

TaxVine

Member Newsletter 1 | 28 Jan 2022



Private Business Tax Retreat

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This Week in Tax



President's Report

Jerome Tse, CTA

28 Jan 2022

In our first TaxVine for the year, our new President, Jerome Tse, CTA, welcomes in the new year and takes a look at what's in store for the year ahead.

The year ahead

We are already through January, and the restrained optimism many felt at the end of 2021 with high hopes of a more normal existence in 2022 has been replaced with the familiar feeling of uncertainty, and for some, anxiety, as COVID-19 cases rapidly escalate across the country. It is clear with the Omicron variant, and the balance of the Greek alphabet left unused, that 2022 will equally be a period of uncertainty for our members, The Tax Institute, the tax profession and the wider community.

In my first preamble as President, I wanted to reflect on the positives of what the year may bring. It is only with this positivity that we can move forward to ensure we deliver on The Tax Institute's vision.

The advent of the new year brings with it ongoing challenges in the form of hesitant customers not wanting to venture out, and new challenges in the form of staffing shortages due to furloughs. But unlike the external factors affecting business operations during 2020 and 2021, extensive government financial assistance is no longer available. These challenges will continue to impact the way tax professionals operate.

The political landscape

The Federal Budget 2022–23 has been brought forward to Tuesday 29 March 2022.

The timing of the Budget will allow for its release before the Government moves into caretaker ahead mode ahead of the Federal election sometime in the first three weeks of May (no later than 21 May 2022). Given the timing of the Budget and the minimum 35-day campaigning period, the election will need to be called by the Government in the small window during the first two weeks in April.

Any bills before the Parliament at the time the election is called will lapse. Post-election, there is the potential for further substantial changes to the Australian tax landscape. A return of the Coalition to Government will likely see previously lapsed measures reintroduced, although a stock take of the long list of previously announced but unenacted measures would be necessary (members should refer to our recently released [State of Tax Policy Report: December 2021](#) for a comprehensive report on the status of key tax and superannuation measures). Alternatively, a new Labor Government could make significant changes to the current tax policy settings. Labor's tax polices will be announced closer to the election.

The Tax Institute's Tax Policy and Advocacy team is already busily preparing for these major and highly anticipated events and will support our members through a suite of products and resources.

What's on the radar for 2022?

2022 will be another big year in tax. Beyond the Federal Budget and the election, there are a number of issues which our members will need to be on top of, including but certainly not limited to the following:

- **Allocation of professional firm profits** — Following the release of [PCG 2021/4](#) on 16 December 2021, members can access a [detailed overview](#)

of the PCG. We will also be running webinars and providing our members with various tools and resources to assist with the administrative requirements associated with this PCG.

- **Section 100A and Division 7A** — We eagerly await the release of new ATO guidance material (including a [draft public ruling](#)) concerning the purpose of s 100A (of the ITAA 1936) and the 'ordinary family or commercial dealing' exclusion, as well as new guidance on Division 7A. The ATO website advises that this is expected to be completed in February 2022. We will keep our members abreast of information as it comes to hand and provide various tools and resources to support our members.
- **STP** — [Phase 2 of Single Touch Payroll \(STP\)](#) reporting commenced on 1 January 2022 unless the employer's digital service provider has a deferral. The ATO is allowing a [flexible approach to transition](#) by allowing employers to start reporting by 1 March 2022. The ATO has released [detailed guidelines](#) to assist employers transition to Phase 2 of STP reporting.
- **Individual residency** — In addition to the ATO's [decision impact statement on the Addy case](#), there is likely to be a significant overhaul to the residency rules for all taxpayers. Following the [announcement](#) in the Federal Budget 2021–22, the individual tax residency rules will be updated with a new framework as recommended by the Board of Taxation in its [2019 report](#).
- **TPB** — The implementation of the [James' review](#) of the Tax Practitioners Board continues and we should see more public information in this regard.

Further, The Tax Institute remains committed to advocating for meaningful and holistic tax reform. The release of our landmark project, [The Case for Change](#) in July 2021, seeks to spark conversation and drive new ideas for tax reform. Over the months and years ahead, we will ensure we maintain the momentum generated since the launch of The Case for Change. We will continue to advocate for a tax and transfer system that is simple, equitable and efficient.

Commitment to membership with renewed leadership team

During 2022, Giles and I are committed to raising the bar on diversity and inclusion within The Tax Institute and in the broader tax community. We are finalising our diversity and inclusion policy, and it is my sincere hope that we will embed a culture of inclusiveness across all facets of Institute life, and by extension, within the entire tax community.

As a tax community, we can and must do better. We must create an environment that values all forms of difference, whether visible or non-visible. This includes gender, nationality, ethnicity, religion, culture, language, sexual orientation, gender identity, disability, age and family status. Further, The Tax Institute must reflect its broad membership base in everything that we do. I am keen to hear from all our members on your thoughts in this respect.

