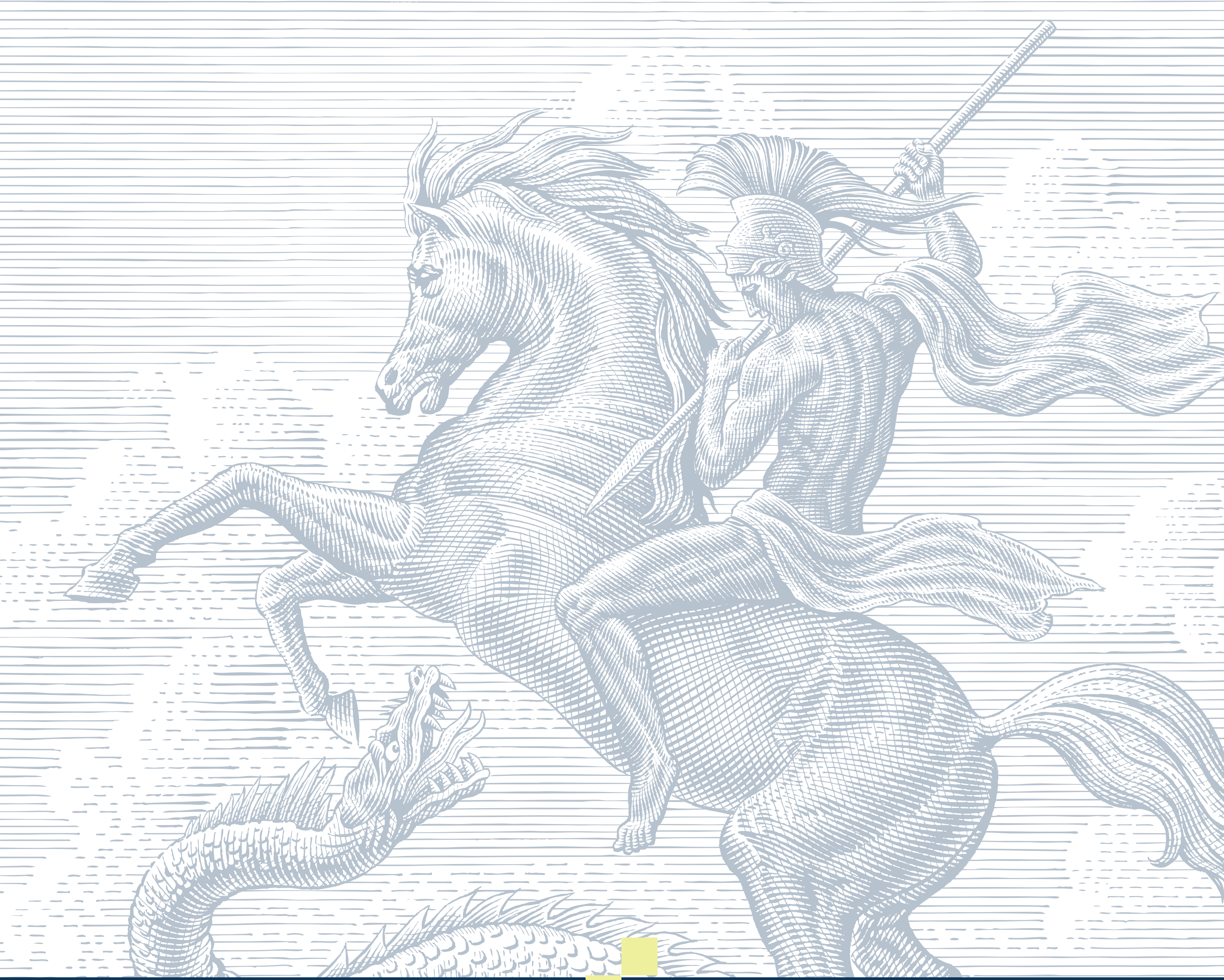
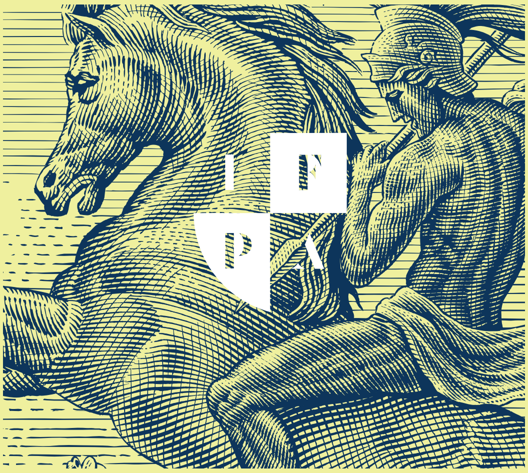


