INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA

MONTHLY TAX UPDATE

February 2024

Presented by

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February 2024

Monthly Update – Agenda

<u>Cases</u>

- *Mitri & Ors* – Land developer assessable on profits from subdivided properties
- *Meakins* – Cost of holding vacant land – insufficient activity
- *Sladden* – Settlement payment assessable as ordinary income
- *Stark* – Settlement payment an ETP made in consequence of termination
- *Fidge* – Transfer of full-time officer to Reserves a redundancy
- *Came* – Earnings associated with transferred foreign super assessable income of super fund not taxpayer

Monthly Update – Agenda (cont'd)

Legislation

- ***Fair Work Legislation Amendment (Closing Loopholes) Bill 2023***
- *Treasury Laws Amendment (2023 Measures No. 1) Bill 2023 (and related TPB releases)*
- *Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023*
- *State Taxation Acts and Other Acts Amendment Bill 2023 (Vic)*

Monthly Update – Agenda (cont'd)

ATO Guidance

- TD 2023/D4 – deductions for financial advice fees
- TD 2023/7 – goods taken for own use
- PCG 2022/1 – non-commercial losses – discretion regarding flood, bushfire, COVID-19
- TR 2023/4 and PCG 2023/2 – worker classification
- Product and Class Rulings

Monthly Update – Agenda (cont'd)

Other

- 2023-24 MYEFO
- Stage 3 tax cut changes
- From the Helpline – passively held active assets

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Mitri & Ors – Land developer assessable on profits from subdivided properties

Facts

- The taxpayers were family members and related companies that carried out land development activities
- One company, Frontlink (wholly owned by daughter) realised gains of over $40m through the sale of properties
- Taxpayers argued gains accrued on a capital account as Frontlink established for daughter's long-term benefit and properties were to be operated as farms
- Taxpayers argued at the time of the land's acquisition by the company there was no intention to sell the properties at a profit

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Mitri & Ors – Land developer assessable on profits from subdivided properties

Issue

- Whether profits on the sales of the properties were on revenue or capital account
- Specifically, whether the land was acquired for *"the not insignificant purpose of resale at a profit and whether such activities carried out in a business or commercial way"*

Mitri & Ors – Land developer assessable on profits from subdivided properties

Decision

- The family's failure to identify any individual as the controlling mind of Frontlink, and the failure to call the daughter to give evidence, was highly significant
- As a result, the AAT could not make findings regarding the company's purpose as it could not say which individual's purpose should be attributed to the company
- If the daughter's father was the controller of the company, then no weight could be given to his evidence as he was not held out as the controller
- In any event, there were difficulties with his evidence eg inconsistencies and evidence that seemed contrary to some of the facts regarding rezoning
- The AAT concluded evidence was insufficiently reliable to discharge the burden of proving the gains were not of a revenue nature

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Meakins – Cost of holding vacant land

Facts

- Vacant land acquired by family trust for $1.3 million in July 2006
- All financed through ANZ
- Refinanced in 2012
- Total holding costs (mainly interest) $1.1 million over 11 years to 2017
- *Intention* was to construct a building to rent out
- But what has the applicant actually *done*?
- Not much at all, as it turns out

Meakins – Cost of holding vacant land

Meakins' case:

- GFC in 2008 created adverse market conditions; had to wait it out
- Planning and building regulatory uncertainty; possible resumption of land for road widening; opportunity to acquire adjoining land to optimise eventual development (which happened in 2020)
- No architectural drawings; no planning applications; no contact with any builder; no cost estimates; no finance arranged or investigated; no tenant secured

Steele's case:

- In stark contrast with Steele, who within three years had retained two sets of architects; obtained planning approval for a major motel complex; negotiated with a manager for the completed project; took on a new partner.
- Project only abandoned after dispute with partner

Meakins – Cost of holding vacant land

Decision

- Holding costs not deductible under s8-1
- 50% shortfall penalty imposed – reckless and not reasonably arguable
- Applicant relied on *Steele* – no dice – sound reasons for delay but facts are very different - not reasonably arguable
- Avoid wishful thinking on reasonably arguable point
- Post 1 July 2019 rules make certain vacant land holding costs non-deductible
- May come into cost base on later CGT event

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Sladden – Settlement payment assessable as ordinary income

Facts

- Taxpayer was a doctor who purchased had two linked insurance policies – Life Protection Plan (LP plan) and Professional Income Protection (PIP) Plan
- In 2013, diagnosed with serious illnesses and made a claim for the payment of the income benefit under the PIP Plan
- After battles to get the benefits paid, taxpayer appointed a professional dispute resolution expert to negotiate a commutation of her PIP benefit
- In 2019, this led to agreement to accept the insurers offer of "$1m in full and final settlement" of claim for payments under the PIP Plan
- The final Settlement agreement also included the insurer's release from its obligations under the other policy ie the LP Plan

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Sladden – Settlement payment assessable as ordinary income

Issue

- Was the settlement amount assessable as ordinary income?
- Was the payment a non-assessable capital amount on the basis of being an undissected lump sum comprising capital and income (per *McLaurin* and *Allsop* principles)?

