THE TAX INSTITUTE

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1 Cases

1.1 MJ and IT Holdings – cash flow boost eligibility

Facts

MJ and IT Holdings Pty Ltd operated a business. Between 1 July 2019 and 30 March 2020, it made payments totalling $28,417 to its director, Merilyn Knight. MJ and IT Holdings accounted for each of these payments by debiting the director's loan account, and described those payments as "director's loan", with a small number being "director's drawing".

Following discussions with Merilyn and her husband, Ian Knight, towards the end of March 2020, MJ and IT Holdings' accountant raised an accounting entry of $25,000 in the company's "Wages Payable-Payroll" account in respect of a wage expense for Merilyn. The single touch payroll system generated a payslip dated from 23 March 2020 to 29 March 2020 for this expense.

On 31 March 2020, the accountant created a journal entry which stated "*To record a payment of wages for Merilyn Knight (Manual Journal: Posted by Ioulia Nossova on 31 Mar 2020 – 2 Jun 2020)",* and which debited Wages Payable-Payroll account in the amount of $13,602 (being $25,000 minus withholding tax) and credited the same amount in the Director's Loan account.

On 8 April 2020, MJ and IT Holdings lodged its March BAS. The March BAS included the amount withheld in the payslip.

On 4 May 2020, MJ and IT Holdings paid superannuation guarantee contributions of $2,375, which were overdue, following an enquiry by the Australian Taxation Office auditor enquiring into the March BAS.

MJ and IT Holdings was audited and the Commissioner determined that $13,602 was not paid to Merilyn. MJ and IT Holdings objected to the Commissioner's decision and was unsuccessful.

In order for MJ and IT Holdings to satisfy the criteria in section 5(1)(a)(i) of the *Boosting Cash Flow For Employers (Coronavirus Economic Response Package) Act 2020* **(CFB Act)**, MJ and IT Holdings needed to have made a payment, in March 2020, of a type that was subject to withholding under Subdivision 12-B, 12- C or 12-D in Schedule 1 of the TAA.

At the hearing, MJ and IT Holdings accepted that $13,602 was not actually paid to Merilyn, but submitted that the application of the $25,000 director fee to the amount standing to Merilyn's credit in the Directors Loan Account constituted constructive receipt of the director fee pursuant to section 11-5 of Schedule 1 of the TTA, which provided:

> *(1) In working out whether an entity has paid an amount to another entity, and when the payment is made, the amount is taken to have been paid to the other entity when the first entity applies or deals with the amount in any way on the other's behalf or as the other directs.*

The Commissioner submitted that MJ and IT Holdings failed to meet the criteria in section 5(1)(a)(i) of the CFB Act as:

1. payments of $28,417 made to Merilyn were largely loans;
2. there is no authority for the proposition that, absent an error, amounts paid by a company and recorded as loan repayments can become a payment of remuneration simply because the company's shareholders agree to retrospectively change the character of the payment;
3. even if the attempt to convert loan repayments to a wage was effective, no amount was actually "paid" to Merilyn, as the credit entry made to the director's loan account did not constitute actual payment;
4. while book entries can effect payment under the doctrine of set-off, the application of this doctrine required cross-liabilities and an agreement, in the present case, there were no mutual liabilities that could be offset;
5. all that happened was that MJ and IT Holdings increased its existing liability to Merilyn by $13,602 on 30 March 2020.

The Commissioner submitted that, in the alternative, constructive payment had not occurred. The Commissioner did not accept a credit entry amounted to money being "applied" or "dealt with" for the purposes of section 11-5 of Schedule 1 to the TAA.

The Commissioner also raised an accounting issue that went to the question of whether the accounting journals were evidence of an actual payment, given that the accounting software which listed Merilyn's loan transactions contained a 'Running Balance column'. As at 30 March 2020 there was a credit of $11,396 owing by MJ and IT Holdings to Merilyn.

The Commissioner also raised the application of the integrity provision under section 5(1)(g) of the CFB Act for the first time. The Commissioner identified the following scheme:

1. the decision by MJ and IT Holdings to make journal entries on 31 March 2020 increasing the director's loan account by $13,602 and reducing the wages payable account by the same amount;
2. the issuing of a payslip to Merilyn; and
3. the lodgement of an Activity Statement for March 2020 which included the gross wage of $25,000 in the total of $48,183 at Item W1 and the purported withholding liability of $11,398 in the total of $15,079 at Item W2.

Evidence tendered at the hearing noted that:

1. the practice had been for some time to fix the director's remuneration at the end of the financial year;
2. MJ and IT Holdings had for the same time period a practice of not remunerating the director to a level so that the company incurred a tax loss;
3. the remuneration had been determined having regard to the profit recorded for the nine months to March 2020 and the amount that had been drawn down in that same period;
4. MJ and IT Holdings had not withheld PAYG when expensing similar payments in the past.

MJ and IT Holdings submitted that the sole purpose of the administrative step of making a record in the director's loan account to increase the applicant's indebtedness to be a record of a transaction that had already occurred, and was not done for the dominant purpose of increasing the applicant's entitlement to a cash flow payment by the specific step of making of journal entries.

Issues

1. Did accounting entries constituted constructive payment?
2. Did the accounting entries have the sole or dominant purpose of increasing MJ and IT Holdings eligible for CFB?

Decision

The Tribunal considered that there was a constructive payment of $25,000 from MJ and IT Holdings to Merilyn, in that Merilyn, in her capacity as director and in her personal capacity, had agreed that MJ and IT Holdings should withhold $11,398 from her remuneration and pay it to the Commissioner, where it would be held on her behalf. The expensing of the director's fee also created an obligation of MJ and IT Holdings to make superannuation contribution for Merilyn.

The Tribunal also noted, in relation to the accounting issues raised by the Commissioner, that accounting software produced accounting records and work papers, and in the preparation of year-end financial statements there can be correcting journals altering the entries made beforehand. Accounting records can also include work papers that explain accounting treatments including correcting or adjusting journals. Therefore the 'Running Balance column' did not lead to a negative inference for MJ and IT Holdings.

Having found in favour of MJ and IT Holdings in relation to the constructive payment issues, the Tribunal Member nonetheless determined that MJ and IT Holdings was ineligible to receive a CFB for the March 2020 period as a consequence of its non-compliance with section 5(1)(g) of the CFB Act. The Tribunal noted that had the parties dealing on arm's length terms, those steps would not occur, and the only reasonable conclusion for MJ and IT Holdings in fixing the remuneration in March rather than in June was increase the Cash Flow Boost available for MJ and IT Holdings.

Citation *MJ and IT Holdings Pty Ltd and Commissioner of Taxation* [2021] AATA 3250 (SM James, Melbourne)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2021/3250.html

1.2 E Group Security – payroll tax and employment agents

Facts

E Group Security was established in 2004 by Sami Chamoun. E Group Security is the main operating company in a group of companies involved in the security industry across Australia.

The security services provided for E Group Security's clients include workers who perform security guard services (such as patrolling buildings, maintaining static security posts, boom gate or access control, and crowd control), and other services (such as concierge, loading dock control, and weighbridge services). These services are provided by both employees of E Group Security and contractors.

E Group Security promotes itself, through its website, as a "national and dynamic Australian Owned business with over 18 years' experience in tailoring and delivering high quality professional services to many private, corporate, retail and government organisations".

E Group Security is the entity (with one qualification) that enters into contracts with third party contractors for the supply of contracted security guards. The qualification is that since July 2017, contracts both with clients and with third party contractors in the hospitality industry have been entered into by a separate entity (with separate branding) in the group, being Vital Security Group.

The payroll functions in relation to the security guards engaged by E Group Security are performed by various of the subsidiaries, depending on the State in which the particular security guard is working. The NSW Chief Commissioner argued that, on the proper characterisation of the arrangements, those entities provide more than payroll functions in that they "procure" the security guards for the benefit of E Group Security.

In 2018, E Group Security had more than 600 clients in different industry sectors, with revenue of around $48 million. The services provided to clients were generally agreed between E Group Security and clients pursuant to public or private tenders or request for quotation (RFQ) processes. In many there was a Standard Operating Procedure (SOP) prepared for the relevant client and in some cases standalone SOPs for particular events.

E Group Security's clients fall within three streams or industrial sectors: (a) commercial, Government and retail; (b) events; and (c) hospitality. Evidence was provided that E Group Security would work with the client to understand its general expectations, and it was "easier to sign the client's contract" rather than negotiating its terms. However, Sami was adamant in his evidence that for security matters, E Group Security would follow its own course.

Other relevant factors include that: the security guards wore uniforms with E Group Security's branding, they used publicly available facilities and did not use staff rooms available to the clients' staff, E Group Security was responsible for all site inductions, training, licensing compliance and rostering for the security guards, and E Group Security prepared all instruction manuals and other documentation used by the security guards.

The Chief Commissioner assessed E Group Security as liable to payroll tax on the basis that it was an employment agent and liable to payroll tax on payments made to security guards whose services had been sub-contracted from third parties for the financial years ended 30 June 2015 to 30 June 2018.

In the alternative, each related entity was an employment agent and E Group Security was the client, similar to the arrangements between the related entities, such that E Group Security was jointly and severally liable for the unpaid payroll tax of the related entities on the payments to the workers.

On 30 October 2018, E Group Security objected to those assessments.

On 14 December 2018, the Commissioner disallowed that objection.

On 12 February 2019, E Group Security filed its summons seeking the Court's review of the assessments.

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During the hearing, E Group Security provided evidence from Sami, employees and contractors. E Group Security also produced documentary evidence of contracts with various of its clients, with several of the contracts not covering the relevant period in dispute and some contracts not listing E Group Security as a contracting party.

E Group Security contended that it did not procure the services of the security guards "for" (in the sense of "in and for the conduct of the business of") its clients. It does not dispute that each of its clients met the statutory description of a "client" or that it "procures" the services of the security guards in question. E Group Security submitted that, for deliberate policy reasons (referring to an Industrial Relations Commission report), the *Security Industry Act 1997* (NSW) prohibits security guards from operating as a labour force available for hire to be added to an unlicensed person's workforce (because an unlicensed person does not have the ability and expertise to control, direct and supervise security guards in a way that will promote the safety of those guards and members of the public).

The Chief Commissioner contended that only certain security guard activities were covered by the *Security Industry Act 1997*, and that this Act does not apply to persons who are exempt under the *Security Industry Regulation 2016* (NSW), including persons employed in the retail industry or persons who scan tickets at events.

Issue

Are the arrangements between E Group Security and its clients (or, alternatively, the arrangements between E Group Security and its wholly-owned subsidiaries) "employment agency contracts" under section 37 of the NSW PTA?

Decision

Ward CJ in Equity confirmed that the "in and for" test requires an analysis as to whether the workers were integrated into the client's business (or added in effect to its workforce), not whether the workers or the provision of their services were integral or essential (as opposed to ancillary) to the client's business or workforce, and not whether the client could itself have performed the relevant tasks.

Ward CJ in Eq also stated that, while the capacity to direct or control the tasks that are performed, or the manner in which they will be performed is a relevant consideration, this factor alone will not necessarily be determinative in all cases as to whether workers work in and for the conduct of a business of a client. Further, where there are constraints imposed by the legislation, it would mean nothing if in practice the constraints were not observed.

Ward CJ in Eq considered the evidence before the court in relation to each client of E Group Services. Her honour considered that Sami was a reputable witness and his evidence, at a general level, as to security procedures was consistent with the evidence of the witnesses whose functions involved security services at a more operational level. Although the documentary evidence was incomplete, Ward CJ in Eq did not consider that this was fatal given that the balance of the evidence was consistent with the effect that E Group Security takes its security licensing obligations seriously and that E Group Security maintained control over the supervision of the security guards it provided to clients.

Ward CJ in Eq accepted the evidence that E Group Security was responsible for supervision of the security operations at various clients' sites. The security guards were directed to comply with E Group Security's instructions and to report back to E Group Security and responding to a request from a client did not change that.

Having regard to the following factors, Ward CJ in Eq concluded that the arrangements by which E Group Security provided security guard services to the clients did not constitute an employment agency contract:

1. the location at which the services are provided by the workers is generally that of the client's premises;
2. there is a regularity with which the workers provide the services to the clients in the commercial sector but a more ad hoc provision of services in health sector or event sector;
3. the level of interaction between the workers and the client's customers or contractors varies but there some interactions between them;
4. there is some level of direction or instruction reserved to the client under the contractual documentation, though it does not extend to the control over or giving of binding instructions as to security decisions of a kind required under the *Security Industry Act 1997* to be made by the security licence holder;
5. the workers' access to and use of client staff facilities was limited or non-existent;

6. there was a significance to the clients of the security services provided by E Group Security's workers; and
7. in respect of clients who were provided services on an ad hoc basis or outside the ordinary day-to-day activities of the client (e.g. the Department of Education), Ward CJ in Eq found no basis to conclude that the security guards were integrated into the client's business.

Ward CJ in Eq rejected alternative argument that the contracts between E Group Security and its subsidiaries were themselves employment agency contracts. Ward CJ in Eq accepted that the payroll arrangements between E Group Security and its subsidiaries were not a client arrangement but rather instances of compliance by the subsidiary with a direction from the parent company. Further, Ward CJ in Eq did not accept that the subsidiaries procured the workers, instead considering that they were performing a payroll tax function.

Ward CJ in Eq ordered that the assessments issued to E Group Security be revoked.

Citation *E Group Security Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 1190 (Ward CJ in Eq, Sydney)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2021/1190.html

1.3 McIntosh Bros – land tax primary production exemption

Land located in Cobbitty, New South Wales was acquired by the McIntosh family in 1868.