Monthly Tax Update

December 2023

INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA



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Monthly Tax Update

December 2023

These notes are a compilation of key case law, regulator updates and industry insights for you to easily stay abreast of the ever-changing tax landscape.

We hope you enjoy this update.

Warm regards,

The Team at the Institute of Financial Professionals Australia

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INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA

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For more information and registration details, please scan the code below or contact members@ifpa.com.au.

We look forward to welcoming you to this transformative event!

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Gambling brothers' luck runs out

What you need to know

Two brothers who claimed to be remarkably skillful and lucky gamblers have failed to have the AAT overturn default assessments raised by the Commissioner because they were unable to demonstrate what their correct taxable incomes actually were. These appeals have gone the same predictable way as many others before it, although there is an interesting angle on the gambling issue in relation to one of the brothers.

Facts

The brothers are Q and W who, after an ATO audit, had amended assessments raised that reflect significant unexplained bank deposits. Both had shortfall penalties imposed at the rate of 75% – intentional disregard of the law. Both brothers argued the unexplained deposits reflected substantial and consistent gambling wins, as well as the repayment of loans they had previously advanced to various people.

Brother Q

Q, the older brother, started up a concrete pumping business in 2003, operating as a sole trader using a single truck. Owing to the physical nature of the work, he brought W into the business to help out and eventually handed it over to W completely in 2013 for no consideration and with little formality. He was unemployed for some time after 2013.

According to his testimony, Q began gambling seriously in about 2001, initially focusing on sports matches and horse racing through the TAB. He would regularly wager many thousands of dollars, sometimes losing, but winning significantly overall. He claimed he was "pretty good" at what he did.

From 2010 onwards Q gambled at casinos as well, playing competitive poker against other players or against the house in table games. He would visit Crown Casino in Melbourne two or three times a year, staying for several days each time. In a blow to his credibility as a witness, Crown records were produced at the hearing showing that Q had lost $338,000 in October 2015, whereas the betting records provided by Q's accountant failed to record any wins or losses for that time at all. When confronted with this apparent discrepancy in cross-examination, Q thought he must have won an equivalent amount in private poker games during the visit, but which he had neglected to record because he had broken even on the trip.

From 2005 Q also began to host private poker games, mostly in his parents' garage. On those occasions, the buy-in amounts were anywhere from $5,000 to $50,000 with hundreds of thousands of dollars changing hands over a two-day period.

Q would employ assistants to provide drinks and cigarettes and attend to other needs of the players. He also engaged two professional dealers for each event, those persons being paid in tips from the winning players. Each pot would have a "rake" which went to the host and was intended to defray the cost of hosting the event.

As the host, Q was also the banker, and at times would make advances to losing players who were running short of cash. These loans were typically made on a very informal basis – they were not documented, no interest was payable and there were no formal repayment terms. Q claimed he was good with figures and kept everything in his head. The loans were generally repaid and banked in the following week and allegedly represented a lot of the unexplained bank deposits.

Q also claimed he regularly made large loans to "close people" using his gambling cash. These loans were also undocumented. Corroborating evidence of sorts regarding a number of such loans given by various witnesses was not accorded much weight by the Tribunal as it was mostly incomplete or inconsistent. Statements were obtained from others who did not appear as witnesses and could not be cross examined. The tribunal was also very skeptical about Q's almost total memory lapse around a loan of $350,000 purportedly made to a Mr. S some ten years earlier, which was allegedly repaid during the 2011-16 period and treated by the Commissioner as assessable unexplained deposits.