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Sladden – Settlement payment assessable as ordinary income

Decision

- The amount was assessable as ordinary income as it was a substitution for income
- Merely replacing assessable monthly benefits with a lump sum payment does not change the character of what is received
- The terms of the deed are not solely determinative of the issue - the facts and circumstances that led to the deed being executed must also be considered
- The taxpayer originally assented to acceptance of the offer of the settlement figure of $1m to commute or settle her claim under the PIP plan only
- Note: Although the taxpayer subsequently agreed to ***also*** surrender the life cover, the agreed settlement sum ***remained*** $1m

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Stark – Settlement payment and ETP made in consequence of termination

Facts

- The taxpayer, a Chartered Accountant, received $505,000 in settlement of proceedings bought against his employer for wrongful termination and deceptive conduct
- The settlement provided that the payment was to be made in respect of “lost earnings” – but without the employer admitting liability for any matter

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Stark – Settlement payment and ETP made in consequence of termination

Issues

- Was the amount excluded from being an ETP under ITAA97 s 82-135(i) on the basis of being a capital payment for personal injury?
- Was the amount exempt from CGT under ITAA97 s 118-37(1)(a) as compensation for any wrong or injury suffered in a person's occupation?

Stark – Settlement payment and ETP made in consequence of termination

Decision - AAT

- At first instance, in *Stark and FCT* [2021] AATA 2583, the AAT ruled that the amount was an ETP as it was received in settlement of a dispute which resulted in cessation of employment and, therefore, it was made "in consequence of the termination of employment"

Stark – Settlement payment and ETP made in consequence of termination

Decision – Federal Court

- The payment was an assessable ETP
- There were no grounds to treat as an exempt payment for “wrong or injury” – either for ETP or CGT purposes
- As the employer made no admission of liability, the payment could not be characterised as a capital amount for compensation "for" any wrong or injury
- The concept of “personal injury” did not extend to personal injury for “destruction of earning capacity” or for “financial injury” (as claimed by the taxpayer)
- The payment was made “in consequence” of the termination of the taxpayer’s employment as it “followed on” from the taxpayer’s action for wrongful termination

Fidge – Transfer of full-time officer to Reserves a redundancy

Facts

- The taxpayer, a Colonel in the Army, held the position of Defence Attaché-Ankara, Turkey from 2016 to 2019
- In June 2019 he was transferred from the Permanent Forces to the Army Reserves as no full-time position was available to him
- He received a special benefit payment of $93,000 in respect of this “transfer”

Fidge – Transfer of full-time officer to Reserves a redundancy

Issue

- Was the special benefit payment a redundancy payment entitled to concessional tax treatment under ITAA97 s 83-175(1)?
- The ATO argued the payment was not a redundancy as his position had not been made redundant as the position of Defence Attaché, Turkey was filled by another officer

Fidge – Transfer of full-time officer to Reserves a redundancy

Decision

- The taxpayer's position as a full-time Colonel was made redundant - his dismissal was given effect by his compulsory transfer into the Reserves
- It was his former position as a Colonel in the regular Army that was to be properly described as redundant ie in excess to the Army's requirements
- The AAT noted that military employment is different from civilian employment - as those in the military are required to render service in whatever capacity "as and where directed"
- The redundancy caused the compulsory transfer to occur - and the payment would not have arisen but for this redundancy (and the payment was made in respect of it)

Came – Earnings associated with transferred foreign super

Background

- Subdiv 305-B - Taxation of superannuation lump sum benefits from foreign superannuation funds
- Treatment depends on whether payment made within 6 months of individual becoming Australian tax resident or ceasing foreign employment
- Payment within 6 months -› generally exempt
- Payment after 6 months -› growth in value accrued since becoming Australian tax resident is assessable income, either
    - ➢ Include in individual's assessable income and taxed at individual's marginal tax rates
    - ➢ Where certain conditions are met, elect under s305-80 to have all or part included in the assessable income of their Australian superannuation fund

