the bank), which is the relevant CGT asset. Therefore, the gain would not be disregarded, even though the bank account is a personal use asset.

Question 2

Yes, the foreign currency gain will be an assessable capital gain, however this gain will be reduced by the amount included as assessable income under the forex provisions under the CGT anti-overlap provisions.

ATO reference *Private Binding Ruling Authorisation Number 1051822836045*
w https://www.ato.gov.au/law/view/document?docid=EV/1051822836045

4.3 Foreign exchange gains – becoming an Australian resident

Facts

X is a dual citizen of country A and B. X is a tax resident of country A where they are currently living.

X has been granted an Australian Visa and plans to move to Australia with their family.

X has several foreign savings and transaction bank accounts located in country A and B. These accounts are not 'qualifying forex accounts'.

Question

If a forex realisation gain or loss on the withdrawal from a foreign currency dominated bank account opened after 1 July 2003 is subject to Division 775 of the ITAA 1997, will the cost (translated to $AUD) be calculated at the date that X becomes a tax resident of Australia?

Decision and reasons

No, the cost will not be calculated on the date that X becomes a tax resident of Australia.

Calculating cost under forex rules

Section 775-165 states that for the purposes of forex the time of acquisition is determined using the CGT acquisition rules in Division 109 of the ITAA 1997.

Section 775-165 of the ITAA 1997 only provides for the acquisition date and the legislation does not include a market value rule for the cost of acquisition. Unlike the CGT provisions, for Forex purposes the cost base is whatever the cost base was when the right was first acquired, i.e. when the bank account was originally opened, and when the relevant deposits made into the account.

Capital gains could apply as well

When X becomes an Australian resident for tax purposes, they will be taken to acquire each of their assets (other than taxable Australian property and pre-CGT assets) at their market value (section 855-45 of the ITAA 1997).

While there are anti-overlap provisions (section 118-20 of the ITAA 1997), when the cost base is determined differently due to residency status changes, there can be residual gains or losses for CGT purposes. The capital gain is reduced to zero if the capital gain does not exceed the amount included in X's assessable income (under Forex provisions).

If the gain were instead a loss, section 110-55 of the ITAA 1997 covers the general rules about CGT reduced cost base.

Subsection 110-55(9) of the ITAA 1997 provides that the reduced cost base of the CGT asset is to be reduced by any amount that you have deducted, or could have deducted except for Subdivision 170-D, as a result of a CGT event that happens in relation to a CGT asset.

Where Forex losses are made, subsection 110-55(9) of the ITAA 1997 operates to reduce the CGT cost base by any Forex loss amount that is claimable as a deduction under Division 775.

ATO reference *Private Binding Ruling Authorisation Number 1051804808183*
w https://www.ato.gov.au/law/view/document?docid=EV/1051804808183

4.4 Defamation damages exempt

Facts

A defamation matter related to publications went before a court and was subject to an appeal.

The Trial Judge awarded special damages to an individual for past economic loss and future economic loss.

The claim in regards to the special damages was for financial loss arising from a loss of earning capacity caused by the defamation.

It was recognised by the Court that the individual suffered economic loss by reason of the defamatory publications.

Questions

1. Are the damages awarded a capital receipt?
2. Is any capital gain disregarded under section 118-37 of ITAA 1997 which provides an exemption from CGT for compensation received for a wrong, injury or illness you or a relative suffers personally?

Decision and reasons

The ATO determined that the amount received was capital and that the exemption section 118-37 applied.

While the ATO noted that payments which substitute for income have been held by the courts to be income under ordinary concepts, no component of the amount awarded was to compensate for loss of income. The payment related to past and future economic loss which is compensation for loss of earning capacity (which the ATO considered a capital asset) rather than for actual loss of income. In consequence, the payment was not assessable as ordinary income.

The ATO considered that defamation is considered a wrong that you suffer personally so that any capital gain will be exempted under section 118-37 of the ITAA 1997.

ATO reference *Private Binding Ruling Authorisation Number 1051876570790*
w https://www.ato.gov.au/law/view/document?docid=EV/1051876570790

4.5 Deductions for conventional clothing

Facts

The taxpayer operates a business as a lifestyle influencer and earns income from activities such as giving interviews, providing content for magazines and attending social events. The taxpayer incurred expenses in having conventional clothing made to wear during these activities.