At the same time, it emerged that Q's records for his concrete pumping business were in no better shape than his gambling records. His position was not helped by the fact that he used his business account to make most of the unexplained deposits which he alleged represented loan repayments and gambling wins. Business receipts were kept in the ashtray of his truck and he occasionally provided these receipts to an accountant he was unable to identify. This left Q in the unfortunate position of not being able to establish what his actual taxable income was, with the predictable outcome that the tax shortfall arising from the amended assessments was upheld by the Tribunal.

Penalties of 75% for the 2011 income year, with a 20% uplift for the subsequent years were also upheld. No grounds were established for general remission.

It is notable that even though Q was unemployed during much of the relevant period, he gambled very frequently and wagered large amounts (at least according to his evidence), and he acknowledged that he was living off his gambling wins, the Commissioner accepted that he was neither a professional gambler nor a gambling promoter.

Brother W

Younger brother W told much the same tale about his gambling history, beginning with sports matches and horse racing before expanding into casino visits and hosting private poker games in his parents' garage (when it wasn't being used by Q). Skill and luck must run in the family, because W confidently told the Tribunal that he mostly won and won big, notwithstanding his young age, a lack of experience or access to any sophisticated data analysis.

The Tribunal was skeptical about these claims, observing W was asking it to "infer he was something of a preternatural gambling genius" [at 99]. Some winning betting records were provided, but the Tribunal concluded it was highly likely that W had failed to retain many losing betting slips, thereby failing to present a complete picture of his overall gambling results.

Like his brother Q, W also made loans to acquaintances from time to time. These loans were allegedly repaid during the period under review and account for some of the unexplained deposits (together with his gambling wins). Some limited corroborating

evidence about the alleged loans was provided, but the Tribunal had concerns about one witness' tendency to exaggerate.

Again like Q, W's business records were not in good shape, leaving him unable to demonstrate what his actual taxable income was in the years in question.

While the Tribunal was satisfied that W made significant bets over the period under review and may have enjoyed modest wagering success, he did not discharge the onus of proving that the Commissioner's amended assessments were excessive and what his correct taxable incomes were.

On the penalties question, the Tribunal took a more lenient view about W's level of culpability. Having regard to his younger age, the Tribunal thought his conduct was more on the reckless end of the penalty scale and reduced the shortfall penalties to 50%.

Source of understated income?

The applicants' representative posed the source question in the course of the hearing. A single cement truck operating five days a week is not capable of producing anywhere near the level of income alleged by the Commissioner and other than the gambling wins and loan repayments alleged by the brothers there was no evidence of what the source of the omitted income might be.

All the Commissioner needs to do is turn up at the hearing and table the notices of assessment, which are then deemed under s350-10 TAA1953 to be conclusive evidence that the assessments were properly made and the amounts and particulars are correct (subject to any Part IVC review or appeal).

There is no onus on the Commissioner to prove what the source of the omitted income might be and the Commissioner led no evidence in this regard at the hearing. The Tribunal did not even comment on what it may have regarded as no more than a rhetorical question.

Comment

One wonders why the Commissioner approached the issues relating to Q on the basis that he was not a professional gambler or promoter. Given the alleged scale and variety of his betting, its regularity, and the fact he claims he was living off his gambling wins during an extended period in which he was unemployed, Q must have been close to wherever the threshold lies between a keen amateur punter and a professional gambler.

Perhaps the Commissioner was concerned about opening the floodgates to claims for gambling losses suffered by the many thousands of Australians who wager and lose substantial amounts and who engage in similar habits as Q. After all, there are more losing punters than winners overall - otherwise the gaming companies wouldn't survive and prosper.