Came – Earnings associated with transferred foreign super

Facts

- Taxpayer terminated employment in South Africa (SA) and immigrated to Australia
- Australian tax resident from 7 July 2004
- During 2020, taxpayer requested lump sum withdrawal of entire super entitlement from his SA super fund
- SA legal requirements required funds to be first transferred into the taxpayer's Emigrant Capital Account (ECA)
- Following compliance with SA legal requirements, the amounts in the ECA were transferred to the taxpayer's Australian super fund
- Taxpayer lodged his 2020 income tax return on the basis he had made s305-80 elections - therefore did not include any amount in taxpayer's assessable income in respect of the foreign SA superannuation payments
- Taxpayer issued with notice of amended assessment on audit including the earnings in the taxpayer's assessable income
- The taxpayer objected, the objection was disallowed and the taxpayer lodged an application for review

Came – Earnings associated with transferred foreign super

Issue

- The Commissioner argued although taxpayer made a choice it was not a choice made under s305-80 because:
  - the funds were not transferred *directly* from the SA fund to the Australian fund and the choice under s305-80, when read in conjunction with s307-15 regarding "*payments for your benefit or at your direction or request*", is limited to where funds are directly transferred at the taxpayer's explicit direction or request;
  - this requirement was essentially the same as the one specified under the previous ITAA36 s27CAA which was replaced and repealed by Subdiv 305-B, and
  - the prohibition on direct transfers of super lump sums from the SA super fund, as dictated by SA law, was inconsequential "and, in particular, has no bearing upon the proper construction of the legislation".

Came – Earnings associated with transferred foreign super

Decision

- AAT overturned Commissioner's decision
- Concluded that the Commissioner's argument is not in accordance with the current legislation
- The legislative changes in Subdiv 305-B demonstrated a clear legislative intention to deviate from the previous requirement in s27CAA which required that a superannuation lump sum be paid directly from a foreign superannuation fund to a complying superannuation fund before the relevant election could be made

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Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

- The Bill received royal assent on 14 December 2023
- The Bill amends the *Fair Work Act 2009* to introduce a number of changes to the workplace relations framework
- Originally, the Bill intended to effectively undo the High Court decisions in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2
- To facilitate an easier passage of the first Bill, these provisions have been moved to the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023*, which is currently before the Senate.

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Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

CFMMEU

[*MTU March 2022*]

- In the High Court the taxpayer established that his engagement to provide builder's labourer services amounted to an employment relationship, which entitled him to certain payments under the relevant award
- Whilst there was a comprehensive written agreement, at a practical level, the taxpayer was supervised and was told what work to do and how and when to do it
- Both the Federal Court and the Full Federal Court applied a multifactorial approach, determining that the taxpayer was an independent contractor basically because of the terms of his contract said he was
- The High Court, however, held the taxpayer, based on a close examination of the terms of the contract, was in fact an employee
- The High Court observed that the labels applied to the taxpayer in the agreement as an independent contractor were inconsistent with the rights and obligations surrounding the working conditions in the rest of the contract

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Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

Jamsek
[*MTU May 2023]*

- Truck delivery drivers operating as partnerships with spouses for 30 years
- Supplied own trucks and engaged by one company, ZG Lighting
- High Court overruled Full Federal Court in February 2022 – under *Fair Work Act 2009* they were contractors
- Terms of contractual arrangements more relevant than subjective and uncertain multi-factorial approach

Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

Jamsek (cont'd)

Question of whether expanded meaning of employee under s 12(3) SGAA applied remitted to FCA.

> *"If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract."*

Full Federal Court held Jamsek was not an employee under s 12(3) and therefore not entitled to SG contributions under the arrangement:

- For s 12(3) to apply the contract has to be between the putative employer and a natural person (not, as in this case, a partnership)
- S 12(3) will not be satisfied where the contract is for the provision of a result, being the delivery of goods using the partnership's truck
- A contract which allows a worker to delegate a task to other persons is not wholly or principally for the labour of the worker

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Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

No. 2 Bill

- Determines the definition of employment and the meaning of 'employee' and 'employer' by "reference to the real substance, practical reality, and true nature of the relationship between the parties"

- Requires the totality of the relationship between the parties, including not only the terms of the contract governing the relationship but also the manner of performance of the contract, to be considered in characterising a relationship as one of employment or one of principal and contractor

Comment

- While both the High Court cases and the current Bill address the *Fair Work Act 2009*, the decisions in the High Court cases are being commonly applied in a taxation context - the current Bill throws this application into question, creating confusion for taxpayers and their advisers

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Get out the gumboots, it is getting deeper

Recent Bills and Legislative Instruments have piled further compliance obligations on the tax profession