Personally, notwithstanding the current spread of Omicron, I am hoping that, as the year progresses, we will see more regular face-to-face events around the country. Immediate Past President Peter Godber, new Vice President Marg Marshall and I look forward to meeting you around the country as these events are held. While traditionally, the President would represent members at events and key consultations, I am hopeful that between the three of us, living in three separate States, we will be able to navigate COVID-19 travel rules successfully to meet with our members in person, allowing us to better represent your needs.

Finally, it would be remiss of me not to recognise the significant efforts of our immediate Past President, Peter Godber, who has led The Tax Institute for the past two challenging years. The demands of Presidency while maintaining a full-time practice cannot be overstated. In more modern Institute times, this is the key reason why the President serves only one of a possible two-year term. We are indebted to Peter for agreeing to a two-year term given the unique circumstances of the pandemic. Peter has been a steadying influence on the Institute through what has been an incredibly challenging period for our organisation. Peter's leadership has since been recognised by his appointment as the National Tax Liaison Group (**NTLG**) Co-Chair (with Second Commissioner Kirsten Fish) for a two-year period. Thank you and congratulations to Peter.

As always, we welcome your views and thoughts, which you can provide [here](#).

Kind regards,

Jerome Tse, CTA

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ADVOCACY TRACKER

Advocacy Tracker

Key issues on the radar

Our Tax Policy and Advocacy team is always working for our members. Our Advocacy Tracker sets out the key issues that we are advocating for on your behalf, including additional resources via the hyperlinks. Should members have any queries or wish to discuss matters with the Tax Policy and Advocacy team, please contact us at [Tax Policy](#).

Members can also track updated ATO [advice under development](#) and [matters under consultation](#).

Issue	Tax Policy and Advocacy activity	Stakeholder
ITEMS ADDED THIS WEEK		
Australian National Audit Office (ANAO) audit of ATO's Engagement with Tax Agents	We are collecting member feedback on this item. See below under Member Advocacy for more details and submission information.	ANAO

Inspector-General of Taxation and Taxation Ombudsman (IGTO) investigation — ATO's Administration and Management of Objections	We are collecting member feedback on this item. See below under Member Advocacy for more details and submission information.	IGTO
IGTO investigation — The Exercise of the General Powers of Administration	We are collecting member feedback on this item. See below under Member Advocacy for more details and submission information.	IGTO
IGTO investigation — The Exercise of the Commissioner's Remedial Power	We are collecting member feedback on this item. See below under Member Advocacy for more details and submission information.	IGTO
Decision Impact Statement: Addy v Commissioner of Taxation	The ATO has released a decision impact statement (DIS) regarding the Commissioner's view of the implication of the High Court decision of <i>Addy v Commissioner of Taxation</i> [2021] HCA 34 on the residency status of working holiday makers. The Tax Institute is working with our National Taxation of Individuals and National Large Business and Internationals committees to ensure the DIS correctly reflects the High Court's decision and provides accurate guidance to taxpayers and tax professionals.	ATO
ONGOING ITEMS		
Non-arm's length income of superannuation funds	Following the recent release of LCR 2021/2 , and PCG 2020/5 in 2020 on how the ATO will apply the non-arm's length income (NALI) provisions to 'non-arm's length expenditure' to complying superannuation entities, we continue to work with the other professional bodies to raise the practical implications of s 295-550 of the <i>Income Tax Assessment Act 1997</i> with the Commonwealth Government.	ATO Treasury
Digital activity statements	Following a number of members raising the issue of the removal of paper activity statements with us, The Tax Institute escalated the matter to the ATO in late 2020. This has resulted in a series of regular meetings to discuss the impact of the ATO's decision to remove paper quarterly PAYG and GST instalment notices and the design of an interim solution which involves the reinstatement of paper activity statements from the March 2021 quarter. We continue to work with the ATO in the design of a permanent solution.	ATO

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MEMBER BENEFITS

Please find your latest member benefits listed in this section. It's just one of the ways we're helping to declutter your inbox while ensuring you have the latest information in a timely manner.

State of Tax Policy Report: December 2021

Keeping up to date with the latest developments in changing legislation can be a challenge at the best of times. Our State of Tax Policy Report: December 2021, prepared by our Tax Policy and Advocacy team is an essential reference tool to keep you up-to-date on the status of key tax and superannuation legislative measures.

[Access the report](#)

MEMBER ADVOCACY

Member Advocacy

ANAO performance audit of the ATO

The Australian National Audit Office (**ANAO**) recently started a performance audit of the Australian Taxation Office's (**ATO's**) engagement with tax agents. The ANAO is keen to hear of our members' experiences of ATO engagement and insights as an input to the audit.

Audit objective and scope

The audit objective is to assess the effectiveness of the ATO's engagement with tax agents in achieving efficient and effective tax and superannuation systems. To achieve this, the ANAO is examining the ATO's strategy for engaging with tax agents and its services and support for tax agents. The ANAO's focus is on the ATO's broader engagement with tax agents, for example, through their guidance, communications, services and consultation, rather than specific compliance actions.

Audit fieldwork is now underway. The ANAO is open to receiving feedback until April 2022, and we will be meeting with them regularly until then. The audit is expected to be tabled in Parliament in August 2022.