Question

Whether the taxpayer is entitled to claim deductions under section 8-1 of the ITAA 1997 for the expenses incurred in having conventional clothing made.

Decision and reasons

The ATO ruled the taxpayer was not entitled to claim deductions for the expenses incurred in relation to having conventional clothes made.

The detailed reasoning in the advice referred primarily to *Taxation Ruling* TR 97/12 which provides that the cost of buying clothing will generally be regarded as an expense of a private nature. In order for such expenditure to be deductible, it must be an outgoing incurred in gaining or producing assessable income.

Circumstances where expenditure for clothing is considered deductible include:

1. occupation specific clothing (being clothing which identifies the wearer as being associated with a certain profession, trade or occupation. There must be a link between the expenditure and the income earning activities, such that the expense is work related);
2. a compulsory uniform (being clothing which forms an integral part of a compulsory uniform, with the expenditure being directly related to deriving income. It is the compulsory and distinctive features which provide the link between the expenditure and the work activity);
3. a non-compulsory uniform (being clothing which identifies the taxpayer as being associated with an employer. Clothing which fits within this category includes uniforms entered on the Register of Approved Occupational Clothing);
4. protective clothing and footwear (TR 2003/16 sets out information relating to the deductibility of protective items, including footwear used for protection against risk of serious illness or injury. Expenditure on protective clothing will have a sufficient connection with deriving income where a taxpayer is exposed to a

risk of illness or injury in carrying out the income earning activities, the risk is not remote or negligible, the clothing provides protection from that risk, and is used in carrying out the income earning activities).

TR 97/12 also confirms that conventional clothing is generally not deductible, on the basis that there is not a sufficient nexus between the expenditure and the income earning activities of the taxpayer.

However, considerations which help determine if a sufficient connection does exist include whether there are express or implied requirements of an employer regarding clothing, the extent to which the clothing is distinctive or unique to the nature of the employment, the extent to which the clothing is used solely for work, and the extent to which the clothing is unsuitable for any activity other than work.

An example is that of *Federal Commissioner of Taxation v Edwards* 94 ATC 4255 where the taxpayer was able to claim a deduction for expenses incurred in buying hats, gloves and formal gowns, for fulfilling her duties as the wife of the Governor of Queensland. It was held that these items were above the personal requirements of her usual private attire.

In *Case 48/94* 94 ATC 422, a professional presenter and speaker was disallowed a deduction for the cost of conventional clothing purchased to wear while presenting. It was distinguished from the *Edwards* case on the basis that the presenter's income did not 'turn upon' her wearing the clothes, despite her perception that the clothes were important for her public image.

Therefore, while the influencer may contend that the made to order clothing is distinctive to their business brand, it does not fit within any of the stipulated categories (occupation specific clothing, compulsory uniform, non-compulsory uniform or protective clothing). The clothing is conventional clothing, which does not have a sufficient connection to income earning activities. The main expenditure was to meet personal requirements of 'modesty, decency and warmth', rather than for any specific income earning reason.

The taxpayer is not entitled to claim a deduction under section 8-1 of the ITAA 1997 for expenses incurred in relation to the made to order clothing purchased.

ATO reference *Private Binding Ruling Authorisation Number 1051887617088*
w https://www.ato.gov.au/law/view/document?docid=EV/1051887617088

4.6 CGT – legal v beneficial interest

Facts

The parents of the taxpayer wished to purchase a home but could not do so as they were unable to secure a loan and, as a result, a property was purchased in the taxpayer's name.

While the loan was in the taxpayer's name, the taxpayer did not contribute to any repayments of the loan or financially for the property in any other way.

The taxpayer never treated the asset as their property. The taxpayer did not receive rent or claim any deductions for expenses. The taxpayer never lived in the property.

The taxpayer did not claim the first homeowner's grant.

The parents treated the property as their main residence.

The parents are now deceased and the property is being sold as part of the finalisation of their estates.

Question

Will the taxpayer have a CGT event A1 arising from the sale of the property by the executor of the parent's estate?

Decision and reasons

No.