For many years the land was used to operate a dairy farm. In 1931, the land was transferred to McIntosh Bros Pty Ltd. In 1987, McIntosh Bros was placed into voluntary liquidation, and the land was informally divided into two parts: the west side controlled by Jim McIntosh and his family (including his son Ian) and the east side controlled by Ron McIntosh and his family (including his son Richard).

There was no formal licence or lease between the company and the members of the families who controlled the occupation of the two parts of the land. The west side was used by Ian to graze his own cattle and agist cattle for third parties, including Mr Hayter. The east side was used by Ron and Richard to conduct a beef cattle operation and was used as part of their wider farming business that involved the running of sheep on their properties at Molong, New South Wales. At all times, the land was not zoned rural.

The Chief Commissioner assessed the land for land tax for the calendar years ending 31 December 2014, 2015 and 2016 (**Relevant Years**). McIntosh Bros applied to the New South Wales Civil and Administrative Tribunal for a review of the decision.

The Tribunal determined that the land was used for primary production during the Relevant Years. The Tribunal found that although there were four or more independent uses of the land by different persons or entities, each use was a primary production use within section 10AA(3)(b) of the LTMA. It also found that for the purpose of determining whether the whole of the land was "land used for primary production" those various primary production uses could be "aggregated or consolidated and weighed against the non-primary production uses". The Tribunal also concluded that both the commerciality and profit purpose tests were established taking account of the individual uses of the land.

The Commissioner appealed to the Tribunal's Appeal Panel. The Appeal Panel upheld the initial decision. The Commissioner next sought leave to appeal to the Court of Appeal of the Supreme Court of New South Wales. The right to appeal in this situation is limited to questions of law.

Issues

The seven proposed grounds of appeal the Court considered were as follows:

1. Grounds 1 and 2: whether the dominant use of land may be an aggregation of primary production uses undertaken independently by persons who are independent from one another;
2. Ground 3: whether the commerciality and profit purpose tests were satisfied in circumstances where the relevant use of the land was undertaken as part of a broader primary production enterprise;
3. Grounds 4, 5 and 6: whether the agistment of cattle to Mr Hayter was for the maintenance of animals for the purpose of selling them or their produce; and

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4. Ground 7: whether the Tribunal was required to and did take into account that the various users of the subject land made little or no accounting profits, bore little or no costs for those uses and received no or meagre income for the labour involved.

Decision

Grounds 1 and 2

The Commissioner contended that where there are, as in this case, a number of primary production uses within section 10AA(3)(a)-(f), those uses cannot be aggregated for the purpose of the dominant use inquiry unless they are undertaken by the same user, or a single cohesive group of users.

The Court confirmed that the purpose of section 10AA of the LTMA is to provide an exemption for land that is used for primary production. Therefore, the Court determined that each primary production activity specified in section 10AA(3) constitutes a use for "primary production", and when undertaken on the land each contributes to the character of the land as "land used for primary production". Accordingly, the Court concluded that there is no apparent reason why any of the activities carried out on the same land should not be treated as collectively contributing to the character as land, the dominant use of which was for primary production rather than for any other purpose.

The Court rejected that Commissioner's contention that the primary production activities ought to be undertaken by a single user in order to be aggregated. The Court relied on the authorities in C*hief Commissioner of State Revenue v Metricon Qld Pty Ltd* [2017] NSWCA 11 and the extrinsic material to section 10AA(3) to confirm that the purpose of section 10AA(3) is not to identify the dominant single primary production user and use, rather the comparison called for is between use for primary production and other uses.

Further, the commerciality and profit purpose tests in section 10AA(2) require an enquiry into the purpose or character of the activity or activities constituting the use of the land, and this enquiry is to be determined objectively (not subjectively). The Court concluded that the satisfaction of the commerciality and profit purpose tests are to be assessed as a whole, taking into account the independent uses constituting that use.

The Court accepted that grounds 1 and 2 raised proper questions of law regarding the construction of section 10AA of the LTMA which justified the grant of leave to appeal. However, the appeal on these grounds was dismissed.

Ground 3

The Commissioner contended that in determining whether the commercial purpose or character of the relevant use is "significant and substantial", regard can be had to activities conducted on other lands where those activities are "integrated" in some way with the use of the subject land, that is, they form part of an overall grazing or farming venture.

The Tribunal and Appeal Panel concluded that the west side cattle operation was part of the wider farming operation because of the "interconnecting integrative elements (management, financial, banking, insurance, accounting and risk management) between the two operations", having the consequence that the overall cattle breeding activity conducted on the land had a significant and substantial commercial purpose or character.

The Court confirmed that activities conducted on the land may be the same or may involve diversification of farming and grazing activities such that the different activity may generate revenue from another source at different times. The Court confirmed that these considerations can be used to inform the assessment of the commercial purpose of character of the use of a particular land as part of an overall business.

The Court concluded that this ground did not identify a question of law, and leave to appeal on ground 3 was refused.

Grounds 4, 5 and 6

These grounds of appeal concerned the use of the land by Mr Hayter. The Commissioner contended that the person maintaining the cattle (Ian) was not the person who had the purpose of selling them (Mr Hayter), therefore

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there was no activity satisfying section 10AA(3)(b) of the LTMA. The Appeal Panel was satisfied the land was being used to maintain livestock for the purpose of their sale, and therefore the identity of the "maintainer" was not relevant. The Court agreed with the Appeal Panel in this regard.

The Commissioner also contended that there was no evidence to support the Tribunal's finding that Mr Hayter was maintaining the animals on the land under a licence. The Court confirmed that there was evidence to this effect, with Mr Hayter providing evidence that he went to the land every two weeks to tend to the cattle, and there was an informal licence permitting him to enter to the land to maintain his cattle. The Court refused to grant leave to appeal on the basis of grounds 4, 5 and 6.

Ground 7

The Commissioner contended that the Tribunal failed to take into account three matters which it was required to consider for the commerciality and profit purpose tests. These matters were:

1. the separate users of the land made miniscule or no accounting profits;
2. the separate users of the land bore no costs for the use of the land (e.g. rates were paid by McIntosh Bros); and
3. the separate users received no or meagre income for the labour involved in their use of the land.

The Court confirmed that the Appeal Panel made findings regarding the profit generated from the activities conducted on the land and concluded that, although profits fluctuated from year to year, they were significant and substantial. Further, in relation to the payment of carrying costs of the land, the Appeal Panel confirmed that there would be no commercial sense for the users of the land to pay the carrying costs. In relation to the income for the labour involved, the Appeal Panel confirmed that the individuals who were engaged in the various uses took their financial returns by way of profits rather than as employees. Therefore, the Court concluded that this ground of appeal did not raise a question of law and was not made out.

Citation *Chief Commissioner of State Revenue v McIntosh Bros Pty Ltd (in liq)* [2021] NSWCA 221 (Meagher JA, Payne JA and White JA, Sydney)
w https://www.caselaw.nsw.gov.au/decision/17ba49dc933fd5acb37385cc

1.4 Kakoz – separated spouses and land tax PPR exemption

Eddie Kakoz, aged 87, and Mabel Kakoz, aged 77, are married. They have two sons, Cenanj Kakoz and Saif Kakoz.

Between them, Eddie and Mabel and their sons own all of the lots in a strata plan at Maroubra, in various ownership combinations.

Unit 8 and Unit 10 were located adjacent to one another on the one floor of the Maroubra property.

Both Eddie and Mabel had registered Unit 8 as their address on the electoral roll at all relevant times.

Sydney Water recorded Unit 8 in the names of Eddie and Mabel and Unit 10 in the names of all four family members.

According to their income tax returns, Eddie and Mabel listed each other as their "spouse" and both recorded Unit 10 as their residential address. Eddie and Mabel's tax returns declared distributions from a partnership between themselves and other family members. They shared a private health insurance policy and a joint bank account.

When the strata plan for the property was registered in 2019, Eddie and Mabel were registered as joint tenants for lots 6 and 7.

Eddie held a driver's licence that recorded Unit 10 as his address. His bank also recorded Unit 10 as his address.

The Chief Commissioner issued land tax assessments to all four members of the Kakoz family for the 2020 land tax year. The Chief Commissioner also issued land tax assessments to Eddie for the 2016, 2017, 2018, 2019 and

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2020 land tax years. Eddie, Mabel, Cenanj and Saif objected to the assessments, which the Chief Commissioner disallowed.

The principal place of residence exemption was sought respect of both Unit 8 and Unit 10 for the 2020 land tax year, on the basis that Eddie and Mabel were estranged and had been living separately for some years, and that there was no intention to resume cohabitation in view of their advanced age and poor health.

Land tax is payable on all land in New South Wales under sections 7 and 8 of the *Land Tax Management Act 1956* (NSW) (the **LTMA**), unless that land is exempt. Section 10(1)(r) of the LTMA states that land to which the "principal place of residence exemption" applies is exempt.

The principal place of residence exemption is set out in clause 12 of Schedule 1A to the LTMA. Under the exemption, there can only be one principal place of residence for members of the same "family". A family is defined as a person, their spouse and any dependent child who ordinarily reside with either spouse. Spouses include legally married and de facto couples. However, the Chief Commissioner has a discretion to choose not to regard married people as spouses if he is satisfied that the spouses do not live together and have no intention of living together again in the future.

Eddie, Mabel, Cenanj and Saif sought a review of the objection decision in the NSW Civil and Administrative Tribunal.

Eddie provided a statutory declaration stating that he resided on his own at Unit 10 and that he had been estranged from his wife for at least 5 years due to her "incapacity and illness". He also provided evidence that he had tried to reconcile with Mabel but her medical condition and attitude made it impossible.

Mabel provided an affidavit stating that she resided solely on her own at Unit 8, where she had lived since 2013 after she had surgery. Mabel's affidavit stated "it has been many years, since 2014, I have been estranged from Eddie Kakoz and do not see any notion of reconciliation in the near future. Unfortunately, my physical condition is getting worse".

The Chief Commissioner sought to call Eddie and Mabel to appear in court for cross examination on their evidence. Eddie and Mabel produced medical certificates stating that each of them was “both physically and emotionally unfit to attend any court like appearance, virtual or otherwise”. These certificates were accepted and the NCAT permitted the statutory declaration and affidavit to be admitted as evidence for consideration.

As part of the application for review, Eddie also sought to set aside the assessments issued to him for the 2016 to 2020 land tax years on the basis that their issue was harsh, unconscionable, unfair or inequitable. It was submitted on behalf of Eddie that he is an elderly gentleman who contributed to Australian society and had admirably elected to retain the property for the benefit of his children rather than to dispose of the property and use the proceeds for his own endeavours. It was submitted that these circumstances should be taken into account in reducing the number years for which assessments were issued.

On review, Eddie, Mabel, Cenanj and Saif also sought an order that the amounts owed under the assessments be reviewed to ascertain the accuracy of the figures used in those assessments.

Issues

1. Was the principal place of residence exemption available for the 2020 land tax year for both Unit 8 and Unit 10?
2. Were the assessments issued to Eddie for the 2016 to 2020 land tax years harsh, unconscionable, unfair or inequitable?
3. Should the assessments be reviewed to allow Eddie and Mabel's accountant to check the accuracy of the figures used in the assessments?

Decision

Issue 1: Availability of the principal place of residence exemption

NCAT held that Eddie and Mabel had not met the onus of satisfying NCAT that as at 31 December 2019 Eddie and Mabel were not cohabiting with each other and had no intention of resuming cohabitation with the other. Accordingly, the principal place of residence exemption was not available for both Unit 8 and Unit 10.

Eddie and Mabel were legally married as at 31 December 2019, and as spouses would only be entitled to treat one property as exempt for land tax under the principal place of residence exemption, unless the Commissioner was satisfied that they were separated.

NCAT stated it was required to feel "an actual persuasion" that Eddie and Mabel were separated, in order to be satisfied under clause 12(8) of Schedule 1A to the LTMA. NCAT raised concerns about the inconsistency of Eddie and Mabel's registered addresses compared with the statements they made in their respective statutory declaration and affidavit. For example, NCAT highlighted that both Eddie and Mabel were listed at Unit 8 on the electoral roll and both Eddie and Mabel listed Unit 10 as their residential address on their income tax returns. Their income tax returns continued to disclose joint income, shared health insurance membership and recorded them as spouses.

NCAT also noted the proximity of the two Units, being within three metres of each other. Eddie and Mabel were also registered as joint tenants of lots 6 and 7 in the property in 2019, well after the date that they had allegedly separated.

NCAT stated that the evidence was insufficient to prove that Eddie and Mabel were not living together. The written evidence from Eddie and Mabel was little more than assertion which was not able to be tested by cross examination. NCAT noted that Eddie and Mabel's evidence did not provide any detail of matters such as their activities on a day-to-day basis, including the extent of contact they had with each other. Although Eddie and Mabel's sons provided some evidence, it did not address Eddie and Mabel's living arrangements. NCAT considered on balance that the evidence was insufficient to provide any actual persuasion that Eddie and Mabel were not living together as at 31 December 2019.

Issue 2: should the assessments be set aside on the basis that they were harsh, unconscionable, unfair or inequitable?

There was no dispute that the assessments issued to Eddie for the 2016 to 2019 tax years were validly issued

NCAT noted that it has no discretion to interfere with a valid assessment on the basis that it is harsh or unconscionable, unfair or inequitable. There is no general discretion in the LTMA permitting the Chief Commissioner to take into account financial considerations, fairness or equity when making an assessment of land tax liability.

Issue 3: Should the Tribunal order a review of the amounts owed under the assessments?

NCAT has broad powers to "make any order it thinks fit" under section 101(1)(e) of the *Taxation Administration Act 1996* (NSW). However, NCAT was not prepared to order a review in this case, stating that evidence had not been presented as to why such an order was necessary.