How to provide feedback

On 22 December 2021, The Tax Institute's representative, our Senior Advocate, Robyn Jacobson, CTA, attended a meeting with the ANAO. Thank you to those members who provided feedback to us in December which allowed us to share some initial feedback with the ANAO relevant to the audit objective in that meeting.

As there is still an opportunity to provide feedback to the ANAO, we invite our members to provide feedback on the following aspects of the ATO's engagement with tax agents:

1. Does the ATO effectively set out their strategic approach to engaging with tax agents? Is this based on consultation with tax agents? Is this approach clearly communicated to tax agents and the associations?
2. Does the ATO assess their performance in engaging with tax agents? Is it measuring the right things?
3. Does the ATO effectively engage with tax agents through forums (e.g. National Tax Liaison Group, Tax Practitioner Stewardship Group and other forums)?
4. Does the ATO effectively consult with tax agents on related matters (i.e. through the ATO Consultation Hub)?
5. Does the ATO have effective communication and education arrangements?
6. Does the ATO effectively manage the Lodgment Program and Key Agent Program?
7. Does the ATO effectively respond to tax agent enquiries — phone line, tax practitioner assistance service and complaints?
8. Does the ATO have effective digital services — particularly Online Services for Agents and the Practitioner Lodgment Service — and associated support?

To enable The Tax Institute to collate member feedback, if you have feedback to share, please email your responses to taxpolicy@taxinstitute.com.au.

Regards

The Tax Institute's Tax Policy and Advocacy Team

Lodgment Program Review Working Group

As advised in TaxVine 48 on 17 December 2021, the ATO's Lodgment Program Review Working Group (**LPRWG**) is currently undertaking a review of the Lodgment Program to identify gaps and opportunities to improve the administration of the lodgment program. The LPRWG first met on 11 November 2021 to discuss the scope of the review and intent of the lodgment program, and will continue to meet in the months ahead.

The group's next step is to identify pressure points under the lodgment program (obligation due dates) and understand factors impacting on agent's ability to manage workload across the financial year.

LPRWG members have also been invited to leverage on their networks with peers, colleagues and members to seek additional input. This will help to form a view of what agents consider are the main factors that contribute to the pressures and challenges of managing practice workload and meeting due dates.

The task

Referring to the [Lodgment Program 2021–22 timeline*](#), we invite our members to respond to the following questions:

1. Where are the pressure points on the timeline (thinking also about the majority of agents, not just your individual situation)?
2. In respect of those pressures:
 1. What are the causes of the pressure for that particular time (e.g. lots of obligations at once, external forces at that time of the year, staff availability at a particular point in the year, clients shutdown at that point in the year). If there are client-specific or practice-specific issues, please note them separately.
 2. Are there specific obligations that create greater pressure points?
 3. What client group are the most impacted (individuals, small business, large/medium, significant global entity, etc.) and the key factors that result in this impact?
 4. How are agents and their clients currently managing the pressure points?

*The timeline and due dates are based on the [due dates published on ato.gov.au](#).

Please send your response by **COB on Friday 4 February 2022** to taxpolicy@taxinstitute.com.au or LodgmentProgramReviewWorkinGroup@ato.gov.au. Our Senior Advocate, Robyn Jacobson, CTA is The Tax Institute's representative on the LPRWG.

Regards

The Tax Institute's Tax Policy and Advocacy Team

IGTO reviews

In TaxVine 48 on 17 December 2021, we shared that the Inspector-General of Taxation and Taxation Ombudsman (**IGTO**), Ms Karen Payne, announced on 9 December 2021 that her office will be progressing three new review investigations throughout 2022.

A brief summary of the three review investigations is set out below.

ATO's Administration and Management of Objections

Taxpayers who lodge objections because they are dissatisfied with a decision that the ATO has made about them or their affairs generally expect their objection to be properly considered and to be finalised in a timely manner, impartially and independent of the original decision maker.

The investigation will focus mainly on the timeliness in issuing objection decisions, the independence of objection decision makers and the objection decision making process, as well as the interaction between objections processes and other initiatives in minimising or narrowing disputes.

Exercise of the General Powers of Administration (GPA)

A number of pieces of legislation specifically provide that the Commissioner of Taxation has the General Power of Administration (**GPA**) of the relevant tax law. These provisions grant the Commissioner discretion only in relation to the administration of provisions set out in the respective Acts. It is arguable that any administrative decision made by the Commissioner (or a delegate, or duly authorised officer) that is not a decision under a specific legislative power is an exercise of the GPA. In this sense, the scope and breadth of the GPA is extremely broad.

The IGTO's investigation does not propose to examine every type of decision that may be made under the GPA, but will draw from case studies in their complaints investigation service as well as stakeholder submissions to identify and investigate particular areas raised as examples of exercise of the GPA that should be investigated. In particular, the IGTO is interested to understand how broad-based GPA decisions (i.e. those affecting large groups of taxpayers) are identified and determined.