QQRK v C of T *[2023] AATA 3493 (27 October 2023), DP Bernard J McCabe and Nick Gaudion, Member*

JobKeeper: No grounds to exercise discretion to waive repayment of overpaid amounts

What you need to know

The taxpayer was unsuccessful in seeking the discretion for the waiving of the repayment of overpaid JobKeeper payments to be exercised in its favour because it did not discharge the burden of proving that the discretion should be so exercised *"...in the absence of a proper explanation for how the overpayments occurred".*

Facts

The taxpayer sought for the statutory discretion for the waiving of the repayment of overpaid JobKeeper payments in s9(4) of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* to be exercised in its favour.

The taxpayer was the trustee of two unit trusts which each operated supermarkets. After an audit, the Commissioner claimed that it was overpaid close to $1m in JobKeeper payments in relation to the employees of the businesses – some $690,000 for one business and some $290,000 for the other business.

The Commissioner argued, among other things, that the payments were made in breach of various conditions for the JobKeeper payments – including that they were made in relation to employees who:

- were no longer employed by the taxpayer at the relevant time
- did not satisfy the "wage condition" (ie were paid less than the fortnightly JobKeeper payment of $1,500), or
- did not satisfy the "residency" requirement.

Except for one amount, the taxpayer generally accepted that it had over-claimed some of the payments.

However, it argued that the discretion in s9(4) of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*, should be exercised in its favour to waive the requirement for repayment of the overpaid amounts – essentially on the grounds that the overpayments resulted from "unintentional" mistakes and that the retention of the payments accorded with the overall objects of the JobKeeper scheme.

Note: One of the main specific contentions of the taxpayer was:

> *"(a) The Taxpayer's use of the JobKeeper payments was consistent with the JobKeeper program's objectives in that any employees who left during the period did so of their own volition or, in limited circumstances, for cause; (b) the Taxpayer passed on the amounts received to the Taxpayer's employees; and (c) the Taxpayer's passing on the JobKeeper payments was both: (i) in advance of its receipt of payments from the Commissioner; and (ii) in excess of amounts received from the Commissioner".*

Issue

Whether the discretion should be exercised in its favour to waive the requirement for repayment of the overpaid amounts in all the circumstances.

Decision

In finding that the taxpayer had not discharged the burden of proving that the discretion should be exercised in its favour, the AAT addressed each of the taxpayer's contentions and made a range of findings, including the following:

- it was not an objective of the JobKeeper scheme that employers would be "subsidised" in excess of the wages paid to an employee for a fortnight;
- it could not be said that receiving amounts greater than $1,500 per employee per fortnight for employees, or where those amounts exceeded the wages paid to the employee, is "consistent with the objective of the JobKeeper scheme";
- while there was a degree of complexity in the eligibility rules, there is no evidence that the taxpayer (or its accountant or bookkeeper) read the rules or engaged with them in any substantial way;
- the fact that over 80% of an amount claimed in one instance was ineligible to be claimed could support an inference that the applicant was "negligent" in the preparation of its claims or "indifferent" to whether they were valid claims;
- it would be an improper exercise of the discretion where the applicant has not provided the AAT with a "full picture of the circumstances" giving rise to the overpayments; and
- the applicant's mere assertion that "any errors were unintentional" was unsatisfactory – as it was not able to be tested by evidence from the bookkeeper who apparently prepared the claims.

Accordingly, the AAT concluded that "it would not be an appropriate exercise of the discretion that large overclaimed amounts need not be repaid in the absence of a proper explanation for how the overpayments occurred".

The AAT also dismissed the taxpayer's claim that it would not survive if it were obliged to repay the amounts, with obvious consequences for staff, customers, and businesses engaged with the taxpayer and the local regional economy. The AAT dismissed the claim as "there was no evidence in support of [the] contention regarding the impact closing down the business would have on the local communities".

Also note the original objection decision was varied to give effect to the Commissioner's concession that the administrative penalties should be remitted in full.

IFPA comment

The ATO is apparently still actively pursuing JobKeeper matters!

Jassar & Manesh Pty Ltd as trustee for the Jassar & Manesh Unit Trust and FCT ***[2023] AATA 3502, 30 October 2023***

Deduction for loss on sale of residential unit

What you need to know

A taxpayer has successfully argued that she bought a residential unit for the purpose of resale at a profit and carried out the relevant activities in a business or commercial manner, to enable her to claim a deductible loss arising on its sale (in accordance with the *Myer-Emporium* principle). This was the case even though she lived in the unit for the two years that she owned it.