Citation *Kakoz v Chief Commissioner of State Revenue* [2021] NSWCATAD 257 (SM Goodman SC, Sydney)
w https://www.caselaw.nsw.gov.au/decision/17ba4868de6bc16cb8dadcbd

1.5 Tang – land tax PPR exemption

Facts

On 10 July 2018, Ieng Tang purchased land at Canley Heights in New South Wales, on which was constructed a house.

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The land became Ieng's principal place of residence from around 10 July 2018. Ieng's wife resided at another address because she was caring for a disabled family member there.

The House remained Ieng's principal place of residence until 12 June 2020, when he vacated it and started to live elsewhere. The reason for this move was that, shortly before that date, he learnt of a death which had occurred in the house and became convinced he heard noises at night. Ieng believed that the house was haunted.

Ieng decided to demolish the house and build a new residence on the land (presumably to rid the unwelcome spirits from the home noted NCAT).

On 9 December 2020, Ieng entered into a contract with Allworth Constructions Pty Ltd for the construction of a new residence.

Ieng, who was self-represented at NCAT, provided the following evidence to support that he lived at the land from 10 July 2018 to 12 June 2020:

1. a receipt for $80.00 dated 7 July 2018 which was purportedly from a removalist to move a bed, table, chair and shelf to the house (to show he moved in);
2. certificate of building insurance issued by NRMA for the period 6 July 2018 to 6 July 2019 evidencing building insurance for an amount of $308,000 for the improvements on the land;
3. three statements from Sydney Water relating to water supply at the land covering the period 9 July 2018 to 8 April 2020;
4. a rates instalment notice due on 31 May 2021; and
5. a notice of valuation for the land issued by the Valuer-General as at 1 July 2019.

Ieng provided extracts of the contract with Allworth Constructions to evidence that the land was unoccupied but intended to be used and occupied as his principal place of residence, presumably to have back up argument that if the land was not found to be used and occupied as his principal place of residence he could rely on the land being treated as his main residence under clause 6 of Schedule 1A.

Ieng also provided evidence that he resided at the land in a way which was informed by his childhood living in post-revolutionary Cambodia and his limited financial resources. According to Ieng, this meant that he:

1. did not use electricity mains but relied on an LED torch;
2. did not use gas mains and instead used bottled gas for cooking;
3. did not cook often and ate preserved food or ate elsewhere;
4. used little water mains, and preferred to conserve rainwater;
5. drank from bottled water; and
6. did not use the toilet installed in the house, preferring either to visit public facilities in a nearby park or to use a receptacle for nocturnal urination, the contents of which he emptied onto the land each morning.

He stated to the Chief Commissioner that he adopted this self-denying regime *"[b]ecause I am on low income and making ends meet"*.

The Commissioner contended that for the 2019 and 2020 land tax years, Ieng did not live at the land, but at another location. The Commissioner provided evidence of Ieng's electoral address (which was not the land), utilities usage (which was either not demonstrated or negligible), insurance coverage (which was for the building only not contents) to demonstrate that the land was not used and occupied as Ieng's principal place of residence.

Ieng was assessed for land tax for the 2019 and 2020 land tax years. After failing on objection, Ieng sought a review of the Commissioner's decision by the NSW Civil and Administrative Tribunal.

Issue

Did Ieng use and occupy the land as his principal place of residence for the 2019 and 2020 land tax years?

Decision

Citing from *Yen-Cheng Chuang v Chief Commissioner of State Revenue* [2009] NSWADT 160, the Tribunal noted:

> [19] The Act does not provide any technical or legal meaning for the expression "principal place of residence" and accordingly, the expression has its ordinary meaning. A person's place of residence is usually understood as "the place where he eats, drinks and sleeps" … The use of the term "principal" in the expression suggests that a person may use and occupy more than one residence but that the exemption is only available for the principal place of residence of the person.
>
> [20] … it is necessary to use an objective test and the conclusion is determined by considering the extent and quality of use and occupation of the residence in each case …
>
> [21] The onus to establish one's principal place of residence is usually discharged on the basis of various matters … :
>
> > "... while sleeping by itself in a place can be an indication of a principal place of residence, it is not the sole matter to be taken into account. One needs to look at a whole indicia of matters ...One needs to look as well at where the applicant ate; his use of electricity and the furniture and fittings and other matters such as entertainment of friends in the house... Sleeping in a place does not make a residence. It has got to be the whole indicia of things that are done in a home which are described in the cases..."
>
> [22] Other indicia … include … the residential address for purposes of his or her mail, driving licence, on the electoral roll, in immigration records, income tax returns and telephone bills.

In considering whether Ieng ate, slept and drank at the land during the relevant period, NCAT had regard to the two pieces of evidence provided by Ieng, being the receipt from the removalist and the water bills.

NCAT did not accept that the removalist receipt was credible evidence of Ieng occupying the property, noting that the receipt did not identify the removalist and appeared to be a pre-printed receipt document. Further, the receipt only related to "remarkably little domestic equipment to support an extended residence".

In relation to the water bills, NCAT accepted that little reticulated water was consumed on the land, which could be consistent with Ieng purchasing bottled water and foregoing the convenience of indoor plumbing, but it suggests that Ieng did not genuinely reside at the land.

In considering the extent and use of Ieng's use of the land, NCAT had regard to the following:

1. there was no evidence for the receipts of bottled gas, batteries to light the house at night, or the purchase of bottled water;
2. inconsistency between Ieng's evidence that he lived on the land frugally due to serious financial hardship when the land was purchased unencumbered for $945,000, and Ieng committed to the expenditure of $549,776 to build a new residence on the land. This suggested to the Tribunal that Ieng's financial circumstances were not so dire for him to live in the house without electricity, running water, gas or flushing toilets;
3. neither the valuation and council rates demonstrate that Ieng used the land as his principal place of residence;
4. the electoral roll searches confirm Ieng's address was another property;
5. no other evidence, such as drivers licence or tax returns, was provided to corroborate Ieng's claims; and
6. the claim that Ieng used a public park or emptied his nocturnal receptacles daily on the land was not corroborated by the evidence. Further, the Tribunal referred to the fact that mains sewerage connection had for over 45 years been a normal part of daily like in the western suburbs of Sydney (as introduced by Gough Whitlam), and that "*Mr Tang's claim that for nearly 2 years he resided in the House while voluntarily subjecting himself to the indignity and inconvenience of not using Mr Whitlam's legacy to Canley Heights is inherently implausible.*"

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NCAT concluded that the quality and extent of Ieng's use of the land was implausible. Further, the there was no evidence to support the degree of permanence required of Ieng's occupation to satisfy the principal place of residence exemption. Therefore, NCAT was not satisfied that during the relevant years, the land was used and occupied as Ieng's principal place of residence.

in relation to the concession in clause 6 to Schedule 1A of the LTMA which concerns the concession for unoccupied land intended to be an owner's principal place of residence, NCAT confirmed that this concession is only available for unoccupied land.

NCAT noted that, if Ieng's claim that he used and occupied the land as his principal place of residence during the relevant years was not accepted, then the concession in clause 6 may be available. However, NACT considered that, given that the contract with Allworth Constructions was only entered into on 9 December 2020, on both 31 December 2018 and 31 December 2019 (the relevant taxing dates) there was no intention to construct a new residence on the land. Accordingly, the requirements for the concession in clause 6 was not satisfied.

NCAT affirmed the Chief Commissioner's assessments.

COMMENT – if this case had been run only on the basis that the property was unoccupied and there was the intention to build a dwelling on and reside at the property, the outcome may have differed.

Citation *Tang v Chief Commissioner of State Revenue* [2021] NSWCATAD 274 (SM Boxall, Sydney)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2021/274.html

1.6 STNK – GST and supplies of gold

Facts

The director of STNK was born in Pune, India. The director obtained a Diploma of Mechanical Engineering and Bachelor of Mechanical Engineering in India and, following that, he commenced work as an engineer with a Swiss company.

The director subsequently moved to Australia and commenced study at RMIT University to obtain a Post Graduate Diploma in Mechanical Engineering, which was completed in December 2005. The director then worked for a company called RCR Engineering.

In 2015 the director and his family moved back to India following the death of the director's father. The director sought opportunities to invest in a trading business that would enable him to remain in India.

While working at RCR Engineering, the director met a Mr Pratik Gajjar. Mr Gajjar approached the director about investing in La Gajjar Pty Ltd, a company controlled by Mr Gajjar. The director understood that Mr Gajjar operated a gold trading business. The director decided to invest.

Subsequently, Mr Gajjar approached the director about increasing his investment in La Gajjar Pty Ltd. The director refused but it was, instead, agreed that the director would establish his own entity, STNK, and STNK would pay La Gajjar Pty Ltd for providing consultancy and operational services to STNK. La Gajjar Pty Ltd would arrange for unrefined gold to be delivered to a refinery on behalf of STNK and the resultant gold bullion would be sold to the refinery. La Gajjar Pty Ltd and STNK would share the margin from the transaction.

In the period of April 2016 to November 2016 (the **First Period**), the arrangement proceeded broadly on the above basis, with STNK making sales to La Gajjar Pty Ltd for $126,086 and to ABC Refinery (Australia) Pty Ltd (**ABCRA**) for $171,590. STNK treated these supplies as GST-free on the basis that they were supplies of precious metals within the meaning section 38-385 of the GST Act.

For section 38-385 of the GST Act to apply as follows:

1. precious metal must be supplied as its first supply after its refining by or on behalf of the supplier;
2. the entity that refined the precious metal must be a refiner of precious metal; and
3. the recipient of the supply must a be a dealer in precious metal.

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A refiner of precious metal means an entity that satisfies the Commissioner that it regularly converts or refines precious metal in carrying on its enterprise.

A dealer in precious metal means an entity that satisfies the Commissioner that a principal part of carrying on its enterprise is the regular supply and acquisition of precious metal.

Later supplies of precious metal are input taxed.

STNK claimed input tax credits for the acquisition of the unrefined gold on the basis that the supplies it made were GST-free.

The director subsequently fell out with Mr Gajjar over the profitability of the arrangement. From November 2016 to January 2017 (the **Second Period**), STNK entered into its own arrangements. It acquired scrap gold bars from PM Melt Services Pty Ltd, paying partly in advance and partly in arrears, and sold them to Emirates Gold DMCC in Dubai. PM Melt Services Pty Ltd arranged for the export on behalf of STNK and STNK authorised PM Melt Services Pty Ltd as a signatory to the account in which Emirates Gold paid for the gold, as security for the arrears to be paid. The invoicing and export documentation prepared by PM Melt Services Pty Ltd indicated that STNK was the owner of the gold at the time of export.

STNK treated its supplies to Emirates Gold as GST-free export sales.

The Commissioner commenced an audit of STNK. The Commissioner considered that STNK 's arrangements were part of a GST gold scheme case under which:

1. gold bullion is acquired and then adulterated to longer meet the definition of a precious metal;
2. an entity supplied scrap gold as a taxable supply without remitting GST. This entity is referred to as the 'missing trader' and, in this case, it was an entity called 'Manila Exchange'; and
3. the scrap gold is then refined by a later entity into gold bullion and supplied as a GST-free supply of precious metal. Input tax credits are claimed on the acquisition.

There are often several intermediary entities in the supply chain.

The scheme defrauds the Commonwealth in that the missing trader acquires either GST-free or input taxed precious metal (gold) and then sells adulterated metal as a taxable supply, without remitting the GST. The GST is the amount defrauded from the Commonwealth.

The Commissioner raised assessments on STNK on the basis that:

1. for the First Period: in respect of the supplies to:
    (a) La Gajjar Pty Ltd – the supplies were not GST-free but were taxable supplies of scrap gold. STNK remained entitled to claim input tax credits;
    (b) ABCRA – the supplies were input taxed supplies of precious metals and, as a result, STNK had improperly claimed input taxed credits. Alternatively, STNK was not carrying on an enterprise or the anti-avoidance regime in Division 165 of the GST Act applied to deny the input tax credits; and
2. for the Second Period, STNK was not carrying on an enterprise and, therefore, was not entitled to claim the input tax credits. Alternatively, the Commissioner considered the anti-avoidance regime in Division 165 of the GST Act applied to deny the input tax credits. The Commissioner pointed to the fact that STNK paid 99.0975% of the spot gold price (plus GST) to PMMS but sold it to Emirates Gold for 98.996% of the spot price as demonstrating that the arrangement was uncommercial.

The Commissioner imposed 75% penalties for intentional disregard of the GST law for the First Period and 50% for recklessness for the Second Period.

STNK objected to the assessments that resulted from the Commissioner's decision at audit. The Commissioner made objection decisions on 25 January 2019 and 21 October 2019 disallowing STNK's objections.

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

At the AAT, contrary to the initial decision at audit, it appears that the Commissioner contended that the position for the supplies to La Gajjar Pty Ltd and ABCRA were the same. That is, that the supplies being made were taxable supplies of scrap gold. The Commissioner considered that, despite the legal arrangements, STNK was supplying scrap gold and not refined gold to La Gajjar Pty Ltd and ABCRA as it was scrap gold that was physically delivered to La Gajjar Pty Ltd and ABCRA and La Gajjar Pty Ltd and ABCRA undertook the refining. The Commissioner considered it was appropriate to disregard the legal nature of the transaction and to have regard to the 'commercial and practical reality' as GST is a 'practical business tax'.