Exercise of the Commissioner's Remedial Powers (CRP)

The Commissioner of Taxation has a statutory discretion to modify the operation of certain provisions in the tax law where those provisions are not operating as intended. The discretion is only able to be exercised where certain conditions have been met.

Through the IGTO's tax complaint investigation service, it has been observed that there appears to be a lack of clarity about how issues are raised for the Commissioner's Remedial Powers (**CRP**) consideration and whether the processes underlying consideration of these matters are sufficiently robust to take into account consideration of relevant factors and expert stakeholder views.

Importantly there are limited avenues to challenge the exercise of either the GPA or the CRP.

Call for member feedback for submission

The Tax Institute, with the assistance of our National Dispute Resolution Technical Committee, will be preparing a submission for lodgment with the IGTO by the end of February 2022.

We are keen to hear of our members' experiences, case studies or feedback on:

- the ATO's management of objections;
- the Commissioner's exercise of the GPA or CRP.

To enable The Tax Institute to collate member feedback, if you have feedback to share, please email your response by COB on Friday 11 February 2022 to taxpolicy@taxinstitute.com.au.

Regards

The Tax Institute's Tax Policy and Advocacy Team

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MEMBER ENGAGEMENT

Member Engagement

Conversations happening in Community:

- [Sale of Land – CGT](#): Can you help this member with a sticky CGT question? Weigh in with your thoughts.
- [2022–23 Pre-Budget Submission](#): Don't forget to share your thoughts, ideas and feedback on our pre-budget submission.

Is there an idea you're keen to share with like-minded tax lovers? [Sign up for a free Community account](#) to start talking with other members of The Tax Institute today.

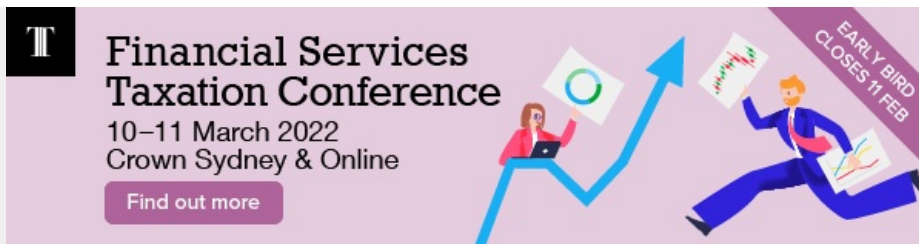
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SUBMISSIONS LODGED

Submissions Lodged

- [The Tax Institute Submission | Treasury Laws Amendment \(Measures for Consultation\) Bill 2022: Increased Tribunal powers for small business taxation decisions](#)
- [The Tax Institute Submission | Consultation paper on streamlining transfer balance cap event-based reporting arrangements for self-managed super funds](#)

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A promotional banner for the Financial Services Taxation Conference. It features a purple background with a white 'T' logo on the left. The text reads 'Financial Services Taxation Conference' in a large, bold font, followed by '10-11 March 2022' and 'Crown Sydney & Online'. Below this is a 'Find out more' button. To the right, there is an illustration of a woman sitting on a blue line graph and a man running while holding a document. A purple banner in the top right corner says 'EARLY BIRD CLOSING 11 FEB'.

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10-11 March 2022 | Crown Sydney & Online | 11 CPD hours

Australia's premier tax event for the financial services

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1. 15 technical sessions presented by experts in their fields
2. An outstanding array of speakers bringing perspectives of regulators, government, taxpayers and advisers
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5. On-demand access to all materials including recordings, technical papers, and presentations (post event).

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IN THE MEDIA

In the Media

- **Self-Managed Super:** On 18 January 2022, a submission by The Tax Institute featured in: [Employee or independent contractor: Impacts for PAYG & SG](#)

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TAX LEADERS' INSIGHTS

Tax Leaders' Insights

- [State of Tax Policy Report: December 2021](#): This report prepared by our Tax Policy and Advocacy team summarises the status of the key tax and superannuation legislative measures.
- [Opportunity to significantly improve a client's position: restructuring legacy pensions](#): Insights from Julie Steed, Senior Technical Services Manager at Australian Executor Trustees, and presenter at our upcoming [Superannuation Intensive](#)
- [Award-winning fintech entrepreneur on building, scaling and selling the future](#): Insights from Award-winning fintech entrepreneur, Amreeta Abbott keynote speaker at our upcoming [Private Business Tax Retreat](#)
- [Student Spotlight: A positive approach to new challenges](#): Insights from Helena Papapostolou, winner of our Emerging Tax Star Award and Gordon Cooper Memorial Scholarship in 2021
- [Defining your own success story: stories from a human behaviour expert](#): Insights from Vicky Jones, founder of The Element Coach and presenter at the [Women in Tax Congress](#)
- [Avoid burnout by building recovery into your routine](#): Insights from human performance researcher Dr Adam Fraser at The Tax Summit 2021
- [Enjoy more quality time through emotional awareness](#): Insights from award-winning leadership strategist Shadé Zahrai at The Tax Summit 2021
- [Improve your quality sleep for a restful break this summer](#): Insights from award-winning leadership strategist Shadé Zahrai at The Tax Summit 2021

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Tax Disputes Masterclass

16 March 2022 | Establishment Hotel Sydney & Online

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EARLY BIRD
CLOSES 18 FEB

Tax Disputes Masterclass

16 March 2022 | Establishment Hotel Sydney & Online | 7 CPD hours

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This year's Masterclass will provide both technical insights and practical tips for resolving tax disputes. The different perspectives of our wide variety of presenters, from senior ATO officers to members of the tax bar and experienced Tax Controversy professionals, will bring fresh thinking to the nuanced challenge of seeking to resolve a tax dispute.