Facts

The taxpayer was a widowed, self-funded retiree who managed her own investment portfolio made up of various shares, managed investment trust and rental property investments. She also ran various businesses with her late husband.

In November 2017 she purchased a two bedroom unit in a complex that was being developed ("the Dune unit"), having previously, in 2015, bought a three bedroom unit in the same complex off-the-plan with the intention of living in it as her home from 2020 when construction was intended to be completed ("the Foreshore unit"). She lived in the Dune unit for two years until its sale in 2020 for a loss of $265,000 (apparently due to the COVID lockdowns). The contract of sale was exchanged in April 2020 and settled in July 2020.

The taxpayer argued that the Dune unit had been purchased for re-sale at a profit (in order to help fund the purchase of the Foreshore unit) and that she had carried out this activity in a commercial or business-like manner. Therefore, she claimed she was entitled to a deduction for the loss made on its sale under s8-1(1) (in accordance with the *Myer-Emporium* principle).

Issues

The three issues before the AAT were:

1. Was the loss incurred in gaining or producing assessable income pursuant to the requirements of s8-1 (per the *Myer Emporium* principle)?
2. Was the loss of a non-deductible private or domestic nature under s8-1?
3. Was the loss "incurred" in the year ended 30 June 2020 when the exchange of contract occurred?

Decision

All three issues were resolved in favour of the taxpayer for the following reasons:

Issue 1: Was the loss incurred in gaining or producing assessable income?

The AAT found that, in accordance with the *Myer Emporium* principle, the evidence clearly supported the position that the taxpayer purchased the property with the requisite profit-making purpose. This evidence included the fact that the taxpayer kept abreast of sales and marketing information regarding the units in the complex. The AAT also *"… placed weight on the incontrovertible fact that, even before purchasing the Dune Walk Unit…she already intended to re-sell it for a profit instead of holding on to it for long-term investment"* and that *"her intention to live in it was a subsidiary purpose"*.

The AAT also emphasised that in accordance with the second limb of the *Myer Emporium* principle that a one-off isolated transaction could be a business operation or commercial transaction (without the need for any recurrent or ongoing activities). In this regard, it also said that *"the requirement that a transaction be a 'business deal' or 'commercial transaction' involves only a low threshold"* and *"so long as there is a flavour of commercial or business dealing, that is sufficient" (ie "something a businessperson would do..")*

In particular, the AAT (relying on judicial authority) found that the transaction the taxpayer carried out *"only had to be the sort of thing a businessperson or person in trade does for it to satisfy the requirements of the Second Limb"* Myer-Emporium principle.

In doing so, the AAT dismissed the ATO's claim that the transaction *"… did not involve a significant degree of sophistication, expertise, systemisation, organisation, research, or effort as required"* – and that a businessperson would wait for better (non-COVID) times to sell.

Note also the taxpayer also was found to be a credible witness who impressed the AAT as being *"savvy and entrepreneurial"*.

Issue 2: Was the loss of a non-deductible private or domestic nature

The AAT found that the fact that the taxpayer *"… resided in the Dune Walk Unit does not displace the fact that it was acquired by her in gaining or producing assessable income"* and that it was *"not convinced that just because the property sold was her residence, that it was automatically a loss of a domestic nature"*. The AAT had also noted that *"… her intention to live in it was a subsidiary purpose"*.

The AAT also referenced a statement by Professor Parsons in his definitive text *Income Taxation in Australia: Principles of Income, Deductibility and Tax Accounting*, in which it is stated that *"… there is no case in which an expense has been found incurred in gaining assessable income, but has been denied deduction as a private or domestic expense"*.