The ATO noted that CGT event A1 occurs when there is a disposal of an ownership interest in a CGT asset. However, the ATO said that CGT event A1 does not occur if there is only a change of legal ownership and not a change of beneficial ownership.

The ATO noted that the taxpayer agreed to be the registered legal owner of the property, but did not have any expectation of having any elements of beneficial ownership of the property and that it can be reasonably concluded that at time of change of legal ownership of the property, that is, when the property was sold, the taxpayer will not have a CGT event A1 or any other CGT event occurring when his or her legal ownership ends.

COMMENT – while this should be lauded as a common sense outcome, it is not in line with other published views of the ATO on property held in trust for more than one person. A similar outcome was also reached in recently published private binding ruling authorisation number 1051888774731.

ATO reference *Private Binding Ruling Authorisation Number 1051893408035*
w https://www.ato.gov.au/law/view/document?docid=EV/1051893408035

4.7 CGT – legal v beneficial interest

Facts

The taxpayer purchased a property together with their child.

The child was unable to obtain finance without the taxpayer being included on the finance and title of the property.

The property was always the child's main residence.

The taxpayer never made any repayments to the loan or contributed any way financially to the purchase or upkeep of the property.

The taxpayer never treated the property as their asset and did not receive rent or claim any deductions for expenses associated with the property.

The taxpayer did not claim any first homeowners grant for the purchase of this property.

The taxpayer now wishes to remove his or her name from the title and the loan.

No consideration will be paid.

Question

Will CGT event A1, or another CGT event, happen when the taxpayer removes his or her name from the title of the property?

Decision and reasons

No.

The ATO noted that CGT event A1 occurs when there is a disposal of an ownership interest in a CGT asset but that it does not happen if there is only a change of legal ownership and not a change of beneficial ownership.

The ATO accepted that, while the taxpayer was the registered legal owner of the property, there was never any expectation of having any elements of beneficial ownership of the property as he or she:

1. was not going to live in the property;

2. was not intending to and did not incur any expenses of ownership of the property, including mortgage payments;
3. did not intend to or obtain rent in respect of your legal ownership; and
4. had no intention to benefit from any future sale of the property.

Accordingly, the ATO considered that no CGT event happened when legal title was transferred by the parent to the child.

COMMENT – this ruling is consistent with the ATO view that where there is only one beneficiary there can be 'absolute entitlement' so that the passing of property to such a beneficiary does not constitute a CGT event.

ATO reference *Private Binding Ruling Authorisation Number 1051895459052*
w https://www.ato.gov.au/law/view/document?docid=EV/1051895459052

4.8 GST – commercial residential premises

Facts

The taxpayer carries on an investment association operation and is registered for GST.

The taxpayer purchased an existing residential property.

The property is a brick building and presently comprises a kitchen, laundry, bathrooms, bedrooms and a number of lounge/living rooms.

The property was used as an orphanage by a previous owner(s) and subsequently as a student boarding house.

The sale to the taxpayer was a taxable supply and GST was paid. GST credits were claimed by the taxpayer.

The taxpayer subsequently decided to sell the property and has entered into a contract for sale to a prospective purchaser.

The parties are awaiting the outcome of this ruling for the pending settlement of the property.

The property has mostly been vacant since its purchased by the taxpayer, however, it was used occasionally for accommodation purposes by one or more parties associated to the taxpayer

Frome the time the sale contract was entered into, the property was vacant and remained vacant apart from a caretaker who resides at the property.

The property is zoned for residential purposes.

Question

Is the sale of the existing residential premises a taxable supply?

Ruling

Yes.

The ATO noted section 9-5 of the GST Act states that a person makes a taxable supply if:

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

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

The ATO noted that the primary issue in this case is whether the supply to the purchaser will be a supply that is input taxed and that a supply of 'residential premises' is input taxed.

The ATO accepted that the property exhibits the physical characteristics of 'residential premises' as it provides shelter and basic living facilities.

However, the ATO considered necessary to consider whether the property has characteristics that align to commercial residential premises.

The ATO's views on commercial residential premises are set out in *Goods and Services Tax Ruling* GSTR 2012/6.