In the AAT, the Commissioner and STNK made competing submissions on the evidentiary value of invoices that stated that STNK was supplying gold bullion. STNK contended that, in accordance with section 1305 of the *Corporations Act*, the invoices were prima facie evidence that gold bullion was being supplied and that, absent evidence to the contrary, the AAT had to accept the position in the invoices. Section 1305 of the Corporations Act provides that books of a company are prima facie evidence of any matter stated or recorded in the book.

The Commissioner contended that section 1305 of the *Corporations Act* did not apply in the AAT as section 33 of the *Administrative Appeals Tribunal Act 1975* (Cth) states that the rules of evidence do not apply in the AAT and, further, applying section 1305 of the *Corporations Act* would be inconsistent with the burden of proof being on taxpayers in tax matters under section 14ZZK of the TAA.

In the AAT, the Commissioner abandoned the argument that that STNK was not carrying on an enterprise. However, in relation to the supplies to Emirates Gold, the Commissioner contended that STNK had not obtained title to the scrap gold when it was exported and, therefore, was not the entity that exported the gold and so was not eligible to treat the supplies as GST-free. Broadly, a supply of goods is GST-free under s 38-185(1) if '*the supplier exports them'* within 60 days. The Commissioner argued that the only party eligible to export goods was the party with title to the goods.

The Commissioner relied on an agreement between STNK and PM Melt Services Pty Ltd dated 27 January 2017 (after the supplies the subject of the objections) that stated property and risk would pass to STNK on it paying the purchase price. As STNK paid partly in arrears, it did not obtain title to the gold at the time of export.

Issues

1. whether the invoices were prima facie evidence that STNK was supplying gold bullion;
2. whether the supplies by STNK to ABCRA and La Gajjar Pty Ltd were GST-free supplies of precious metals;
3. whether STNK made GST-free export supplies to Emirates Gold DMCC;
4. whether the benefit of the input tax credits to which STNK was entitled were negated by Division 165 of the GST Act;
5. whether the penalties of 75% for intentional disregard of the GST law for the First Period and 50% for recklessness for the Second Period were properly imposed.

Decision

The AAT noted that the Commissioner contended this was a "GST gold scheme case' but that the response made on behalf of STNK was that, 'if there was a "carousel fraud" then it was the applicant [i.e. STNK] who was taken for a ride'. The AAT noted that the Commissioner did not allege that, to the extent that there was a fraud on the Commonwealth because an entity in the chain failed with remit GST, STNK was aware of such fraud or the failure by an entity to remit GST.

Invoices as prima facie evidence

While there was no concluded authority on the point, the AAT considered that section 1305 of the *Corporations Act* is a rule of evidence that is excluded by section 33 of the AAT Act.

The AAT considered that the invoices remain evidence to which the AAT should have regard, including with the other evidence, such as the written oral testimony of the director. The AAT noted the burden of proof in section 14ZZK simply required a weighing up of the evidence and, if the taxpayer tips the scales 'ever so slightly', it has discharged its burden.

Whether STNK made GST-free supplies of precious to ABCRA and La Gajjar Pty Ltd

This issue depended on, STNK having supplied gold bullion to ABCRA and La Gajjar Pty Ltd, the relevant entity being a refiner and the recipient of the supply being a a dealer in precious metal.

The AAT did not accept that the Commissioner's 'practical business tax' submission that the terms of the transaction could be disregarded, particularly where the Commissioner did not invite the AAT to conclude that the terms of the transaction were sham. However, the AAT did not need to come to a concluded view on the gold bullion requirement due to its conclusion on other requirements.

The AAT was not satisfied that STNK had provided evidence which would discharge its burden of proving that either ABCRA or La Gajjar Pty Ltd were refiners of or dealers in precious metals. This meant that the supplies were not GST free, and so had to be taxable.

GST-free export supplies to Emirates Gold?

The AAT did not accept that it was necessary for STNK to have title to the gold in order for it to make GST-free export sales to Emirates Gold. However, the AAT also considered that, if it was wrong to conclude this, while finely balanced, STNK did have title to the gold for the following reasons:

1. the agreement relied on by the Commissioner did not apply to the supplies made in the Second Period at it was dated 27 January 2017 (after the relevant transaction);
2. PM Melt Services Pty Ltd made arrangements for the export of the gold on the basis that STNK was the owner of the gold and not PM Melt Services Pty Ltd

Accordingly, the AAT considered that STNK did make GST-free export sales and was entitled to the input tax credits on the acquisitions from PM Melt Services Pty Ltd.

Division 165 of the GST Act

The application of Division 165 of the GST Act was only relevant to the acquisitions made in connection with the supplies made to Emirates Gold as the AAT had concluded that the supplies made to ABCRA and La Gajjar Pty Ltd were taxable supplies.

The AAT noted that the real mischief in the arrangements here were the actions of Manila Exchange not remitting GST on the supplies it made earlier in the supply chain. The AAT noted that the application of Division 165 would punish STNK for the actions of another entity. The AAT considered this an 'unfortunate prospect' but accepted that it had to approach the application of Division 165 in accordance with the statutory criteria.

The AAT noted that the application of Division 165 of the GST Act depended on whether it is reasonable to conclude that either:

> *(i) an entity that (whether alone or with others) entered into or carried out the scheme, or part of the scheme, did so with the sole or dominant purpose of that entity or another entity getting a *GST benefit from the scheme; or*
>
> *(ii) the principal effect of the scheme, or a part of the scheme, is that [the applicant] gets the GST benefit from the scheme directly or indirectly.*

The AAT noted that it had to apply objective criteria in making this assessment and went through that criteria. The key matters that the AAT had regard to in applying the objective criteria was as follows:

1. the AAT did not accept the Commissioner's conclusion that the transaction was uncommercial on the basis that STNK paid for the gold at a percentage of spot price that was higher than the percentage of spot for which the gold was sold, noting that STNK made a profit from the arrangements as it was likely that the spot price for which the gold was sold was higher than the spot price for which it was purchased;
2. the actions of Manila Exchange were to perpetuate a fraud on the Commonwealth, by not remitting GST on supplies that were taxable supplies, rather than for the purpose of securing the entitlement to an input tax

> credit for STNK. It was the non-payment of the GST by Manilla Exchange and not the claiming of input tax credits by STNK that was the principal effect of the scheme.

The AAT accepted that STNK and the director had no knowledge of arrangements whereby Manila Exchange did not pay GST on the supplies it made. The AAT noted that the Commissioner did not allege otherwise.

Accordingly, the AAT held that Division 165 of the GST Act should not be applied to negate the benefit of the input tax credits for the acquisitions that STNK made from PM Melt Services Pty Ltd.

Penalties

The AAT noted that it was only necessary to consider the penalty level for the First Period. The AAT noted that there was no evidence that STNK or the director has intentional disregarded the law. The AAT accepted the director's evidence that STNK was an innocent participant in the series of the transactions. No evidence was adduced however as to what level of care was taken in preparing the relevant business activity statements. Accordingly, the AAT concluded that a penalty of 75% for the First Period was excessive but that it was appropriate that a penalty of 50% for recklessness be imposed.

The AAT did not consider that there were any circumstances warranting a further remission of penalties.

Citation *STNK and Commissioner of Taxation* [2021] AATA 3399 (SM Olding, Sydney)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2021/3399.html

1.7 Appeal Updates

Doyle – revenue v capital

Craig Doyle has discontinued his appeal in the decision of *Doyle v Commissioner of Taxation* [2020] AATA 345.

In this case, the AAT had held that proceeds from the sale of undeveloped industrial land were income and not capital in nature as the sales were part of Doyle's ordinary course of business.

Citation *Doyle v Commissioner of Taxation* [2020] AATA 345
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2020/345.html

Joubert – residency

Mark Joubert has discontinued his appeal against the Commissioner in the decision of *Joubert v Commissioner of Taxation* [2020] AATA 2645.

In this case, the AAT held that an Australian citizen working in Singapore was an Australian tax resident according to the 'ordinary concepts test.'

Citation *Joubert v Commissioner of Taxation* [2020] AATA 2645
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2020/2645.html

2 Legislation

2.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Treasury Laws Amendment (2020 Measures No. 4) 2020	28/10	25/3	11/5		
Treasury Laws Amendment (2021 Measures No. 2) 2021	17/3	11/8	11/8	2/9	13/9
Treasury Laws Amendment (2021 Measures No. 5) 2021	24/6	10/8	11/8		
Treasury Laws Amendment (2021 Measures No. 6) 2021	11/8	26/8	31/8	2/9	13/9
Treasury Laws Amendment (2021 Measures No. 7) 2021	25/8				

2.2 Miscellaneous Treasury amendments

Treasury has published exposure draft documents to make minor amendments to various laws falling within the Treasury portfolio, including proposed amendments to the Corporations Act 2001 (Cth), superannuation laws and the *Foreign Acquisitions and Takeovers Act 1975* (Cth).

w https://treasury.gov.au/consultation/c2021-207222

2.3 COVID-19 (NSW): phasing down of JobSaver

The New South Wales Government has announced that it will fund an extension of the JobSaver program despite the announced of the Commonwealth Government that it would cease making JobSaver payments from 10 October 2021.

The support of the New South Wales government will continue until 30 November 2021. The following table sets out the JobSaver payments available until 30 November 2021:

JobSaver (excluding extension program)	Share of weekly payroll	Weekly payment range (paid fortnightly)	Weekly payments to non-employing business (paid fortnightly)
Current	40%	$1,500 to $100,000	$1,000
10 October	30%	$1,125 to $75,000	$750
80% double dose	15%	$562.50 to $37,500	$375
30 November	0%	0	0

w https://www.nsw.gov.au/media-releases/jobsaver-extension-to-boost-boost-business-recovery

2.4 COVID-19 (VIC): support for regional businesses

Eligible businesses in Victoria will receive Business Costs Assistance Program and Licensed Hospitality Venue Fund payments for the remaining two weeks of September.

Eligible businesses include hospitality and accommodation operations, gyms, hair and nail salons, and tourism and events-related businesses.

Under the Business Costs Assistance Program, eligible businesses will receive the following amounts to help pay wages, rent, utilities and other ongoing expenses:

- those with an annual payroll of up to $650,000 will receive $5,600 – equal to two weekly payments of $2,800;
- those with a payroll of $650,000-$3 million will get $11,200; and
- those with a wages bill of $3 million-$10 million will receive $16,800.

Additionally, in response to ongoing patron and density limits, eligible hospitality businesses across the State will receive the following Licensed Hospitality Venue Fund payments:

- venues with a capacity of under 100 people will receive $10,000;
- venues with a capacity of 100-499 will receive $20,000; and
- venues with a capacity over 499 will receive $40,000.

w https://www.premier.vic.gov.au/supporting-regional-businesses-when-they-need-it-most

2.5 COVID-19 (Qld): support package for businesses on New South Wales border

On 14 September 2021, the Commonwealth and Queensland Governments announced a joint $52.8 million emergency support package for businesses suffering due to border restrictions with NSW and provide targeted support to tourism and hospitality businesses.

Employing businesses in the Tourism and Hospitality sectors that have experienced a reduction in turnover of at least 70 per cent for at least seven consecutive days between 1 July and 30 September will be eligible for a one off grant of:

- $15,000 for small businesses;
- $25,000 for medium businesses; and
- $50,000 for large businesses.

Recipients of the COVID-19 Business Support Grants in the border zone will also receive a one-off Hardship Scheme grant of $5,000 for employing businesses and $1,000 for non-employing sole traders in the event of an extended border closure. These grants will be available from mid-October 2021.

Additionally, $6.3 million has been set aside to extend the existing COVID-19 Business Support Grants program.

w https://joshfrydenberg.com.au/latest-news/queensland-businesses-on-nsw-border-to-benefit-from-multimillion-dollar-funding-injection

2.6 COVID-19 (ACT): additional support during lockdown

The Australian Capital Territory Government announced that it will extend and expand previously announced financial support measures.

31,000 eligible households in Canberra will receive an additional one-off $200 increase in the utilities concession totalling $1,000 for the 2021-22 financial year.

Commercial landlords who offer rent relief to tenants through to 31 December 2021 may be eligible for a commercial rates credit of up to $10,000 (increased from $5,000).

Residential landlords providing rent relief to tenants will be eligible for a credit on their residential land tax of up to $100 per week to share the cost of passing rent relief on to tenants. This land tax relief for landlords has been extended out to 31 December 2021.

w
https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/barr/2021/additional-financial-support-during-lockdown

2.7 COVID-19 (TAS): business support package for Tasmanian businesses

On 14 September 2021, the Commonwealth and Tasmanian Governments announced that grants up to $50,000 to be available to eligible businesses based on annual turnover, with two funding rounds, the first in October and the second in November. The announcement included that businesses that have already been deemed eligible for support through the initial support package will automatically receive the next payment in line with the new maximum grant amounts.

The Tasmanian Government will also provide support for eligible businesses through providing:

- payroll tax relief for tourism and hospitality industry businesses where there has been a 30 per cent reduction in turnover in the September 2021 quarter;
- waiving vehicle registration and passenger transport accreditation fees for vehicles including taxis, luxury hire cars, tour operator buses and rental car operators for renewal notices received between 1 July until 31 December 2021; and
- waiving the license fees payable to Parks & Wildlife for tourism business operating withing Tasmania's parks.

w https://joshfrydenberg.com.au/latest-news/supercharged-business-support-package-on-the-way-for-tasmanian-businesses/

2.8 SA Budget Bill

The *Statute Amendment (Budget Measures 2021) Bill 2021* has been received in the Legislative Council of South Australia. The Bill proposes to make amendments to the *Land Tax Act 1936*, *Mining Act 1971*, *Motor Vehicles Act 1959*, *Payroll Tax Act 2009* and the *Road Traffic Act 1961*.