Issue 3: Was the loss "incurred" in the year ended 30 June 2020

Relying on the binding nature of the Commissioner's position in *Taxation Ruling TR 97/7: Section 8-1: meaning of 'incurred' – timing of deductions*, the AAT found that the taxpayer was *"completely subjected"* to the loss and that it was "capable of reasonable estimation" at the time she entered the contract in May 2020 (ie the income year ended 30 June 2020). It therefore concluded that she was entitled to the loss in the 2020 income year when she signed the contract of sale.

Conclusion

The AAT concluded by saying that the:

> *"...result in this case is unusual. It is especially unusual because a loss was made on a recent re-sale of Australian property when property has mostly appreciated in value. However, there is no rule in Australian income tax law that a profit or gain made on the sale of one's residence, in circumstances where there is a profit-making intention, cannot give rise to a profit that is taxable as ordinary income. It therefore follows that a taxpayer whose intention was to make a profit in a commercial dealing but who ultimately incurred a loss is allowed to claim a deduction for that loss under s 8-1(1) of the ITAA 1997."*

IFPA Comment

The Commissioner may be quite happy for this case to stand. It gives him some (further?) ammunition to argue that those who acquire a home for the purpose of reselling it at a profit and carry out the activity in any business or commercial like manner can be assessed on that profit as ordinary income, even if they live in the home. And maybe some people who appear in the real estate sections of newspapers and other publications may need to be aware of this case.

Bowerman v FCT ***[2023] AATA 3547, 31 October 2023.***

No extension of time to lodge objections

What you need to know

A self-represented applicant with possibly a little too much time on his hands has failed in his bid to have the AAT set aside a decision by the Commissioner not to treat objections for 21 separate years of income over claims for the estimated cost of work-related text messages as having been lodged within the time specified under the law.

Facts

The applicant is a self-preparer who claimed more than $300 in work-related expenses in each of the relevant years (1999 to 2019). In making those claims, however, he neglected to make a claim for the cost of work-related text messages sent from his mobile phone.

He argues that his failure to claim the cost of the work-related text messages is the fault of the ATO because neither the Tax Pack nor the instructions for “D5 Other Work-Related Expenses” made it clear that these costs are deductible. He did not become aware of his entitlement until he heard about it by way of a passing remark from another guest at a social function he attended in July 2022.

He promptly contacted the ATO, requesting amendments going back as far as the year ended 30 June 1999, which was when he first acquired a mobile phone. He has no documentary evidence of the actual cost of the text messages, nor exactly how many work-related texts he would have sent, but has made what he claims is a conservative estimate of 20 texts for each income year at a cost of 10 cents per message, or $2 per year. Over the 21 years in question, this amounts to a grand total of $42 in additional deductions and a potential refund of tax of a little under $20.

After the Commissioner declined to process the requested amendments, the applicant lodged an objection against all 21 of the assessments, and asked the Commissioner to treat the objections as having been lodged within the required time.

The Commissioner refused to exercise his discretion to allow an extension of time, and the applicant referred the decision to the AAT for review. The Commissioner did allow the applicant’s 2020 and 2021 objections, which were presumably lodged on time.

The law

Section 14ZW(1)(aa) *Taxation Administration Act 1953* (TAA1953) provides that for most individuals, an objection has to be lodged within two years of the issue of the notice of assessment (it used to be within four years up to the year ended 30 June 2004).

However, s14ZW(2) TAA1953 provides that taxpayers may ask the Commissioner to treat an out of time objection as if it had been lodged on time. Such a request must state fully and in detail the taxpayer’s reasons for failing to lodge the objection within the time specified under subsection (1)(aa).

The law does not provide any express guidance on how the Commissioner should decide whether or not to exercise his discretion to treat the objection as having been lodged on time, leaving the Tribunal to infer the matters to be considered from the subject matter, scope and purpose of the legislation.

The matters considered in a number of other tax cases include:

- the reasons for the delay
- the merits of the substantive issue, and
- potential prejudice to the parties.

This was also the approach adopted by the Tribunal here.

Reasons for the delay

Noting that the delay in lodging his objections ranged from 22 months to 20 years for the various income years, the Tribunal was not persuaded by the applicant's claim that his ignorance about his entitlement to claim the cost of work-related texts was all the fault of the Commissioner.