Treasury Laws Amendment (2023 Measures No. 1) Bill 2023

- Assented on 27 November 2023
- Amends the *Tax Agent Services Act 2009* (TASA) to implement certain recommendations of the Review of the Tax Practitioners Board (TPB) (Tranche 1 of the James Review recommendations), being:
  - amends the objects clause of the TASA
  - creates a special account for the TPB
  - requires tax practitioners not to employ or use a ***disqualified entity*** without the TPB's approval, or enter an arrangement with a disqualified entity
  - converts the registration period from at least every three years to at least every year
  - enables the Minister to supplement the existing Code of Professional Conduct (the Code)

Australian Greens amendments:

- Amendments by the Greens made only the day before the Bill passed, allowing no opportunity for consultation, introduced significant obligations on registered tax and BAS agents
- The Greens made four amendments to the Bill

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Get out the gumboots, 🤫 it is getting deeper

Australian Greens amendments (cont'd):

- **Firstly,** only "community representatives" being individuals who are not partners, former partners, or former executive officers (with ongoing connections) of a registered tax or BAS agent that has more than 100 employees, can be a TPB board member.
  - ➢ This amendment would seem short-sighted as tax and BAS agents in the larger firms are a relevant and necessary component of the tax system and to deny their voice at the TPB is to introduce a deficiency into the process. Is the TPB for all, or just for small?
- **Secondly,** from 1 July 2024, if a registered tax or BAS agent suspects they have significantly breached the Code, the registered tax or BAS agent must notify the TPB within 30 days of becoming aware of (or ought to have become aware of) the breach occurring.
- **Thirdly,** from 1 July 2024, any registered tax or BAS agent who suspects another tax or BAS agent of a significant breach of the Code must, in writing within 30 days, notify the TPB.
- **Lastly,** in addition to the third amendment, also from 1 July 2024, where the registered tax or BAS agent is aware that the other agent is a member of a professional association, they must also notify that association of the breach in writing within 30 days.
- The third and last amendments now impose a legal obligation on tax and BAS agents to dob in their mates
- The Bill does not contain a definition of "significant"
- Tax and BAS agents are left to their own judgment regarding situations to which these new obligations should apply.
- When an agent takes on a new client and finds errors in past lodgements, the agent must now determine whether it was an innocent mistake or a breach of the Code, and presumably document their decision to avoid any blow back
- Additionally, the legislation lacks any protections for the whistleblower agent

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TPB(I) D51/2023 "Code of Professional Conduct - Employing or using a disqualified entity in the provision of tax agent services without approval"

TPB(I) D52/2023 "Code of Professional Conduct - Prohibition on providing tax agent services in connection with an arrangement with a disqualified entity"

- On 18 December 2023 the TPB released two exposure draft information sheets, providing draft guidance on ***disqualified entities***
- The exposure drafts attempt to provide a pathway of minimum steps for identifying if an entity is a disqualified entity
- The first is to check the TPB Register - if the entity is registered it is not a disqualified entity
- If the entity is not on the register the pathway quickly becomes uneven
- The exposure drafts confirm that the new requirements are not intended to apply in respect of entities that provide only peripheral services
  - ➢ But who makes that determination?
- Attempts to clarify the phrase "ought reasonably to know" the entity was a disqualified entity (contained in the legislation)
- Requires judgement and is open to interpretation
  - ➢ Who makes that interpretation?
- Despite the best intentions the exposure drafts still leave many of the new requirements in a very grey area

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Get out the gumboots, it is getting deeper

Draft Tax Agent Services (Code of Professional Conduct) Determination 2023

- Seizing on the newly bestowed power to supplement the existing Code, the Minister wasted no time in tabling a draft Determination
- The draft Determination does not amend the TASA, but rather, expands upon it
- The draft Determination expands many of the Code items, including to:
  - ➢ uphold and promote the Code of Professional Conduct
    - ❖ Isn't this the TPB's role?
  - ➢ protect public trust and confidence in the integrity of the tax profession and tax system
    - ❖ Protecting public trust is a macro goal that should sit within the remit of Treasury, the Australian Taxation Office, the Tax Practitioners Board, and ultimately the Australian Government, not tax and BAS agents
    - ❖ "ensure that you do not bring the profession into disrepute" would be a requirement far more within the control of tax practitioners
- The Institute of Financial Professionals, together with other associations, objected to the Minister having the power to supplement the existing Code by legislative instrument as there is no Parliamentary oversight and can result in grossly unfair outcomes, as in this case
- To introduce such granular requirements, together with concepts such as "ought reasonably to have known" only act to make a tax practitioner's job more difficult with greater chance for them to inadvertently trip up

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Get out the gumboots, it is getting deeper 🤫