Land Tax Act 1936

The Bill amends the Land Tax Act 1936 by inserting a new provision to provide for a 50% reduction in taxable value for certain build-to-rent properties where construction of the building commenced on or after 1 July 2021.

The legislation contemplates that guidelines will be released for a building to be regarded as being used as a build-to-rent property.

Payroll Tax Act 2009

The Bill amends the *Payroll Tax Act 2009* (SA) by deleting section 17 from Schedule 2, which relates to exempt wages paid or payable by a motion picture production. There is a transitional provision for this amendment.

w
https://legislation.sa.gov.au/LZ/B/CURRENT/STATUTES%20AMENDMENT%20(BUDGET%20MEASURES%202021)%20BILL%202021.aspx

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3 Rulings and determinations

3.1 Games and sports exemption

The ATO has published a draft Taxation Ruling (TR 2021/D6) concerning the income tax exemption for societies, associations or clubs under table item 9.1(c) of section 50-45 of the ITAA 1997. The draft Ruling replaces *Taxation Ruling* TR 97/22 which has been withdrawn.

TR 2021/D6 notes that for a society, association or club to satisfy the 'games and sports exemption' (as the ATO calls the exemption under table item 9.1(c) of section 50-45 of the ITAA 1997) it must meet the following requirements:

1. the society, association or club is established for the main purpose of the encouragement of a game or sport;
2. the society, association or club is not carried on for the purposes of its individual members' profit or gain, and
3. the society, association or club meets other special conditions.

TR 2021/D6 does not consider the special conditions, such as the governing rules and sole purpose test which are considered by TR 2015/1.

TR 2021/D6 notes that an entity must meet the definition of a society, association or club.

Society, association or club

The ATO adopts the ordinary meaning of society, association or club for the purpose of the income tax exemption. An essential requirement for a society, association or club is that it be a voluntary organisation of people that have associated together for a common or shared purpose.

The ATO considers that this would not include a discretionary trust as neither the trustee or the trust constitution is a voluntary organisation of people that have associated together for a common or shared purpose.

Non-profit requirement

The ATO notes that the most common way for a society, association or club to meet the non-profit requirement is to include a not-for-profit clause in its governing documents.

However, if the society, association or club is prohibited by statute from distributing profits, this will be sufficient to meet the non-profit requirement.

Game or sport

The ATO notes that game or and sport are not defined in the legislation and so they take their ordinary meaning.

The ATO considers that a common feature of a sport is that there are a set of conventions, expectations and rules.

The ATO notes that a game or sport often involves a competition but that will not necessarily be the case.

The ATO considers a game or sport can be contrasted with an activity where a thing, object or animal is the essential focus, or the activity is merely a means to an end. Accordingly, the ATO considers the following are not a game or sport:

1. stamp and coin collecting,
2. body building;
3. train modelling;
4. keeping guinea pigs or fish; and
5. activities by participants in car owners' club; and
6. playing of gambling or gambling machines or gambling generally.

The ATO also considers that some activities may be a game or sport in a particular context (for example, where there is a competitive element) but not in other contexts. The ATO gives the example of dancing as a social activity.

Main purpose established for the encouragement of a game or sport

The ATO considers that determining the main purpose of a club requires an objective evaluation of all material facts and circumstances. The ATO makes the following general propositions:

1. the subjective motives or intentions of the founders or members of the society, association or club are relevant but not determinative;
2. the stated purpose of the society, association or club is significant but not decisive;
3. the other important considerations include the activities and history of the club and how the club is controlled.

Where a society, association or club has other purposes (i.e. non-gaming or sporting purposes), it will not satisfy the requirement for the exemption unless those other purposes are ancillary or secondary to the gaming or sporting purposes.

The ATO notes that the use of surplus funds is a relevant consideration. The ATO considers a club using surplus funds from its activities, including its commercial activities, to support the conduct of sporting activities will not necessarily have the main purpose of encouraging a game or sport.

The ATO notes that the main purpose can change over time based on the activities conducted by the society, association or club.

The ATO provides the following example of the impact of the use of surplus funds on the purpose:

Example 3 - surplus funds and purpose

Local Club is an incorporated association which is not carried on for the profit or gain of its individual members.

Local Club has a long history of fielding Australian Rules football teams in competitions in their region and has been described as a nursery for the development of the professional sport.

Membership of Local Club includes football members and social members.

The objects of Local Club include the promotion of Australian Rules football in the region as well as independently providing social facilities for members.

Local Club provides extensive social facilities to its members which include a bar, bistro and gaming venue.

Local Club has been accumulating surplus funds for a number of years, and has a detailed business plan to develop land it acquired a number of years ago as a football oval for its junior football competition. The development plans received local council approval and the club is currently negotiating with contractors for the proposed works on the development.

Local Club has also put aside some of its surplus funds as a contingency for unexpected future events. Local Club can reasonably show the need for such a fund and that when accumulated, it serves Local Club's purposes indifferently.

These facts show that Local Club has a mixed purpose, being the encouragement of Australian Rules football and the provision of facilities for its members who do not participate in football.

Given Local Club can show detailed plans to use its surplus funds to support the football games by building further playing fields, its retention of surplus funds is consistent with a conclusion that its main purpose is to encourage Australian Rules football.

The contingency fund is likely to be neutral when weighing up the factors to determine Local Club's main purpose. This is because Local Club can reasonably show the need for a contingency fund and, at the time the fund is accumulated, it serves all Local Club's purposes indifferently. If Local Club uses the contingency fund, it will need to consider how the use of the contingency fund impacts on its main purpose at that time.

If, instead of the facts in this Example, Local Club retains surplus funds with a plan to provide additional facilities for social members who do not participate in football, the significance of these plans would need to be considered objectively in light of the objects of Local Club (and its other activities) to ascertain whether there would be a material impact to its main purpose.

In all instances, any surplus funds retained by Local Club will just be one factor of many that must be objectively weighed up to determine its main purpose. Local Club should keep appropriate records (for example, meeting minutes for important decisions or a business plan which relates to surplus funds) so it can show its plans for surplus funds and how surplus funds will serve a main purpose of encouraging a game or sport.

TR 2021/D6 is open for consultation until 5 November 2021.

ATO reference *Taxation Ruling TR 2021/D6*
w https://www.ato.gov.au/law/view/document?docid=DTR/TR2021D6/NAT/ATO/00001

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4 Private Binding Rulings

4.1 Setup costs for ESS

Facts

A Parent Company is a listed public company.

Parent Company's 100% owned Australian subsidiary, Subsidiary Company, conducts the business operations for Parent Company in Australia. Parent Company and Subsidiary Company are not members of a tax consolidated group.

Subsidiary Company employs all Australian resident employees of the Parent Company Group which includes members of Parent Company's Board of Directors (Subsidiary Company Employees). Parent Company has no employees.

Parent Company owns several patents and trademarks which it licenses to its subsidiaries (which includes Subsidiary Company). These entities pay Parent Company a license fee, which Parent Company returns as assessable income in Australia.

Parent Company incurs additional expenses on behalf of its various Parent Company Group members including auditing fees, accounting fees and professional advice fees in relation to the taxation affairs of the various Parent Company Group members. These amounts are recharged to the relevant Parent Company Group subsidiary without an additional 'mark-up' percentage.

Parent Company has implemented the Parent Company Long-Term Plan (an employee share plan), which provides certain Australian employees of the Parent Company Group the opportunity to become participants and receive rights to fully paid shares in Parent Company.

Parent Company decided to establish the Parent Company Employee Share Trust (EST), which was settled via a Deed to facilitate the provision of shares in Parent Company under the Plan to eligible Subsidiary Company Employees.

Parent Company makes contributions to the Trustee of the (EST). These contributions are used by the Trustee to subscribe for shares in Parent Company (or acquire Parent Company shares on-market). These contributions are recharged to Subsidiary Company.

When Parent Company established the EST it incurred costs including legal fees and other professional fees. It also incurred stamp duty and other ancillary 'one-off' expenses. It is also incurring ongoing costs.

The establishment expenses have been recharged to Subsidiary Company on a 'dollar for dollar' basis, without any margin being applied, as are the ongoing costs.

Questions

1. Are the establishment and ongoing costs deductible to Parent Company?
2. Are the reimbursements received from the Subsidiary Company assessable?

Decision and reasons

<u>Establishment and ongoing costs</u>

The ATO considered that the costs incurred by the Parent Company were not deductible under section 8-1, section 40-880 (the blackhole provision) or as tax-related expenses (to the extent they related to managing the tax affairs of the EST.

The ATO considered that a deduction could not be claimed under section 8-1 as the expenditure was not productive of the Parent Company earning its income, and were not incidental or relevant to any income producing activity of the Parent Company.

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The ATO also considered that the potential receipt of dividends from the subsidiary was 'too remote' a connection to assessable income to allow a deduction to be claimed.

The ATO set out that they considered the establishment costs for the EST were capital in nature but not deductible under section 40-880 as they were not considered to be 'in relation to' the business carried on by the Parent Company.

The expenses of assisting the EST to comply with its tax obligations, as not deductible under section 8-1, were considered not deductible under section 25-5 (tax affairs) as the outgoings did not related to managing the 'tax affairs' of the Parent Company or assisting the Parent Company in complying with an obligation imposed on it under the tax laws.

In relation to the on-charged amounts the ATO considered that they were not assessable income. They quoted from *Batchelor and Federal Commissioner of Taxation* [2013] AATA 93:

There is no general principle of Australian tax law to the effect that amounts received by way of reimbursement or compensation for deductible expenses are assessable. The receipt must be otherwise income, according to ordinary concepts, to be assessable, and an amount is not income simply because it is a recoupment of a deductible expense: Federal Commissioner of Taxation v Rowe [1997] HCA 16.

As the Parent Company was not in the business of establishing or administering ESTs, that it established the EST for its subsidiaries on the basis that it would be reimbursed, and as Parent Company had no intention of profiting from the arrangement, the amounts received by way of reimbursement (the on-charged amounts) were not ordinary income. The amount could however be statutory income as an assessable recoupment if the amount was received by way of insurance or indemnity, and the amount incurred was deductible, or if the recouped amount was deductible under one of the items in the table in section 20-30. The ATO also considered that the amount would not be an assessable recoupment, and so not statutory income. They considered it was not received by way of guarantee or indemnity and could not be assessable in that way. As the amount recouped was also not deductible under an item in the table in section 20-30 the ATO did not consider it could be an assessable recoupment in that way.

COMMENT – the PBR did not consider whether the on-charged amounts would be deductible to the subsidiary. Presumably they would be as they related to the business of the subsidiary.

ATO reference *Private Binding Ruling Authorisation Number 1051571929248*
w https://www.ato.gov.au/law/view/document?docid=EV/1051571929248

4.2 Division 7A loan

Facts

Mr and Mrs A are shareholders the following companies:

1. Company X: an Australian resident private company, which is an importer and exporter of goods but its operations have reduced in the recent income years.
2. Company Y: a private company incorporated and domiciled overseas.

Mr and Mrs A are directors of Company Y. Mr A is the sole director of Company X.

Company Y lent Company X an amount in the 20XX financial year, which was documented in a loan agreement prepared by Australian lawyers, to assist Company X to pay outstanding creditors. Company X had an outstanding loan to Mr and Mrs A.

Company X will pay to Mr and Mrs A in the 20XX financial year the same amount that was lent to it by Company Y.

Company X does not appear to have the capacity to repay the loan to Company Y.

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Question

Does section 109T(1) of the ITAA 1936 apply and deem the transfer of funds from Company X to Mr and Mrs A as a loan or payment pursuant to the provisions of Subdivision E of Division 7A of the ITAA 1936 (the interposed entity provisions)?

Decision and reasons

The ATO ruled no.

The ATO noted that due to section 109J of the ITAA 1936 the repayment of the loan by Company X to Mr and Mrs A would not ordinarily give rise to a dividend under Division 7A.

However, as Company X borrowed money from Company Y, section 109T of the ITAA 1936 needed to be considered. Section 109T relevantly provides as follows:

> *(1) This Division operates as if a private company is taken to make a payment or loan to an entity (the target entity) as described in section 109V or 109W of the ITAA 1936 if:*
>
> *(a) the private company makes a payment or loan to another entity (the first interposed entity) that is interposed between the private company and the target entity; and*
>
> *(b) a reasonable person would conclude (having regard to all the circumstances) that the private company made the payment or loan solely or mainly as part of an arrangement involving a payment or loan to the target entity; and*
>
> *(c) either:*
>
> *(i) the first interposed entity makes a payment or loan to the target entity; or*
>
> *(ii) another entity interposed between the private company and the target entity makes a payment or loan to the target entity.*

The ATO noted that, given the amount lent by Company Y to Company X will be paid to Mr and Mrs A, on a straightforward interpretation of section 109T of the ITAA, it could be said that it would be reasonable to conclude that sole or main reason for Company Y lending the amount to Company X is as part of an arrangement involving a loan or payment to Mrs and Mrs A as the target entity.

However, the ATO noted that section 109V of the ITAA 1936 needs to be considered. Section 109V operates to determine the amount which is taken to be a payment to the target entity and section 109V(2) of the ITAA 1936 provides that the Commissioner is to have regard to the following:

1. the amount the interposed entity paid the target entity; and
2. how much the amount the Commissioner believes represented consideration payable to the target entity by the private company or any of the interposed entities for anything (assuming that the consideration payable equals that for similar transactions at arm's length).

The ATO noted that Taxation Determination TD 2011/16 sets out the factors that are to be taken into account under section 109V(2).

In this case, the ATO considered that the payment by Company X to Mr and Mrs A was a genuine loan repayment as the total debt position would remain the same. That is, the increase in the debt position of Company X by the loan from Company Y would be offset by a reduction in the debt position through the loan repayment to Mr and Mrs A.