Book now to save \$200 off your registration. Early Bird closes on Friday 18 February 2022

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ATO RULINGS

ATO Rulings

Class rulings

- [CR 2022/3](#) Think Childcare Limited – Scheme of arrangement, interim dividend and permitted dividend
- [CR 2022/4](#) 1300 Smiles Limited – Scheme of arrangement and special dividend
- [CR 2022/1](#) rhipe Limited – Scheme of arrangement and special dividend
- [CR 2022/2](#) Cuscal Limited – Equal access off-market share buy-back and selective off-market share buy-back

Decision impact statement

- [2020/6929](#) *MJ and IT Holdings Pty Ltd and Commissioner of Taxation*

Notices

- [CR 2021/92A1 - Addendum](#) Victorian Department of Justice and Community Safety – early retirement scheme 2021–23

Legislative instruments

- [F2022L00016](#) Taxation Administration: Single Touch Payroll – 2021–22 and 2022–23 years Withholding Payer Number Exemption 2021
- [F2022L00004](#) Income Tax: Alternative method for calculating the tax-free component and taxable component of a superannuation benefit paid during the 2021–22 financial year for recipients of certain pensions under the *Defence Force Retirement and Death Benefits Act 1973* and the Trust Deed referred to in section 4 of the *Military Superannuation and Benefits Act 1991*.

CASES CORNER

Cases Corner

Guardian

Guardian AIT Pty Ltd ATF Australian Investment Trust v Commissioner of Taxation [2021] FCA 1619

Logan J

21 December 2021

Brisbane

Synopsis

The Federal Court has found that a structure where a corporate beneficiary was established to receive the benefit of a trust did not give rise to a reimbursement agreement under s 100A of the *Income Tax Assessment Act 1936 (ITAA 1936)* or a scheme with the sole or dominant purpose of obtaining a tax benefit under Part IVA of the ITAA 1936. The Court made this finding on the basis that this arrangement was carried out in the course of an 'ordinary family or commercial dealing'.

Facts

The Australian Investment Trust (**AIT**), a discretionary trust, was settled on 25 June 1998. The trustee of the AIT was Mr Springer from its inception until 1999 when Guardian AIT Pty Ltd (**Guardian and the Taxpayer**) was appointed as the corporate trustee.

In June 2012, AIT Corporate Services Pty Ltd (**AITCS**) was incorporated and appointed as a member of the eligible beneficiary class of the AIT (along with Mr Springer). Guardian as trustee resolved that AITCS be entitled to the relevant net income of the AIT for the 2012 to 2014 income years.

On 28 June 2012, Guardian made AITCS presently entitled to the net income of the AIT amounting to approximately \$2.6 million. AITCS' present entitlement for the 2012 income year was not paid out in cash, giving rise to an unpaid present entitlement (**UPE**). On 17 April 2013, AITCS drew on the UPE to cover its income tax liability for the 2012 income year of nearly \$800,000. On 1 May 2013, AITCS declared a fully franked dividend of nearly \$1.85 million to the AIT. This amount was paid by setting off the UPE against the dividend payable which reduced the balance of the UPE to nil.

A similar course of events took place for the 2013 and 2014 income years.

On 17 November 2017, the Commissioner issued amended assessments including administrative penalties to the AIT in respect of the 2012, 2013, and 2014 income years. The Commissioner considered that the AIT was liable to income tax under s 99A(4A) of the ITAA 1936 on the basis that s 100A applied. Across the 2012 to 2014 income years, AIT's tax liability under the amended assessments was nearly \$3.7 million and the administrative penalties were approximately \$1.85 million.

On 15 January 2018, the Commissioner further issued alternative assessments to Mr Springer on the basis that Part IVA of the ITAA 1936 applied. These assessments effectively cancelled the tax benefits Mr Springer received under these arrangements, thereby increasing his tax liability by nearly \$3.55 million, and also imposed administrative penalties of approximately \$1.77 million on these amounts.

Mr Springer and the Taxpayer both lodged objections against the amended assessments. The Commissioner disallowed the objections, and Mr Springer and the Taxpayer appealed the Commissioner's decision to disallow its objections to the Federal Court.