Treasury consultation paper: Enhancing the TPB's sanctions regime

- In December 2023 Treasury issued a consultation paper (the Paper) seeking "feedback and views on proposed reforms that will provide the TPB with a stronger and more agile sanctions regime"
- The Paper proposed the following amendments to the TPB's sanctions regime:
  - criminal penalties for practitioners that operate without a registration with the TPB
  - broader and increased civil penalties in the TASA
  - an infringement notice scheme attached to the civil penalty regime
  - a new TPB power to allow it to enter enforceable voluntary undertakings with tax practitioners
  - a new TPB power to impose interim and contingent suspensions
- The intention of the proposed amendments is to give the TPB the "ability to impose sanctions that escalate in severity in response to more serious contravention of the law"
- The Institute of Financial Professionals is concerned that bestowing these new enforcement options upon the TPB, without the appropriate checks and balances in place to make sure they are wielded responsibly, may result in otherwise compliant tax practitioners being inadvertently and inappropriately caught up

INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA

Get out the gumboots, it is getting deeper

Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023

- The Bill was introduced into Parliament on 16 November 2023
- The Bill contains the second tranche of the James Review recommendations, being to:
  - expand the operation of the promoter penalty provisions
  - enable the sharing of certain protected information
  - extend the whistleblower protections to eligible whistleblowers who make disclosures to the TPB
  - reverse the burden of proof for certain claims of protection
  - amend the TASA in relation to the TPB Register and the TPB's delegation powers
- These changes enact the proposals in the "response to PwC" Treasury consultation papers, as discussed in our November 2023 Monthly Tax Update

State Taxation Acts and Other Acts Amendment Bill 2023 (Vic) - No buck passing

- *State Taxation Acts and Other Acts Amendment Bill 2023* (Vic) was assented to on 12 December 2023
- The Bill amends the treatment of both land tax and windfall gains tax upon the sale of land and broadens the land tax net

Land Tax Recovery

- Commencing from 1 January 2024, the Bill amends the *Sale of Land Act 1962* to introduce a prohibition on the recovery of land tax from the purchaser under a contract of sale of land

Windfall Gains Tax Recovery

- Similarly, the Bill amends the *Sale of Land Act 1962* and the *Windfall Gains Tax Act 2021* to introduce a prohibition on the recovery of windfall gains tax under an option or contract of sale of land
- The prohibition does not apply to:
  - a contract of sale of land entered into before 1 January 2024
  - an option to enter into a contract of sale of land granted before 1 January 2024
  - a contract of sale of land entered into on or after 1 January 2024 under the exercise of an option that was granted before 1 January 2024

State Taxation Acts and Other Acts Amendment Bill 2023 (Vic) - No buck passing

Land Tax Scope and Rate

- The Bill also amends the *Land Tax Act 2005* (Vic) to:
  - apply vacant residential land tax to all vacant residential land in Victoria on and after **1 January 2025**; and
  - extend the definition of vacant residential land tax to include certain unimproved land in metropolitan Melbourne effective from **1 January 2026**
- The Bill also provides for an increase in the rate of vacant residential land tax applying to land, other than residential land within the meaning of the *Land Tax Act 2005*

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TD 2023/D4 – deductions for financial advice fees

Background

- Considers the deductibility of fees paid for financial advice under s8-1 and 25-5 for individuals not in business
- TD 2023/D4 replaces TD 95/60 which is now withdrawn
- s8-1 allows for, but also limits, deductible expenses to those incurred in the course of earning assessable income
- s25-5 in part provides a deduction for tax-related expenditure incurred in relation to the management of an entity's tax affairs or in complying with Commonwealth tax laws
- Modernisation but not a change in view
- Some clarification that fees for services provided by a recognised tax advisor may need to be apportioned

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TD 2023/D4 – deductions for financial advice fees

Type of expenditure	Deductible?
Financial advice prior to acquisition of an asset, a proposed investment, or a new financial plan	No except to the extent the advice is of a non-capital nature provided by a recognised tax advisor and relates to tax implications*
Ongoing (regular/recurrent) fees or retainers to manage or service existing investment portfolio	Yes*
Advice to change the mix of investments by an existing or new adviser , provided the advice does not amount to new financial plan	Yes*
Advice relating to investments that do not produce assessable income	No
Advice relating to household budgeting	No

TD 2023/D4 – deductions for financial advice fees

*** Tax (financial) advice**

- The ATO takes the view that "tax (financial) advice" as defined in s90-15 of *TASA 2009* comes within the meaning of "tax affairs" for the purpose of s25-5
- Not all advice provided by a financial adviser would be tax (financial) advice eg

  "factual information about a financial product that does not involve the application or interpretation of taxation laws to the client's personal circumstances"
- See examples in Draft Determination

TD 2023/D4 – deductions for financial advice fees

Example 1 (TD 2023/D4)

Min-Ji sought financial advice from Claudio (a recognised tax adviser) for the purposes of section 25-5 to enable her to increase her regular income by generating higher investment returns.