Accordingly, the ATO considered it was appropriate that the amount under section 109V of the ITAA 1936 is nil.

ATO reference *Private Binding Ruling Authorisation Number 1051862671060*
w https://www.ato.gov.au/law/view/document?docid=EV/1051862671060

4.3 Issuing redeemable preference shares

Facts

Company A was incorporated after 1985. Person B is the company's current director and sole shareholder. Person B is described in the application as Company A's 'sole controller'. Person B works in Company A's business.

Company A:

- conducts a business providing trade services in an Australian city and for regional projects elsewhere in the same Australian state
- has builders and developers as clients
- has current projects including major apartment and retail complexes
- has a significant number of employees, apprentices and labour hire staff.

Company A has retained earnings of $X, and $XM in liquid funds, which are surplus to working capital requirements. Out of these liquid funds, approximately $XM is held in term deposits.

Company A proposes to conduct a series of transactions in the following sequence:

- Issue 10 Redeemable Preference Shares (RPS) to Company D, for a total subscription price of $XX ($X each). These RPS:
  - carry no rights to dividends, votes, or any surplus of capital on winding up;
  - are redeemable only on winding up, with a right to a return of the subscription amount.
- Resolve to grant a discretionary dividend right to each RPS. The dividend right will cease at the earlier of a director's decision to remove the right, or within three years from the issue of the RPS.
- Pay a once-off, fully franked dividend of $XM to Company D. The dividend will be franked at Company A's corporate tax rate of 26%.
- Cancel the dividend right attaching to each RPS. Company D will hold the RPS for more than 90 days.

The ruling was apparently applied for as Person B has become concerned about potential liability, both to Company A, and Person B as its director, arising out of Company A's business. Person B is concerned that risks arise from trade services work on projects performed by Company A's employees or its subcontractors, and that there is an ongoing risk that potential claims could exceed existing insurance cover. Person B believes that claims could arise from significant property damage, losses from interruption to business, and loss of human life.

Questions

1. Will the RPSs be equity interests?
2. Will the issue of the RPSs give rise to a value shift?
3. Will the dividend streaming provisions apply?
4. Will the dividend stripping rules apply?
5. Will the provisions dealing with schemes to obtain franking credit benefits in section 177EA of ITAA 1936 apply?
6. Will Part IVA apply?

Decision and reasons

Equity interest

Under the debt/equity rules the RPSs will be equity interests if they are an interest in the company as a member of the company. The ATO considered this requirement was met as after the issue of the RPSs Company D would be a shareholder in the company.

If the RPSs were also considered to be debt they would be classified as debt despite also being classified as equity interests. To be debt interests there would need to be an effectively non-contingent obligation on Company A to provide a financial benefit at least equal to the financial benefit received. That is, if the share was issued for $1, it would need to be under an effectively non-contingent obligation to provide a return of at least $1. A financial benefit to be provided outside of a 10-year period is measured in present value terms, with the legislation setting out the discount rate to be used.

The ATO noted that in ATO ID 2003/873 they considered that a company that could choose to redeem a preference share at its discretion was not under an effectively non-contingent obligation. As here, there would only be a return (outside the dividend) would only be received on winding up, and potentially outside of 10 years, the ATO concluded that there was no effectively non-contingent obligation in relation to the capital return.

In relation to the dividend proposed to be paid, the ATO considered that there was no 'obligation' to pay the dividend, notwithstanding it was part of the planned sequence of events. While they acknowledged that given the profits of Company A it could be argued it was under an 'effectively' non-contingent obligation, the ATO considered there was still no obligation.

With no effectively non-contingent obligation to provide a return at least equal to the financial benefit received the RPSs were equity interests that were not also debt interests.

Value shifting

The ATO considered that as the RPSs had no rights on issue, and then only rights to dividends after the rights change, that:

… determining what an arms' length purchaser would pay for the shares is more difficult. The nominal subscription value has no bearing on what an arms' length purchaser would pay for the preference shares, because the return of the subscription amount will only happen on winding-up, which will not happen at any pre-determined time, if it happens at all. The presence of ordinary shares, and another class of shares with discretionary dividend rights, allows Company A to pay dividends to either share class to the exclusion of the other.

It seems unlikely that a fully informed purchaser, acting at arms' length, from outside the family group, would pay any price for the RPS, at any point.

As the ATO considered there was no value in the RPSs, they were not being issued at a discount, so that there was no value shift on that basis. The ATO recognised that there were 'down interests' under the scheme as it would have the result of reducing the value of the ordinary shares. The ATO set out that as there was no increase in the value of an equity interest, and no interest was issued at a discount, no value shift occurred.

The ATO noted that because of the rights reversal that was to occur, the value shift reversal provisions in section 725-90, which broadly provide that a value shift is taken to not occur if the value shift is to be reversed within 4 years, would prevent the value shifting rules from applying.

Dividend streaming

Under section 204-30 the Commissioner can make a determination that franking credits are unavailable in circumstances where, under a scheme, dividends are stream to an entity that can derive greater benefits from the franking credits than another shareholder.

The Commissioner reasoned that as both Person B and Company D were tax residents, neither would receive a greater benefit from the franking credits so that section 204-30 would not result in a cancellation of the franking benefit.

Dividend stripping

While the ATO acknowledged that the transaction contained some characteristics of a dividend stripping operation, as they considered it was not entered into for a non-incidental purpose of tax avoidance, the dividend stripping rules would not apply. While they acknowledged that paying a dividend to Company D rather than Person B would save tax, the ATO set out that there were other considerations, such as:

- Company A has no history of paying similar sized dividends to its shareholder: the largest dividend paid in the last decade was about $XXX
- Company D is wholly owned by Person C, who has a similar tax profile to Person B
- all entities - Person B, Person C and Company D - are Australian residents entitled to claim franking offsets
- the dividend will be paid to Company D, which has a 30% tax rate, which is greater than Company A's rate of 26% - taking franking credits and offsets into account, it would have a tax liability representing the 4% difference on the assessable income from the dividend, including franking credits.

The ATO ultimately accepted that the same asset protection benefit could not have been achieved by paying a dividend to Person B, as they were at risk as a director. The ATO accepted that asset protection was the better explanation for the proposed transactions than a tax avoidance purpose.

Section 177EA

As the threshold test for section 177EA applying is whether there is a more than incidental purpose of obtaining a tax benefit, the ATO ruled for the same reasons as in relation to dividend stripping (where it is understood to be a dominant purpose test) that section 177EA did not apply.

Part IVA

The ATO did not consider that the dominant purpose of the transaction was to provide a tax benefit. The ATO considered the asset protection benefits outweighed the tax benefits.

COMMENT – the ATO also issued a PBR number 1051851272382 in August 2021 where they considered that dividend stripping did not apply to an asset protection arrangement.

ATO reference *Private Binding Ruling Authorisation Number 1051859101404*
w https://www.ato.gov.au/law/view/document?docid=EV/1051859101404

4.4 Vesting of a trust and cost base

Facts

The assets of a discretionary trust included shares which were acquired by the trustee before 20 September 1985.

The trustee undertook the following steps:

1. by a Deed of Appointment, appointed person X as a primary beneficiary of the Trust; and
2. by a Deed of Variation, appointed person X as the sole beneficiary of the Trust;
3. by a Vesting Deed, transferred the Trust Fund to the person X in accordance with the Trust Deed.

No consideration was paid by person X for the assets, including the shares.

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Question

Is the first element of the cost base or reduced cost base of shares that are CGT assets immediately after the vesting of the Trust is equal to the market value of the shares at the time of the vesting in accordance with section 112-20 of the ITAA 1997?

Ruling and reasons

The ATO ruled yes.

<u>CGT event</u>

The ATO noted that CGT event E5 happens when a beneficiary becomes absolutely entitled to an asset as against the trustee.

The ATO noted that the Commissioner's views on absolute entitlement are set out in *Draft Taxation Ruling* TR 2004/D25, which provides that for a beneficiary to be absolutely entitled to an asset they must have an interest in the asset that vested and indefeasible.

The ATO noted that a sole beneficiary of a trust would ordinarily be absolutely entitled to the assets of the trust.

The ATO considered that upon the execution of the vesting deed, person X became absolutely entitled to the assets of the trust and CGT event E5 happened.

<u>Market value substitution rule</u>

The ATO noted that section 112-20(1) of the ITAA 1997 provides that a person's cost base or reduce cost base of a CGT asset will be the market value of the CGT asset where

(a) you did not incur expenditure to acquire it, except where your acquisition of the asset resulted from:
  (i) CGT event D1 happening; or
  (ii) another entity doing something that did not constitute a CGT event happening; or
(b) some or all of the expenditure you incurred to acquire it cannot be valued; or
*(c) you did not deal at * arm's length with the other entity in connection with the acquisition.*

The ATO considered that person X did not give incur any expenditure to acquire the assets and that, therefore, the cost base and reduced cost base of the assets is their market value under section 112-20(1)(a).

ATO reference *Private Binding Ruling Authorisation Number 1051848021924*
w https://www.ato.gov.au/law/view/document?docid=EV/1051848021924

4.5 122-A rollover and relationship breakdown

Facts

A and B, who were living in a de facto relationship, equally own shares in a Company.

A is sole director of the Company.

The Company has retained earnings and a franking account balance.

A and B have now separated and are looking to separate their financial affairs. They do not want to remain joint owners of the Company.

To enable the separation, it is proposed that:

1. A and B will transfer their shares to respective wholly owned companies, Company A and Company B for no consideration;
2. the Company will pay fully franked dividend distributions to its shareholders;

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3. the dividend will be retained in Company A and Company B for future investment activities;
4. Company A and Company B have no other liabilities and, after payment of the dividends, the market value of A's shares in Company A will be equal to the market value of A's shares in the Company and the market value of B's shares in Company B will be equal to the market value of B's shares in the Company; and
5. the Company will then be wound up.

A and B and all of the companies are Australian residents for tax purposes.

Questions

1. Is each of A and B eligible for the rollover under subdivision 122-A of the ITAA 1997 on the transfer of shares in the Company to a wholly owned company, Company A and Company B respectively?
2. Should the Company declare a fully franked dividend to Company A and Company B, will section 177EA of the ITAA 1936 have any application to the proposed arrangement?

Ruling and reasons

The ATO ruled yes to question 1 and no to question 2.

<u>122-A rollover</u>

The ATO noted that section 122-15 of the ITAA 1997 provides that an individual can choose to obtain a roll-over where there is a disposal of a CGT asset, or all the assets of a business, to a company by an individual if certain requirements are met.

The ATO noted that the requirements include the following:

1. the consideration received by the individual for the CGT event must only be shares in the company, or shares in the company and the company undertaking to discharge liabilities in respect of the asset or assets;
2. the shares received by the individual cannot be redeemable; and
3. the market value of the shares received from the disposal of the CGT asset must be substantially the same as the market value of the CGT asset disposed of;
4. the individual must own all the shares in the company just after the disposal of the CGT asset;
5. the CGT asset disposed of cannot be an 'excluded CGT asset';
6. the company must not be an exempt entity; and
7. the individual and the company must both be Australian residents at the time of the disposal of the CGT asset.

The ATO considered that all of the above requirements were satisfied. In particular, the ATO considered that the market value of the shares in Company A Company B received by A and B respectively will substantially be the same as the shares transferred from the Company as Company A and Company B will have no assets or liabilities other than the shares in the Company.

Accordingly, the rollover will be available.

<u>177EA</u>

The ATO noted that section 177EA of the ITAA 1936 is an anti-avoidance provision to protect against imputation abuse and to ensure that imputation benefits flow to the economic owners of the shares.

The ATO noted that section 177EA will apply where:

> *(a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and*
> *(b) either*
> *(i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or*

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(ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and

(c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and

(d) except for this section, the person (the relevant taxpayer) would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and

(e) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant tax payer to obtain an imputation benefit.

The ATO noted that a scheme for the disposition of membership interests includes any scheme involving a change in the legal ownership of shares, which is what will occur under the proposed transaction. Further, the ATO noted that an imputation benefit will arise for Company A and Company B.

The ATO had regard to the factors set out in section 177EA(17) of the ITAA 1936, noting that in this case:

1. the arrangement was being undertaken to separate the financial affairs of former spouses;
2. that, while Company A and Company B will benefit, it is still the same individuals who will ultimately benefit as the shareholders of the two companies.

Accordingly, the ATO ruled that section 177EA will not apply to the proposed scheme.

ATO Ref *PBR Authorisation No.* 1051876224024
w https://www.ato.gov.au/law/view/document?docid=EV/1051876224024

5 ATO and other materials

5.1 Gifts and loans from related overseas entities

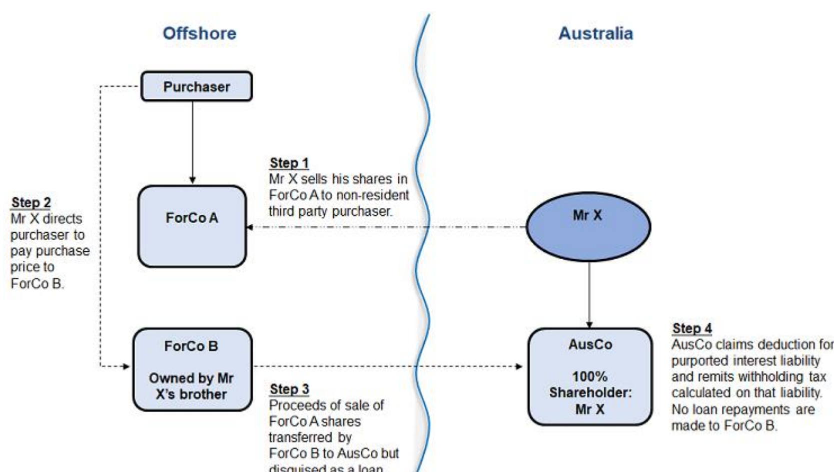
On 17 September 2021, the ATO released *Taxpayer Alert* TA 2021/2 concerning arrangements whereby Australian tax residents fail to declare foreign income in their tax return and conceal the character of the funds when they are repatriated back to Australia by disguising the income received as a 'gift' or loan from a related overseas entity (i.e. a family member, friend, related company or trust).