Federal Court decision

The Federal Court upheld the Taxpayer's appeal, finding that there was not a reimbursement agreement that resulted in the application of s 100A because a reimbursement agreement must necessarily precede the payment of money, the transfer of property to, or the provision of services or other benefits in order for s 100A to apply, and in this case, there was no evidence on or prior to June 2012 that there was a real or implied reimbursement agreement between Mr Springer or Guardian (or at least not until many months later);

Even if there was such an agreement in June 2012, it provided only for the payment of money to a beneficiary, AITCS. It went no further, and did not provide for 'the payment of money or the transfer of property to, or the provision of services or other benefits for, a person or persons other than the beneficiary or the beneficiary and another person or other persons'.

His Honour went on to hold that the incorporation of AITCS, its appointment as a member of the eligible beneficiary class and the resolution to make a distribution to it of trust income were each nothing more than an 'ordinary family or commercial dealing' for the purposes of s 100A(13), which excludes the arrangement from s 100A. The purpose of the arrangement was to facilitate the Taxpayer's transition into retirement, and there were clear prevailing family and commercial conditions behind the Taxpayer's actions (i.e. risk minimisation and wealth accumulation).

Finally, Logan J concluded that the arrangement was not subject to Part IVA of the ITAA 1936 because:

- there was no tax benefit to the Taxpayer under s 177C; and
- even if there was a tax benefit, consideration of the eight factors in s 177D in detail served only to reinforce a conclusion as to an absence of a dominant purpose to obtain a tax benefit.

His Honour concluded that the Taxpayer's sole or dominant purpose was not in obtaining a tax benefit, but in minimising risk to himself and to accumulate wealth through a passive investment structure.

Further analysis and implications of the decision

The decision is important because the Guardian case is one of the few, if not the first, occasions the Court has looked at the meaning of 'ordinary family or commercial dealing' in s 100A(13). Although Logan J's reasoning is a sign that the Court is willing to apply this exemption in some instances, His Honour's judgment does not provide much clarity about the characteristics or features of ordinary family or commercial dealings, other than they 'lack artificiality'.

It is expected that the Commissioner will appeal this decision to the Full Federal Court, so this issue is likely to be addressed by the Full Court in greater detail.

A detailed explanation of the facts, analysis of the Federal Court's decision and the significance of the decision is available in this [article](#).

SingTel

Singapore Telecom Australia Investments Pty Ltd v Commissioner of Taxation [2021] FCA 1597

Moshinsky J

17 December 2021

Melbourne

Synopsis

In this case involving the transfer pricing rules, the Federal Court found that the terms of an intergroup financing arrangement between members of a multinational telecommunications group lacked commercial rationale, and that independent parties dealing at arm's length in the same circumstances would not have entered into the arrangement. In particular, the case highlights the Commissioner's ability to reconstruct an arrangement when applying the transfer pricing rules to a limited (though undefined) extent.

While the case concerned former Division 13 of Part III of the *Income Tax Assessment Act 1936* (**ITAA 1936**) and Subdivision 815-A of the *Income Tax Assessment Act 1997* (**ITAA 1997**) and legacy arrangements from many years ago, the principles remain relevant to the current application of the transfer pricing rules in Subdivision 815-B of the ITAA 1997.

Facts

During 2001 and 2002 through a series of steps, the Taxpayer, Singapore Telecom Australia Investments Pty Ltd (**STAI**), an Australian resident company and wholly-owned subsidiary of Singapore Telecommunications Ltd (**SingTel**), a listed company resident in Singapore, acquired the Optus telecommunications business in Australia by acquiring all the shares in Singtel Optus Pty Ltd (**SOPL**) from another wholly-owned subsidiary of SingTel, Singtel Australia Investment Ltd (**SAI**), which was incorporated in the British Virgin Islands and is also a tax resident in Singapore.

The consideration paid by STAI for the shares in SOPL was the issuance to SAI of \$9 billion in shares in STAI and loan notes worth approximately \$5.2 billion subject to a Loan Notes Issuance Agreement (**LNIA**). The LNIA set out an interest rate on the loan notes at inception, but between 2002 and 2009, the terms were amended that resulted in the total interest payable increasing by nearly \$5 billion.

In October 2016, the Commissioner made transfer pricing adjustments under former Division 13 of Part III of the ITAA 1936 (former Div 13) and Subdivision 815-A of the ITAA 1997 (Subdiv 815-A) in respect of the four income years ending 31 March 2010 to 31 March 2013.

In December 2016, the Taxpayer lodged objections against the amended assessments. In September 2019, the Commissioner disallowed STAI's objections. In response, the Taxpayer appealed the Commissioner's decision to disallow its objections to the Federal Court.

Federal Court decision

The Federal Court upheld the Commissioner's decision.

After referring to the recent decisions in *Chevron Australia Holdings Pty Ltd v Federal Commissioner of Taxation* [2017] FCAFC 6 (**Chevron**) and *Commissioner of Taxation v Glencore Investment Pty Ltd* [2020] FCAFC 187 (**Glencore**) for relevant principles applicable to the current case, Moshinsky J concluded that independent parties in SAI and STAI's position would not have agreed to the amendments of the LNIA. This was because the Taxpayer could not show evidence that there was any commercial reason why an independent party would have done likewise in the same position. Accordingly, STAI failed to demonstrate that the amended assessments were excessive.