Claudio assessed Min-Ji's financial situation by considering her assets and liabilities, income, risk profile and tax profile and recommended Min-Ji invest her savings in a managed investment scheme.

In providing this advice, Claudio interpreted and applied the tax laws to Min-Ji's circumstances and provided advice about liabilities, obligations and entitlements when acquiring, holding and disposing of the investment.

To the extent Claudio charges for work:

- *in recommending the investment and acquiring the units in the fund, this is **not deductible** under section 8-1 (as the fee is incurred as part of putting the income-earning investment in place and does not have a sufficient connection with earning income, and further, it capital or of a capital nature)*

- *in relation to the tax (financial) advice provided relating to the taxation implications of the investment in the specific fund nominated, this is **deductible** under s25-5 (as the advice was provided by a recognised tax adviser in relation to managing Min-Ji's tax affairs).*

As the advice is provided for multiple purposes, Min-Ji needs to apportion the total amount of the fee between the different components of the advice on a fair and reasonable basis.

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TD 2023/7 – goods taken for own use

- TD 2023/7 released 22 November 2023 updates the safe harbour amounts for goods taken for own use over a range of industries for the 2023-24 income year
- Up by just over 5% from 2022-23
- Butcher shop $1,030 per adult per annum; mixed business $5,200 per adult per annum
- Amounts determined using ABS data
- Free to use own figures but need evidence – most businesses use safe harbour amounts

TD 2023/7 – goods taken for own use

- For an incorporated business, taking inventory items for the proprietor's own use represents drawings, or a reduction in equity
- Accounting treatment (for those who bother):

Dr	Equity	$600
Cr	Inventory	$600 (GST exclusive amount)

- Do any practitioners or their clients record journal entries for these events?
- Should they, and is that even possible when using the safe harbour amounts?

TD 2023/7 – goods taken for own use

- Where the enterprise is a private company, does the taking of an inventory item by the proprietor represent an unfranked distribution under Division 7A?
- GST implications – is there a change in use where the enterprise has claimed ITC when acquiring item for the purpose of making taxable supplies?
- ATO does not appear to have raised this as an issue
- Difficult to make a change in use adjustment when using the safe harbour amounts

PCG 2022/1 – Non-commercial business losses – discretion regarding flood, bushfire, COVID-19

Background

- PCG 2022/1 deals with the rules in Div 35 that prevent an individual's non-commercial business losses being offset against their other assessable income in the year the loss is incurred, unless:
  - the individual meets the income requirement, and the business activity satisfies one of the 4 stipulated tests; or
  - the individual has a business activity that is eligible for an exception; or
  - the Commissioner exercises the discretion in s 35-55 for the business activity for one or more income years
- The discretion can be exercised by the Commissioner (or self-assessed in terms of safe harbour rules in the Ruling) if it would be unreasonable to defer the losses because of "special circumstances"
- These special circumstances refer to matters outside the control of the taxpayer - including drought, flood, bushfire or other natural disaster and Government imposed lockdowns or business closures because of COVID 19

PCG 2022/1 – Non-commercial business losses – discretion regarding flood, bushfire, COVID-19

Updated Ruling

- A taxpayer can self-assess the discretion in s 35-55 ITAA 1997 to allow a loss from non-commercial business activities that arise in ***the 2023-24 income year*** to be offset against other assessable income derived in that year

- Note: The discretion now applies for the 2019–20, 2020–21, 2021–22, 2022–23 and ***the 2023-24*** income years

Finalised Taxation Ruling and Practical Compliance Guideline on Worker Classification

Background

TAA s12-35:

> *…An entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as an **employee** (whether of that or another entity) …*

- ATO has released its final guidance on worker classification:
  - TR 2023/4: *Income tax: pay as you go withholding – who is an employee?*
  - PCG 2023/2: *Classifying workers as employees or independent contractors – ATO compliance approach*

Finalised Taxation Ruling and Practical Compliance Guideline on Worker Classification

Ruling

- Ruling is relatively uncontroversial
- Explains when an individual is an employee within the term's ordinary meaning
- Confirms the High Court's decisions in *Personnel Contracting* and *Jamsek*
- Terms of a contract are the primary determinant
- Characterisation requires an objective consideration of the *totality of a relationship*, having regard only to the ***contractual*** rights and obligations existing, and known, between the parties at the time of entering the contract

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Finalised Taxation Ruling and Practical Compliance Guideline on Worker Classification

Ruling

Where legal rights and obligations are in the form of a written contract, it is the terms of the contract alone which are to be taken into account, unless the contract:

- is not comprehensive
- has been challenged as a sham
- the terms have been varied, waived, discharged (including by conduct), or
- is the subject of an estoppel or any equitable, legal or statutory right or remedy

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Finalised Taxation Ruling and Practical Compliance Guideline on Worker Classification

Ruling - "Useful Approach"

- "At its core" the distinction between an employee and independent contractor is that an employee serves in, and performs the work as part of, the business of an employer

- "A useful approach" for assessing whether a worker is an employee is to ask whether:

  *... the worker is working in the business ... of the engaging entity, **based on the terms of the contract**, having regard to the various **employment indicia** .... identified in case law*

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Ruling - Indicia

- Not all details of a contract are of equal weight or important in any given situation
- May vary in importance from one factual situation to another
- Whilst no factor determinative (the right to) control is strongly indicative
- A right to delegate is “inherently inconsistent with an employee relationship” provided it is not limited in scope, is not a sham and is legally capable of being exercised - if fettered, consistency with other indicia need to be considered
- PAYG withholding provisions will generally not apply to payments made to non-individual entities

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PCG

- Unwillingness or inability to undertake identification and characterisation of terms of a contract may (in part) explain ATO's decision to provide practical certainty in form of PCG

- Colour coded risk zone-based approach to self-assess whether compliance resources are likely to be applied to worker classification

- The PCG:
  - does not affect ATO's view as to whether a worker is an employee or independent contractor (if the ATO applies compliance resources, it will apply the technical principles described in the TR and PCG)
  - does not relieve parties of their obligations to comply with relevant laws
  - does not apply for the purpose of other employment matters that are not tax or super eg awards, payroll tax, workers compensation etc
  - does not extend to the personal income tax positions of the worker eg whether they are carrying on a business
  - is optional

Finalised Taxation Ruling and Practical Compliance Guideline on Worker Classification

PCG

- 7 criteria to self-assess against
- Criteria based on actions taken by parties when entering arrangement
- Must meet ALL criteria as indicated (in following tables) to fall in relevant risk zone
- Must be reassessed if material change in circumstances
- ATO will not apply further compliance resources where business decides to treat arrangement as one of employment and all employer tax, super, and reporting obligations met

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	Risk Zones	Very low	Low	Medium	High
	Will further ATO compliance resources be applied to test worker classification?	No	No unless review arose from unpaid super query	Yes but with lower priority	Yes with higher priority and higher penalties
	Criteria relating to the arrangement, intention and understanding				
1	There is evidence that **both** parties **intended** for the worker to be classified in the same way	**Yes**	**Yes**	**Yes**	**Any arrangement that does not fall within other 3 risk zones**
2	There is a properly executed **comprehensive written agreement** that governs the entire relationship between the parties	**Yes**	**Yes**		
3	The engaging party relying on the PCG has evidence to show that both parties **understood** what the worker's **classification** meant, and what the tax and superannuation **consequences** of that classification would be	**Yes**			

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	Risk Zones	Very low	Low	Medium	High
	Will further ATO compliance resources be applied to test worker classification?	No	No unless review arose from unpaid super query	Yes but with lower priority	Yes with higher priority and higher penalties
	Criteria relating to conduct of parties				
4	The **performance** of the arrangement has not significantly **deviated** from the contractual terms (significant if an aspect of performance contradicts the contract or a deviation relates to a crucial component)	Yes	Yes	Yes	Any arrangement that does not fall within other 3 risk zones
5	The party relying on this PCG is **meeting** the correct tax, superannuation, and reporting **obligations** that arise for their intended classification (as detailed in Table 1 and 2 of the PCG)	Yes	Yes	Yes	

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	Risk Zones	Very low	Low	Medium	High
	Will further ATO compliance resources be applied to test worker classification?	No	No unless review arose from unpaid super query	Yes but with lower priority	Yes with higher priority and higher penalties
	Criteria relating to advice received				
6	The party relying on this PCG obtained **specific advice*** confirming the classification was correct	**Yes**	**Yes**		**Any arrangement that does not fall within other 3 risk zones**
7	An engaging business relying on this PCG also obtained **specific advice*** confirming the application of the **extended meaning** of employee under the **SGAA**, **and communicated** this outcome to the worker	**Yes**			

** **Specific advice** must be prepared by an appropriate qualified professional either in-house counsel or third party e.g. solicitor, tax professional, admin body, or client specific written advice from ATO. Can be a single piece of advice for multiple workers under same kind of arrangement. Must be at least reasonably arguable (see MT 2008/2) and copy provided to the ATO if requested.*

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Finalised Taxation Ruling and Practical Compliance Guideline on Worker Classification