The ATO is concerned that Australian-resident taxpayers are entering into these arrangements to attempt to avoid or evade Australian tax on their foreign assessable income.

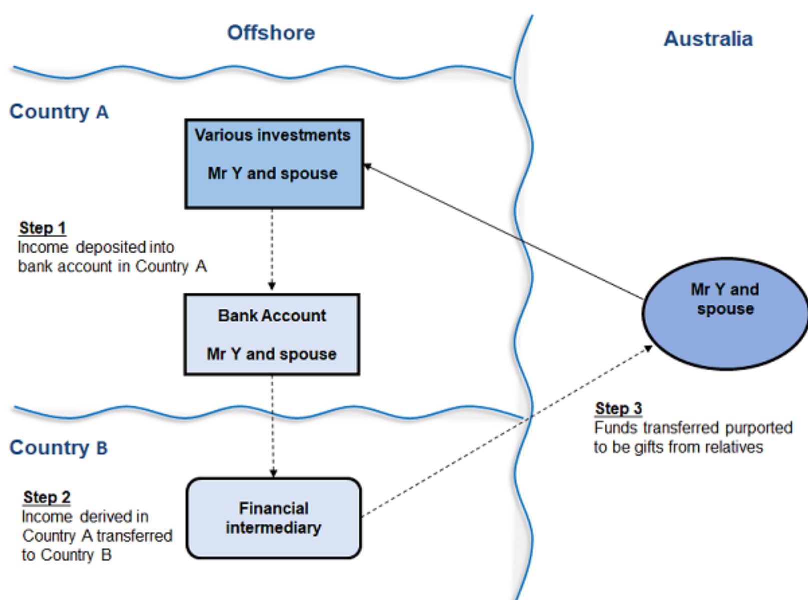
In those cases where the funds are repatriated to Australia in the form of a purported loan, the ATO is also concerned that taxpayers may be entering into, or taking additional advantage of, these arrangements to claim deductions for interest that was never incurred.

TA 2012/2 includes three examples of arrangements that may attract the scrutiny of the ATO.

Example 1 - disguising foreign capital gain as a loan from a related overseas entity



Example 2 - disguising foreign income as a gift from a related overseas entity



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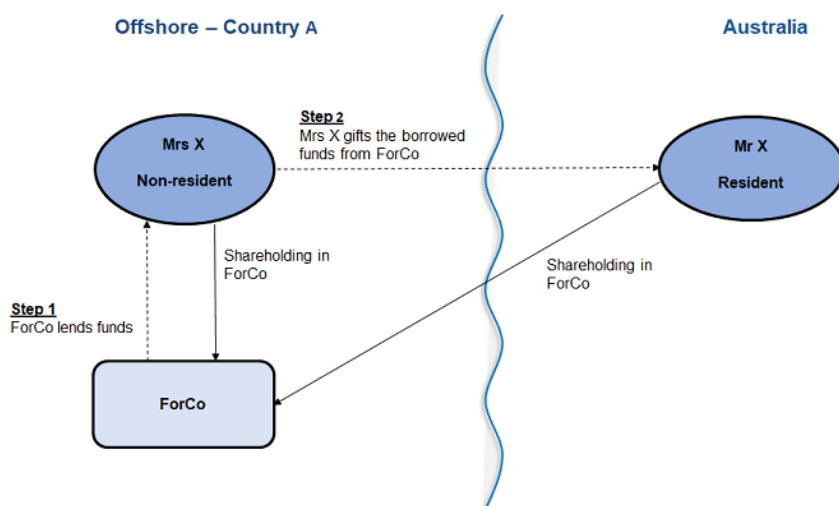
Example 3 - disguising repatriation of profits from a foreign company as a gift from a related overseas entity



The examples in TA 2021/2 are not intended to be exhaustive.

The ATO has the following concerns with such arrangements:

1. foreign assessable income and/or interests in foreign assets are being concealed by the arrangements;
2. taxpayers have not declared all their ordinary income or statutory income, including amounts assessable**:**
   (a) under the CFC provisions in Part X of the ITAA 1936;
   (b) under the transferor trust provisions in Division 6AAA of Part III of the ITAA 1936;
   (c) under section 99B of the ITAA 1936;
   (d) as dividends as a result of section 47A or Division 7A of Part III of the ITAA 1936 applying;
3. taxpayers may not have disclosed all their offshore interests at the relevant labels of their income tax returns;
4. where the funds received are repatriated to Australia in the form of a purported loan, deductions are improperly being claimed for the purported interest under section 8-1 of the ITAA 1997;
5. Part IVA may apply to cancel any tax benefit from such arrangements; and
6. the conduct may amount, in the view of the Commissioner, to fraud or evasion.

Current ATO activities

The ATO is currently actively engaging in audits and reviews of taxpayers who have been involved in these arrangements.

The ATO will be relying on its exchange of information powers to gather information from other countries, including the foreign assessable income derived by taxpayers in those countries. The ATO will also use other sources of information, such as data from AUSTRAC and via the *Common Reporting Standard (CRS)* and the *Foreign Account Tax Compliance Act (FATCA).*

Taxpayers who have entered into these arrangements are being encouraged to:

1. contact the ATO;
2. amend their return;
3. seek independent professional advice, and/or
4. make a voluntary disclosure to reduce penalties that may apply.

TA 2021/2 does not cover circumstances where an Australian-resident taxpayer has not derived any foreign assessable income but receives a genuine gift or loan from a related entity overseas entity. TA 2021/12 directs taxpayers to consider the ATO guidance on genuine gifts and loans published on the ATO website.

ATO reference *Taxpayer Alert TA 2021/2*
w https://www.ato.gov.au/law/view/document?DocID=TPA/TA20212/NAT/ATO/00001

5.2 ATO guidance on gifts or loans from related overseas entities

The ATO has published guidance on its website on when the ATO will consider a gift or loan from an overseas related entity to be genuine.

A genuine gift or loan is one where all of the following are satisfied:

1. the characterisation of the transaction as a gift or loan is supported by appropriate documentation;
2. the parties' behaviour is consistent with that characterisation;
3. the monies provided are sourced from funds genuinely independent of the taxpayer.

Where genuine gifts (inheritance) are used to fund a taxpayer's business or to acquire income producing assets, the ATO will look to supporting documentation including:

1. any contemporaneous declarations the donor has made in their country of residence about the nature of the amounts transferred;
2. an executed contemporaneous deed of gift prepared by the donor (although a deed of gift alone may not necessarily prove a gift is genuine);
3. formal identification of the donor (such as a copy of their photo identification from their passport or identity card);
4. a certified copy of the donor's will or distribution statement for the estate;
5. a copy of the donor's bank statements showing the gift and the donor's wealth before they made the gift; and
6. financial records reflecting the donor's transfer to the taxpayer.

Where a genuine loan is used to fund a taxpayer's business or to acquire income producing assets, the ATO will look to supporting documentation including:

1. properly documented loan agreement which includes, details of the parties, date, loan amount, interest, loan term and repayment frequency;
2. correspondence relating to the loan (including pre-contractual negotiations);
3. any documents evidencing security provided for the loan;
4. financial and accounting records to show the taxpayer used the loan amount including ledger and journal entries, bank statements, receipts);
5. declarations made by the lender in their country of residence about the provision of the loan;
6. statement of assets and liabilities provided to the financial institution;
7. extract from the lender's financial and accounting records showing that the loan balance is outstanding;
8. foreign bank account statements;
9. documents showing the payment of withholding tax; and
10. financial plans, cashflow forecasts, net assets position or budgets showing a capacity to repay the loan.

The ATO may also make further inquiries to verify information or documents provided.

w https://www.ato.gov.au/Business/Privately-owned-and-wealthy-groups/Tax-governance/Tax-governance-guide-for-privately-owned-groups/Gifts-or-loans-from-related-overseas-entities/

5.3 NSW Payroll tax and employer superannuation contributions

The Commissioner of State Revenue has published a new practice note (CPN 021) on the application of payroll tax to employer superannuation contributions.

CPN 021 notes that contributions for the benefit of an employee or a person deemed to be an employee for payroll tax purposes, including directors, are wages for the purposes of payroll tax.

CPN 021 notes that “company” has a broad meaning under the *Payroll Tax 1997* (NSW) and includes all incorporated and unincorporated bodies, and partnerships. Revenue NSW notes that superannuation contributions paid or payable as remuneration in relation to a member of the board of management of such bodies are also “wages”.

Underpaid wages and superannuation contributions

CPN discusses the operation of payroll tax for superannuation contributions in the case of underpaid wages.

CPN notes that the payroll tax liability on underpaid wages arises when the wages are paid or become payable, whichever occurs first and, as a result, underpaid wages are taxable in the financial year in which the wages should have been paid.

However, under the SGAA, the obligation to make the superannuation contribution arises when the underpaid wage is actually paid. As a result, additional superannuation contributions for underpaid wages must be included in the employer’s payroll tax return for the month or financial year in which the contributions are paid.

Payroll tax on SGC

CPN 021 notes that payroll tax arises for SGC (including the nominal interest and administrative charge) on the day that an SG statement is lodged as that is when the SGC becomes payable. Where the SGC arises due to a default assessment, the payroll tax arises on the day that the default assessment is made. Where SGC arises due to an amendment assessed by the ATO, the payroll tax arises on the date of the original assessment as that is when the superannuation was payable.

The SGC must be included in the employer’s payroll tax return for the quarter or financial year in which the SG statement is lodged or default assessment is issued.

Compensation for late wages and superannuation

Revenue NSW considers that compensation paid to an employee for late wages and superannuation is not wages under the PTA and, as such, is not subject to payroll tax. However, if the employer makes an additional contribution to the employee’s superannuation fund as compensation, that contribution will be wages for payroll tax.

ATO amnesty and SGC payments

Revenue NSW accepts that where an SGC payment is covered by the ATO amnesty such that there is no administrative charge, only the superannuation contribution component and the administrative charge are subject to payroll tax. However, where the ATO has agreed for the liability to be paid by instalments, the full amount is subject to payroll tax at the time that the SG statement is lodged.

Revenue NSW reference *Commissioner's practice note: CPN 021*
w https://www.revenue.nsw.gov.au/help-centre/resources-library/cpn/cpn-021-employer-superannuation-contributions-payroll-tax-act-2007-including-division-3-of-part-3

5.4 Fuel credit claims

The ATO has released *Taxpayer Alert* TA 2021/3 regarding fuel tax credit over-claims caused by use of telematic technologies.

The ATO is reviewing arrangements where tax professionals or providers of GPS or telematics software, are marketing telematics technology products for fuel tax credits purposes, which are leading to over-claims of fuel tax credits. These over claims are a result of failing to correctly manage these devices, including failing to carry out the appropriate checks and adjustments to the technologies, which results in incorrect data analysis, and

incorrect apportionment of fuel tax credits. The ATO has advised that over claims will lead to substantial audit adjustments and may attract penalties and interest.

Telematics technology products gather a range of information that can be sources from the Global Navigation Satellite System, vehicle sensors and engine diagnostics. These technologies can be helpful in identifying where and how taxable fuel is being used to support fuel tax credit claims. However, the ATO has recognised issues with various products resulting in inaccurate information being produced.

The ATO has been made aware of tax professionals and marketers of telematic technology products approaching clients, encouraging them to use their product, with claims that they have been 'missing out' on fuel tax credits and that they will be able to make large claims without much scrutiny. Certain marketers have also claimed that the ATO has endorsed their product.

Issues identified include:

1. incorrect classification of roads;
2. inadequate sample sizes;
3. use of incorrect assumptions, inputs, algorithms;
4. failure to reconcile source documentation; and
5. incorrect use of ATO simplified methods.

Penalties may apply to both participants and promoters of these arrangements, including serious penalties under Division 290 of Schedule 1 to the *Taxation Administration Act 1953* for promoters.

The ATO states that steps should be taken by tax professionals and product marketers to ensure that the product and its results lead to correct fuel tax credit claims by:

1. having sufficient internal controls and governance;
2. keeping supporting evidence to justify the information provided;
3. testing the reasonableness of results with the actual use of fuel; and
4. reconciling product results with other supporting documentation.

The ATO is encouraging marketers and tax professionals to engage with the ATO by seeking guidance on the products for fuel tax credit purposes, by applying for a Product Ruling or Class Ruling.

ATO reference *Taxpayer Alert TA 2021/3*
w https://www.ato.gov.au/law/view/view.htm?docid=%22TPA%2FTA20213%2FNAT%2FATO%2F00001%22

5.5 Legal professional privilege protocol

On 23 September 2021, the ATO released its draft legal professional privilege (**LPP**) protocol containing the ATO's recommended approach for identifying communications covered by LPP and making LPP claims to the ATO in response to requests for information the ATO make under its formal information gathering powers.