Further analysis and implications of the decision

The decision is important because, until the recent cases of Chevron and Glencore, some taxpayers had argued that the only aspect of a transaction that the Commissioner could change was price. In Glencore, the Middleton and Steward JJ observed that this could include terms that 'include a pricing formula or some other methodology for the determination of price'. Thawley J went further, stating that in his Honour's view, the statutory language did not contemplate or require a distinction between pricing and non-pricing terms, and that conditions that did not define price may be substituted or 'reconstructed'.

The reconstruction debate has created lingering uncertainty as taxpayers and advisers digest the SingTel decision. Some practitioners still consider that the majority comments in Glencore should be preferred as they are perceived to carry more judicial weight (given they were made by two judges of the Full Federal Court). However, Moshinsky J agreed with Thawley J's obiter comments in his separate judgment that reconstruction of non-pricing conditions is permissible.

A detailed explanation of the facts, analysis of the Federal Court's decision and the significance of the decision is available in this [article](#).

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SUPERANNUATION

Superannuation

Finalised your SMSF audit? Time to lodge your SAR

Once your SMSF audit has been finalised by an approved auditor, it's time to lodge your SMSF annual return (**SAR**).

If you lodge a SAR yourself, your due date is:

- generally, 28 February following the financial year
- 31 October if you didn't lodge your return for the previous financial year on time
- 31 October for your first year.

More information can be found [here](#).

SMSF auditors requesting non-binding advice

The ATO is simplifying their processes for seeking interpretative assistance or advice.

If you're seeking interpretative assistance, you can access the ATO's range of guidance and self-help products [here](#).

If you require tailored technical and interpretative assistance for a specific individual or group of taxpayers and your query cannot be resolved online, you can contact the ATO by:

- secure mail in [Online Services for Business](#) if you're a business or SMSF auditor
- secure mail in [Online Services for Agents](#) if you're a tax practitioner
- phone on **13 10 20** from 8:00am – 6:00pm on Monday – Friday.

New insolvency legislation – Impact on SMSF corporate trustees

At the beginning of 2021, the Government made changes to the insolvency framework. One change included a new debt restructuring process and a simplified liquidation process for eligible incorporated small businesses through the appointment of a restructuring practitioner.

Following this change, amendments were made to the *Superannuation Industry (Supervision) Act 1993 (SIS Act)*, which included a new category of disqualified persons, which could affect SMSFs with a corporate trustee. This new category applies when a restructuring practitioner is appointed in an insolvency event. This will trigger the disqualification of a corporate trustee of a superannuation entity, including an SMSF, from managing a superannuation entity.

Find out what these changes mean for existing funds and new funds [here](#).

Unclaimed superannuation money (USM) paper statement updated

The Unclaimed superannuation money (**USM**) paper statement has been updated in line with the *Treasury Laws Amendment (2021 Measures No. 5) Act 2021* that was enacted on 7 December 2021.

The change to the USM paper statement is relevant only to superannuation providers who accept KiwiSaver accounts. The update will apply to amounts received by the Commissioner on or after the commencement of the amendment.

More information on the changes can be found [here](#).

Getting it right for superannuation

Paying superannuation is an important part of being an employer.

If your client missed, or didn't pay the full amount of, their employees' superannuation guarantee (**SG**) for the quarter ended 31 December 2021, they need to:

- lodge a SG charge statement to the ATO by 28 February 2022;
- pay the SG charge to the ATO.

By law, the ATO is unable to extend the due date to pay SG.

More information can be found [here](#).

Guide to help you use SuperStream Rollovers version 3

SuperStream Rollovers version 3 (including SMSFs and certain release authorities) is now in production.

The [SuperStream Rollovers v3 guide for SMSFs](#) sets out what you need to use in SuperStream and includes tips to minimise delays when rolling to or from an SMSF and how to respond to release authorities via SuperStream.

The ATO has also developed additional [SMSF checklists](#) to assist with rolling money out of and in to your SMSF.

More information can be found [here](#).

eSAT closes 1 March – Switch to OSB now

The ATO is decommissioning the electronic superannuation audit tool (**eSAT**) at 12:00am on 1 March 2022. Now is the best time to switch to Online services for business.

To switch, simply log in or sign up for Online services for business through the ATO website. If you are new to the ATO's Online services, you may need to set up your myGovID and link it to your Relationship Authorisation Manager (**RAM**).

More information can be found [here](#).

Superannuation processing schedule

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GST

GST

Excise return and instructions

Instructions to help you complete the Excise return form (NAT 4285) can be found [here](#).

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SMALL BUSINESS MEASURES

Small Business Measures

Rewarded staff for getting their COVID-19 vaccination?

If you have provided incentives or rewards to your employees for getting their COVID-19 vaccination or booster dose, it's important to understand what your tax and superannuation obligations are.

If you have provided non-cash benefits, you may have to pay fringe benefits tax on them, unless an exemption applies.