The ATO noted that the term 'commercial residential premises' is defined in section 195-1, in part, as:

1. (a) a hotel, motel, inn, hostel or boarding house; or
2. (b) premises used to provide accommodation in connection with a *school; or
   ...
3. (f) anything similar to residential premises described in paragraphs (a) to (e).

The ATO considered it necessary to consider whether the property meets the descriptions of hostel or boarding house.

Features of boarding houses

The ATO considered that a boarding house has the following features:

1. it is a dwelling at which board and lodging are provided to guests or residents;
2. it provides accommodation for a commercial purpose but non-profit entities can also operate commercial residential premises;
3. it has the capacity to supply accommodation for multiple occupancies;
4. a boarding house will ordinarily be a single dwelling although it may have an additional standalone structure. However, it does not have separate, independent living units; and
5. the accommodation is the occupants' principal place of residence.

The ATO considered that there are a number of similarities between the Property and the descriptions of boarding houses as follows

1. it can provide multiple occupancy;
2. it has buildings designed to supply accommodation at a comparatively low cost to occupants with a significant number of dormitories, separate common areas of amenities, laundry and lounge area and separate commercial kitchen with indoor and outdoor dining and recreation space; and
3. it includes self-contained office rooms for guardian supervisors.

The ATO noted that the definition of 'commercial residential premises' encompasses establishments similar to, or establishments that exhibit characteristics that place them on a similar footing to, hotels, motels, inns, hostels and boarding houses.

On balance of the facts, the ATO considered that the property has sufficient features to be characterised as being sufficiently similar to a hotel, motel, inn, or boarding house and the property will fall within paragraph (f) of the definition of commercial residential premises defined in section 195-1.

The ATO considered it was not relevant that the property is vacant at the time of sale as the property displays characteristics of a boarding house and has been clearly established for that purpose. The property was also advertised as "a boarding house of fourteen bedrooms and bathrooms" based on a search done on RP Data.

ATO reference *Private Binding Ruling Authorisation Number 1051886074381*
w https://www.ato.gov.au/law/view/document?docid=EV/1051886074381

5 ATO and other materials

5.1 Arrangements to avoid luxury car tax

The ATO has announced in TA 2021/4 that it is reviewing arrangements involving both new and second-hand sales of luxury cars between participating entities in order to improperly obtain refunds of luxury car tax (**LCT**) and evade LCT on the retail sale of the cars.

According to the ATO, such arrangements typically involve:

- the supply of a luxury car to a pre-determined recipient identified by the controlling mind of the arrangement;
- a number of wholesale sales of the car are purportedly made, along a chain of participating entities often acting in collusion, prior to the final retail sale to the pre-determined recipient;
- one of the entities claims a refund of LCT while creating a liability to another entity in the chain;
- one or more of the participating entities does not correctly report and pay their LCT liabilities.

The arrangements sometimes also involve artificially embedding LCT in the price of a car that is not otherwise subject to LCT. A participating entity then seeks to recoup this LCT as a refund, and the artificial LCT liability is never reported and paid.

The ATO's concern is that entities are using such arrangements to improperly obtain LCT refunds and to evade LCT. In addition the arrangements can result in luxury cars are being sold without income tax and GST being paid.

The ATO is engaging with taxpayers to ensure that LCT, GST and income tax obligations are correctly met. Taxpayers and their advisors who are involved in these types of arrangements can expect increased scrutiny from the ATO.

ATO reference *Taxpayer Alert 2021/4*
w https://www.ato.gov.au/law/view/document?docid=TPA/TA20214/NAT/ATO/00001

5.2 PCG 2020/3 extended

Practical Compliance Guideline PCG 2020/3: Claiming deductions for additional running expenses incurred whilst working from home due to COVID-19 has been updated to extend its application to 30 June 2022. This is the PCG that contains the 80 cents per hour claim from working from home.

ATO reference *PCG 2020/3*
w https://www.ato.gov.au/law/view/view.htm?docid=%22COG%2FPCG20203%2FNAT%2FATO%2F00001%22

5.3 Revenue Western Australia – Duties and Easements

On 5 November 2021, the WA Commissioner of State Revenue issued Practice DA 22.3 'Easements'.

The Practice Note clarifies how duty will be assessed on the creation, grant or surrender of an easement.