Approach to determining LPP

The recommended approach consists of a three-step approach:

1. Step 1 involves assessing the situation and communication by considering the nature of the legal engagement, reviewing then determining the status of each communication, with separate review undertaken for each email within a chain of emails, attachments to the emails, a forwarded copy of the email and its attachment. This step also involves checking if LLP had been waived, and whether it belongs to a category of documents which are usually not privileged. A key list is provided in the LLP Protocol as a reference.
2. Step 2 involves particularising LPP claims. Standard particulars include the document id, date, pages, type and form of the document, identity of the privilege holders, the identity and role of each person that are parties to the document and/or communication, the dominant purpose for the communication, the legal issue being advised, whether the communication was forwarded and whether LPP is claimed in full

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or in part. The LPP Protocol provides for additional particulars to be provided in specific circumstances, including where in-house counsel is involved, or in circumstances of specific engagements.

3. Step 3 involves advising the ATO of the approach to making the LPP claims, including of the LPP Protocol is followed, whether computer-assisted processes was used to assess if LPP applies, and whether the assessment of LPP was based on any assumptions or pre-determined judgements.

ATO concerns about LPP claims

The ATO has concerns about contrived claims for LPP. The ATO specifically identifies the following circumstances:

1. contrived arrangements or relationships which purport to attract LPP where there is a purpose of concealing communications from the ATO. The ATO notes that it reviews arrangements where LPP is promoted as a feature of the tax advice;
2. where advice is ‘routed’ through a lawyer merely for obtaining LPP. The ATO considers that communications having the purpose of obtaining privilege are not for the sole or dominant purpose of giving or receiving legal advice or for litigation;
3. legal engagements entered into after the substance of advice was provided by non-legal persons;
4. concepts and ideas proactively promoted or marketed, or presented by a person or firm, whether lawyer/law firm or otherwise, prior to a legal engagement and unsolicited by the taxpayer;
5. communications exclusively between non-legal persons in circumstances where the involvement of a lawyer is not apparent; and
6. unclear (and potentially overlapping or inconsistent) capacities and relationships designated to different members of the firm. For example, non-legal persons purporting to be an agent of the client in dealing with legal staff, an agent of the lawyer in dealing with the client, as well as potentially being an independent expert on tax law matters.

w https://www.ato.gov.au/law/view/document?DocID=SGM/LPP&PiT=99991231235958

5.6 IGTO Report on JobKeeper enrolment deferral

On 16 September 2021, the Inspector-General of Taxation and Taxation Ombudsman published a report into the ATO's administration of JobKeeper applicant's requests to defer the due date for lodgement of JobKeeper enrolment notices, referred to in the report as JobKeeper enrolment deferrals.

The report noted that the ATO administers JobKeeper enrolment deferrals in accordance with section 388-55 of Schedule 1 to the TAA and PS LA 2011/15: Lodgment obligations, due dates and deferrals, JobKeeper enrolment deferral.

PS LA 2011/15 provides that JobKeeper enrolment deferrals requests may be granted where it is "fair and reasonable" to do so. The ATO procedures and internal guidance also lists 4 ATO-specified circumstances in which requests would be granted, which were not intended to restrict or narrow the granting of deferral requests to only those cases which matched the ATO-specified circumstances.

The report noted that IGTO complaint investigations that were conducted up to around April 2021 did not observe the ATO applying the ‘fair and reasonable threshold’, as set out in PS LA 2011/15, in its decisions regarding JobKeeper enrolment deferral requests.

Specifically, the report noted that the ATO:

1. only granted lodgement deferral of JobKeeper enrolments where there were exceptional circumstances which matched one of the circumstances on a list of ATO-specified circumstances;
2. did not apply the fair and reasonable threshold, despite this threshold being set out in PS LA 2011/15;
3. did not consider the particular facts and circumstances of each case to determine whether lodgement deferral was appropriate; and
4. referred to disseminated guidance materials, including scripting for frontline staff, which confined JobKeeper enrolment deferral approvals to only those cases with circumstances that matched those on an ATO-specified list of circumstances and did not allow staff to refer requests to a more senior decision-maker unless the officer considered that the case may fall within that ATO-specified list.

The report stated that there has been an improvement in ATO's decision making since April 2021, in that the ATO had overturned initial decisions in a number of JobKeeper enrolment deferral requests.

w https://www.igt.gov.au/investigation-reports/an-investigation-into-the-atos-administration-of-jobkeeper-enrolment-deferral-decisions/

5.7 Revenue NSW – employment agency contracts guidelines

On 1 March 2021, the Chief Commissioner released Practice Note CPN 005v2 *Employment Agency Contracts Guidelines* which replaces the previous practice note.

The purpose of the Practice Note is to assist taxpayers to decide whether their arrangements constitute an employment agency contract, and if so, which payments are wages for payroll tax purposes. The Practice Note provides detailed examples to assist taxpayers in the application of the employment agency provisions and identifies some common misconceptions about employment agency contracts (not previously included in the prior version of the practice note).

Section 37 of the PTA defines an employment agency contract as a contract under which an employment agent procures the services of a service provider for a client of the agent. A contract that is an employment agency contract cannot be a relevant contract under the PTA.

The key elements of an employment agency contract are as follows:

1. there is a contract, agreement, arrangement or undertaking;
2. the contract requires the agent to procure a service provider for the client;
3. the service provider may be the person who performs the work under the contract, or may engage workers to perform the work;
4. it does not matter if the service provider or worker was initially recruited by the client.
5. the workers are added to the workforce of the client and perform work in a similar way to employees, but not necessarily as employees of the agent; and
6. a contract may be an employment agency contract even if the agent is not an employment agent or labour hire firm as those terms are commonly understood, or as defined in other legislation.

An employment agency contract may be written or oral.

A service provider (i.e. worker) is “procured” by an employment agent for a client if the agent causes the services of the worker to be provided to the client with the expenditure of care or effort by the agent under an arrangement (or contract) between the agent and the client.

Importantly, under an employment agency contract, the workers must perform work “*in and for the conduct of the client’s business*”. This means the worker performs work in the same way, or much the same way as would an employee of the client. That is, the workers are added to the workforce of the client to enable to client to conduct its business. The Chief Commissioner will look at the totality of the relationship between the business of the client and the workers, including:

1. the continuity or regularity of services performed by the workers;
2. control or direction of workers including time and place of work;
3. whether the workers are perceived to be employees;
4. who supplies the materials and equipment;
5. whether the services are incidental to the core business of the client; or
6. the client is outsourcing a business function.

Under s 40(1)(a) of the PTA, any amounts paid or payable by the person taken to be an employer under an employment agency contract “in relation to” the service provider and “in respect of the provision of services in connection with the employment agency contract” are wages and liable for payroll tax.

The Chief Commissioner lists some common misconceptions about the employment agency provisions, including:

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1. contracts with independent contractors are not employment agency contracts. Rather, the relevant question is whether the worker is added to the workforce of the client for the conduct of the client's business;
2. result-based contracts or arrangements are not employment agency contracts;
3. a contract or arrangement can only be an employment agency contract if the work undertaken is a 'core business activity' of the client's business or if it is carried out during normal trading hours. The Chief Commissioner confirms that an employment agency contract may exist whether the worker undertakes core, non-core, ancillary or incidental activities of the client's business and whether the services are provided before, during or after business hours;
4. working in and for the conduct of the client's business requires the relationship between the worker and client to be an employee-employer relationship. As above, the relevant question is whether the worker is added to the workforce of the client for the conduct of the client's business;
5. a fixed price contract cannot be an employment agency contract;
6. the worker is working for the agent and therefore is not working in and for the conduct of the client's business; and
7. the employment agency contract provisions only apply to a contract with an employment agent or labour hire firm as those terms are commonly understood.

Revenue NSW reference *Commissioner's Practice Note CPN 005v2*
w https://www.revenue.nsw.gov.au/help-centre/resources-library/cpn/commissioners-practice-note-employment-agency-contracts-guidelines-v2

5.8 Penalties for use of electronic sales suppression tools

The ATO has published *Practice Statement Law Administration* PS LA 2021/D2 concerning the application and remission of administrative penalties for the production, supply, possession and use of an electronic sales suppression tool (ESST).

An ESST is designed to interfere with electronic sales records including by falsifying, obfuscating, destroying or preventing the creation of the electronic sales record. ESSTs come in various forms but they include:

1. software that deletes or modifies point of sale (POS) records;
2. storage devices (such as back-up drives) containing software that deletes or modifies records; and
3. POS devices with software that deletes or modifies records.

PSLA 2012/D2 sets out what will constitute an ESST for the purpose of the penalty regime under the TAA.

Penalties for ESSTs

Penalties can be imposed under the TAA for the following conduct in relation to an ESST:

1. producing an ESST
2. supplying an ESST
3. acquiring an ESST
4. using an ESST to keep, make or alter a record or preventing a record to be kept; and
5. aiding or abetting the above conduct.

The penalties range from 30 to 60 penalty units ($222). In PS LA 2021/D2 the Commissioner set out the circumstances in which a penalty for conduct relating to an ESST will be remitted.

PS LA 2021/D2 notes that there is no right to object against the imposition of an ESST penalty.

PS LA 2021/D2 also notes that persons that produce, supply or possess an ESST or use an ESST to incorrectly keep taxation records may be liable for criminal prosecution.

ATO reference *Practice Statement Law Administration PS LA 2021/D2*
w https://www.ato.gov.au/law/view/document?docid=DPS/PSD20212/NAT/ATO/00001#ft8

5.9 Taxation of cryptocurrency

The ATO has published updated guidance on its views as to the tax implications of holding and disposing of cryptocurrency.

The ATO notes that cryptocurrency is treated like shares and many other investments such that it is generally regarded as a CGT asset.

The ATO's guidance notes that ownership of cryptocurrency will fall into one of three categories for tax as follows:

1. the cryptocurrency is held as an investment so that any gain or loss is on capital account and the tax treatment is dealt with under the CGT provisions;
2. the person holding the cryptocurrency is miner or trader of cryptocurrency and, where the activities amount to a business, the trading stock rules apply and not the CGT rules; or
3. the cryptocurrency is a personal use asset.

Cryptocurrency as a personal use asset

The ATO's guidance indicates that the ATO will not commonly regard cryptocurrency as being a personal use asset, noting that the longer cryptocurrency is held the less likely it will be a personal use asset.

The ATO notes that cryptocurrency will not a personal use asset it is kept or used mainly as an investment, in a profit-making scheme or in the course of carrying on a business.

The ATO notes that only capital gains made from personal use assets acquired for less than $10,000 are disregarded but that all capital losses from personal use assets are disregarded.

Approach to cryptocurrency compliance

The ATO sets out a series of questions that advisors should ask clients when attempting to categorise how the cryptocurrency is held:

- How did they receive the cryptocurrency?
- When did they receive it?
- Why are they holding it?
- How long will they keep it?
- What will they do with it?
- Did they receive any income from it, for example, airdrops and staking rewards?
- How much is it worth in Australian dollars?
- When did they sell or dispose of it?

w https://www.ato.gov.au/Tax-professionals/TP/Cryptocurrency---investment-or-personal-use-asset/

5.10 Pandora Papers

The ATO has announced that it will be analysing the data referred to as the 'Pandora Papers' released by the International Consortium of Investigative Journalists (ICIJ) on 4 October 2021.

The ATO Deputy Commissioner and Serious Financial Crime Taskforce (SFCT) Chief Will Day stated that the ATO will compare the Pandora Papers with data already held to identify any possible Australian links to tax evasion and financial crime.

As a member of the Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC), Joint Chiefs of Global Tax Enforcement and other international and domestic partnerships, the ATO is working with 42 national tax administrations to pool resources and share intelligence to rapidly develop a more accurate picture of the data contained within the Pandora Papers and more generally.

The ATO is also encouraging individuals who may have undeclared offshore income to contact them.

w https://www.ato.gov.au/Media-centre/Media-releases/ATO-statement-regarding-Pandora-Papers/

5.11 Serious Financial Crime Taskforce

The ATO has published a summary of the current activities of the Serious Financial Crime Taskforce.

The SFCT is a joint agency taskforce comprised of several Commonwealth government agencies.

The summary notes that the current focus of the SFCT is on the following:

- cybercrime (technology enabled crime) affecting the tax and superannuation systems;
- offshore tax evasion;
- illegal phoenix activity; and
- serious financial crime affecting the ATO-administered measures of the Commonwealth Coronavirus Economic Response Package.

w https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Serious-Financial-Crime-Taskforce/

5.12 ATO: side hustles

The ATO is reminding taxpayers that it is paying close attention to undeclared income from secondary work, including from the sharing or 'gig' economy.

The ATO has recognised that some taxpayers have picked up "side hustles" during the pandemic which range from freelancing work, setting up a local market stall or receiving income from subscribers on platforms such as Patreon, Twitch or OnlyFans.

The ATO confirms that payment for the provision of services needs to be reported as income, even if it is one-off. The ATO is receiving information from a range of providers, including financial institutions, online marketplaces, ride-sourcing applications, and short-term rental websites for data-matching purposes.

Taxpayers will need to consider their additional tax obligations including the need for an ABN, registering for GST, and implementing a record keeping system to track income and expenses.

w https://www.ato.gov.au/Media-centre/Media-releases/Side-hustles-are-front-of-mind-this-tax-season/

5.13 Expanding Australia's tax treaty network

The Federal Government has announced that Australia will expand its tax treaty network, with 10 new and updated tax treaties to be entered into by 2023. Currently, Australia is party to 45 bilateral tax treaties.

The aim is to improve tax system integrity by establishing a bilateral framework of cooperation on preventing tax evasion, collecting tax debts and establishing rules to address tax avoidance.

The program will be divided into two phases. The first phase will involve negotiations with India, Luxembourg and Iceland this year, whilst the second phase will involve negotiations with Greece, Portugal and Slovenia planned to occur next year.

w https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/expanding-australias-tax-treaty-network-cover-80-cent

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