Reminders

- Must meet ALL criteria as indicated to fall in relevant risk zone
- Must be reassessed if material change in circumstances
- ATO will not apply further compliance resources where business decides to treat arrangement as one of employment and all employer tax, super, and reporting obligations met (ie treated as “very low risk”)
- Where a review arises from an unpaid superannuation query by a worker, in the absence of specific advice relating to the extended SGAA definition and evidence of the understanding and communication of the outcome, ATO will apply compliance resources to test the worker classification

Product and Class Rulings

Background

- Product and Class Rulings are public rulings
- Public rulings are binding on the ATO once published in the Government Notices Gazette
- Product rulings give certainty to participants on the tax consequences of an arrangement eg an investment, financial or insurance arrangement, provided it is carried out as described in the ruling eg forestry schemes and agribusiness projects
- Class rulings explains how a relevant provision of the tax law is applied to a specific class of participants for a particular scheme, providing certainty to participants without the need for individual participants to seek private rulings

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Product and Class Rulings

Product and Class Rulings issued since 1 December 2023	
PR 2023/24	Allianz Guaranteed Income for Life
PR 2023/25	XLD Commodities Pty Ltd - XLD Grain & Fertiliser Prepayment Program
PR 2023/26	Luxury Escapes Business Traveller Program
CR 2023/67	Two10degrees Pty Ltd - use of Global Alerting Platform In-Vehicle Management System for fuel tax credits
CR 2023/68	Thorn Group Limited - return of capital
CR 2023/69	Newcrest Mining Limited - employee share scheme - shares disposed of under scheme of arrangement
CR 2023/70	B&C Hospitality Holdings Pty Ltd - employee share scheme - reducing the minimum holding period
CR 2023/71	SILK Laser Australia Limited - scheme of arrangement and special dividend
CR 2023/72	St Barbara Limited - return of capital by in specie distribution of ordinary shares in Genesis Minerals Limited
CR 2024/1	AFL Players' Association Limited - Education and Training Grant Program
CR 2024/2	Geotab Australia Pty Ltd - electronic car logbook and odometer record-keeping system

2023-24 Mid-Year Economic and Fiscal Outlook

- Government released its 2023-24 Mid-Year Economic and Fiscal Outlook (MYEFO) on 13 December 2023
- 'Mini-budget' showing improvements in both budget and debt positions
- Tax related measures:
  - Removal of deductibility of GIC and SIC incurred on or after 1 July 2025
  - Definition of fuel-efficient vehicle for LCT tightened from 7 to 3.5 litres from 1 July 2025
  - Foreign resident CGT WHT rate increased from 12.5% to 15% and property value threshold reduced from $750k to nil for real property disposals with contracts entered into from 1 January 2025
  - Commonwealth penalty unit increased by 5.4% from $313 to $330

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Stage 3 Tax Cuts Changes

- In his address to the National Press Club on 25 January the Prime Minister announced the following changes to the Stage 3 tax cuts:
  - Reduce the 19% tax rate to 16% (for incomes between $18,200 and $45,000)
  - Reduce the 32.5% tax rate to 30% (for incomes between $45,000 and the new $135,000 threshold)
  - Increase the threshold at which the 37% tax rate applies from $120,000 to $135,000
  - Increase the threshold at which the 45% tax rate applies from $180,000 to $190,000
- Therefore, following these announcements and assuming amending legislation is passed, the Australian resident personal income tax rates from 1 July 2024 will be:

From 1 July 2024	
Resident individuals	
Up to $18,200	Nil
$18,201 to $45,000	16% on part over $18,200
$45,001 to $135,000	$4,288 + 30% on part over $45,000
$135,001 to $190,000	$31,288 + 37% on part over $135,000
$190,001 and over	$51,638 + 45% on part over $190,000

From the Helpline – passively held active assets

Facts

- A small commercial property was jointly owned by a husband and wife
- Only the husband used it to carry on his business (hair-cuts)

Issue

- Can the wife's 50% interest qualify as an "active asset" for CGT SBC purposes given that she, herself, did not use it to carry on a business and she was not a "connected entity" (s 328-125) or an "affiliate" (s 328-130) in the circumstances

From the Helpline desk – passively held active assets

Outcome

- In the case of a "passively" held asset, s 152-47 can treat the wife's 50% interest in the property as an "active" asset by deeming her husband to be her "affiliate"
- Specifically, s 152-47 applies if:
  - the taxpayer owns a CGT asset (in this case, the wife's 50% interest in the property);
  - the asset is used, or held ready for use, in the course of carrying on a business by another entity ie the "business entity" (in this case, her husband);
  - the business entity is a "spouse", or a "child" who is under 18 years of age at the time; and
  - the business entity is not otherwise an affiliate of, or connected with, the taxpayer.

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