More information can be found [here](#).

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BUSINESS MEASURES

Business Measures

Director ID applications are available

Your clients can apply for their director identification number (**director ID**) at [Australian Business Registry Services \(ABRS\)](#).

Member-only guide

A member of The Tax Institute, Stephen Page, CTA, Partner at Sydney accountancy firm, Stephen Page & Co has written a member-only guide '**Director Identification Numbers**' that takes you through all that you need to know about director IDs.

Members can access the guide [here](#).

Key dates

The dates for when your clients need to apply, depends on when they become a director.

The first key date is for clients who become a director between 1 November 2021 and 4 April 2022. They need to apply within 28 days from their appointment. From 5 April 2022, directors will need to apply for their director ID prior to their appointment.

If your clients were a director on or before the 31 October 2021, they will need to apply for their director ID by 30 November 2022.

For a full list of key dates including directors of Aboriginal and Torres Strait Islander corporations, see [who needs to apply and when](#).

Short videos for tax professionals

To help you understand the director ID requirement and how to apply, watch the following short videos for tax professionals:

- ATO's [introduction video](#)
- ABRS' [video for tax professionals](#).

Update for professional firms allocating profits

If you own or operate a professional firm, read the ATO's updated Practical Compliance Guideline [PCG 2021/4 Allocation of professional firm profits – ATO compliance approach](#) to find out if the way you distribute profit or income is compliant with your tax obligations. The PCG applies from 1 July 2022.

Under the new PCG, you will need to review your profit allocation arrangement against two new 'gateways' before you can work out if you are meeting your obligations.

If your arrangement passes both gateways, the guideline will help you to:

- work out if there's a risk your arrangement isn't compliant
- understand the level of engagement you can expect from the ATO
- decide whether to seek professional advice or contact the ATO
- support your application for 'binding advice' if you want certainty.

More information can be found [here](#).

Claiming the research and development tax offset?

The Research & Development (R&D) Tax Incentive allows companies to claim a tax offset for their R&D expenses incurred on their registered R&D activities.

If you registered for the offset, the 'at-risk' rule helps to determine if your R&D expenditure is eligible for the offset under the scheme. It looks at whether expenditure you intend to claim a tax offset for can be considered 'at risk'.

The ATO recently clarified the rule and how it applies to expenses claimed as an R&D tax offset to help you make your decisions.

Find out how the 'at risk' rule may affect your claim for an R&D tax offset [here](#).

Draft effective life of assets used in the casino operation industry

The ATO is seeking your comments on the draft list of effective lives for assets used in the casino operation industry defined within ANZSIC code 92010.

The proposed new determinations can be found [here](#). Comments are open until 18 February 2022.

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INTERNATIONAL TAX

International Tax

ATO reviewing the advance pricing arrangement program

The advance pricing arrangement (APA) program provides a valuable service delivering certainty on your dealings with international related parties.

The ATO will be undertaking a review of the program in 2022, primarily to focus on:

- whether the APA product continues to be providing the right service for all taxpayers
- assuring transfer pricing risk in the most efficient manner possible.

As part of the review, the ATO will consider how to tailor the APA process to better align to risk and taxpayer behavioural indicators.

More information can be found [here](#).

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OTHER MEASURES

Other Measures

CPI rose 1.3% in the December 2021 quarter

The Australian Bureau of Statistics (**ABS**) has released the CPI index number of 121.3 for the December quarter 2021. The most significant price rises were for new dwelling purchases by owner-occupiers (+4.2%) and automotive fuel (+6.6%).

Read more [here](#).

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ATO NEWS

ATO News

Protecting your practice

As a tax professional, you need to protect your business and client information, online and off.

The Australian Cyber Security Centre's (**ACSC**) Essential Eight contains baseline mitigation strategies to protect your systems from common cyber threats. Find out more [here](#).

ATO information exchange with Tax Practitioners Board

The ATO provides information to the Tax Practitioners Board (**TPB**) when it has identified potential activities involving agent misconduct or unregistered practitioner behaviour.

The ATO and TPB lawfully and regularly share information on areas of mutual interest through an information exchange. For the ATO, this means sharing relevant information and referring suspected breaches of the *Tax Agent Services Act 2009* (**TASA**) to the TPB.

Find out more [here](#).

McDonald's conviction for failure to comply

On 14 January 2022, McDonald's Australia was convicted and fined for failing to provide documents to the ATO.

The ATO issued a formal notice on 26 July 2019 requiring McDonald's Australia to produce documents with a compliance date of 30 August 2019. However, despite continued engagement with McDonald's Australia to obtain the information and resolve the matter, the documents were not provided by

the compliance date.

The matter was subsequently referred for prosecution by the Commonwealth Director of Public Prosecutions, which saw McDonald's Australia plead guilty at the Downing Centre Local Court in Sydney to one count of failing to comply with an information gathering notice.

Deputy Commissioner, Will Day, said the conviction serves as a reminder to all taxpayers to be open and transparent in their dealings with the ATO.

Read more [here](#).

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