The creation or grant of an easement is a dutiable transaction as an acquisition of new dutiable property. The person liable to pay transfer duty is the person that acquires the new dutiable property.

The surrender of an easement is a dutiable transaction as a surrender of special dutiable property. The person liable to pay transfer duty is the person to whom the interest is surrendered.

In respect of determining the dutiable value of the dutiable transaction, the Commissioner's practice is as follows:

1. If consideration is paid or agreed to be paid for the grant or surrender of an easement and the transaction is between arm's length parties, the consideration will generally be accepted as representing the dutiable value;

2. If one party to the transaction is a government authority or provider of utility services (for example, water, power or gas) and no consideration is paid or agreed to be paid for the grant or surrender of the easement, the Commissioner will accept that the easement has no value and no duty is payable; and
3. If the grant or surrender of an easement is between parties at arm's length and either no consideration is paid or nominal consideration is paid, and evidence is provided that the consideration is nil or nominal, the Commissioner will generally accept that the transaction has no dutiable value or that the agreed consideration represents the fair market value, as the case may be.

The easement will be referred to the Valuer-General for valuation if:

1. the Commissioner considers it appropriate to do so;
2. if the consideration or stated value is uncertain or appears inadequate; or
3. if a transaction relating to the grant or surrender of an easement is between parties who are not at arm's length.

Revenue Western Australia, *Commissioner's Practice* DA 22.3
w https://www.wa.gov.au/government/publications/duties-cp-da22

5.4 Media release Victoria – build-to-rent developments and land tax

On 12 October 2021, the Victorian State Government released a media release which confirmed that eligible Build-to-Rent developments completed and operational between 1 January 2021 and 31 December 2031 will receive both the 50 per cent land tax discount and full exemption from the Absentee Owner Surcharge (AOS) for up to 30 years from 1 January 2022.

Government noted that Build-to-Rent is aimed at providing a new approach to residential housing, where properties in a development are designed to be held for rental over the long term. These initiatives are intended to increase rental supply, improve the diversity of housing choice and mix, and provide more long-term rental options.

Victoria State Government, Treasurer Media Release *creating more rental housing choices for Victorians*
w https://www.premier.vic.gov.au/sites/default/files/2021-10/211012%20-%20Creating%20More%20Rental%20Housing%20Choices%20For%20Victorians.pdf

5.5 ATO tool on GST obligations for property transactions

The ATO has updated its tool on GST obligations when buying, selling or leasing property.

The tool can be used to determine:

- the GST needed to be paid;
- the GST withholding amount payable by the purchaser;
- whether the purchaser is eligible for GST credits;
- if the supply is GST-free; and
- if the margin scheme can be applied.

w https://www.ato.gov.au/Newsroom/smallbusiness/GST-and-excise/Get-help-calculating-GST-obligations-for-property/

5.6 Commissioner address to the Tax Institute's Tax Summit 2021

On 21 October 2021, the Commissioner of Taxation, Chris Jordan AO, addressed The Tax Institute's Tax Summit.

The Commissioner's address covered a number of aspects of tax administration over the past 12 months but points worth noting were as follows:

1. it is recognised that there are ongoing complexities in the consistent understanding and application of Division 7A of the ITAA 1936 and section 100A of the ITAA 1936 and the ATO is committed to providing further guidance in the next calendar year;
2. the ATO will soon also publish revised guidance on the allocation of profits by professional firms, and on arrangements where taxpayers redirect their income to an associated entity from a business or activity which includes their professional services;
3. the ATO acknowledges the importance of tax practitioner engagement strategy due to the level of influence tax practitioners have over the compliance with their clients' tax and superannuation obligations. The Commissioner noted that in 2020-2021 financial year, the ATO made 169 evidence-based referrals, and made 605 referrals based on intelligence, to the Tax Practitioners Board. Of these referrals, 36 registrations were terminated;
4. the Commissioner, in reference to the Pandora Papers, reaffirmed that the ATO is investigating and will take action against those involved in offshore tax evasion.

w https://www.ato.gov.au/Media-centre/Speeches/Commissioner/Commissioner-s-address-to-the-Tax-Institute-s-Tax-Summit-2021/