The Tribunal accepted the Commissioner's contention that the ATO's guidance material was framed in quite broad terms and agreed that a reference to "telephone expenses" in the ATO's Tax Packs and Individual Tax Return Instructions should have been interpreted as encompassing all telephone costs, including rental, calls, text messages and data use (if deductible). Moreover, a taxpayer choosing to self-prepare under a self-assessment regime bears the onus of ensuring they have made themselves aware of all their entitlements to deductions.

All things considered, the reasons given for the delay in lodging the objections did not warrant the granting of an extension of time.

Merits of the substantive issue

While the decision whether or not to grant an extension of time should not lead to a mini trial around the substantive issue, the merits or otherwise of the claim do have a bearing on the decision.

The Commissioner (and the Tribunal) agreed in principle that the cost of work-related texts can be an allowable deduction. Even if the extension sought was granted, however, the applicant would face considerable hurdles before obtaining a deduction. His problems would stem mainly from the substantiation requirements:

- his evidence was that he used a pre-paid phone card which he topped up from time to time when it was low, but he did not receive detailed statements as to what charges were debited to the card;
- he provided no evidence regarding the work-related nature of his estimated text messages and failed to establish the requisite s8-1 ITAA97 connection;
- he did not demonstrate that the estimated text messages were not of a private or domestic nature; and
- he was unable to provide substantiation by way of a telephone account or a diary.

In the Tribunal's view, the applicant had little prospect of succeeding with his objections in the event an extension was granted, which weighed quite heavily against granting an extension.

Potential prejudice to the parties

The Commissioner conceded that granting the extension sought would not cause him to suffer any material prejudice in the sense of not being able to defend the assessments or make relevant enquiries.

While the applicant would lose his right to an independent review of the assessments if an extension were not granted, the Tribunal considered the degree of prejudice suffered as a result would not be significant, given that the amounts involved are fairly trivial and his chances of success on the substantive issue are slim.

> *"... the Applicant's potential over payment of tax would be no more than $21.00 and he would be required at objection to substantiate his claimed deductions and has said he is unable to do so." [80]*

In the circumstances, the Tribunal upheld the Commissioner's decision not to grant an extension of time in which to lodge the objections.

Comment

While the standard application fee for having a tax case heard at the AAT is $1,082, this applicant would have been eligible for a lower fee of $107 since:

- the amount of tax in dispute is (a lot) less than $5,000, and
- the ATO has refused to extend the time for lodging an objection.

The decision to take the issue to the AAT might still not make sense on a strict monetary basis, but a lot of people are prepared to pay something to have their day in court on an issue they feel strongly about.

Holm v C of T [2023] AATA 3545 (31 October 2023), Member D Mitchell

McPartland appeal

What you need to know

The McPartlands were unsuccessful in having an earlier AAT decision remitted back to a differently constituted Tribunal on the basis that the original AAT decision (which we reported on in May 2022) was attended by errors of law.

The issues

An ATO audit found that the McPartlands used funds belonging to companies they controlled to finance private expenditure such as home loan repayments, personal travel, handbags and personal credit card repayments. The audit also revealed that their private expenditure was far in excess of the Centrelink payments they said they relied on to fund their living costs. It treated those amounts as assessable income in the nature of directors' fees and allowances and assessed a total of $936,000 spread equally between them.

They objected on the basis that most of the payments identified represented the repayment of loans the McPartlands had made to one of the companies controlled by them. In the absence of any loan documentation or other evidence of loan repayments (aside from an accounting journal entry in the books of the company), the Tribunal did not accept their explanations and upheld the default assessments raised by the Commissioner.

Errors of law

A taxpayer can only appeal to the Federal Court against an AAT decision where the Tribunal has made an error of law in considering the matter before it.

Questions of fact are not generally challengeable, unless the Tribunal has failed to properly consider sound evidence pointing to a particular factual scenario.

Consideration

One ground for appeal was that the Tribunal had misunderstood or misapplied the burden of proof requirement in s14ZZK(b)(i) TAA1953 by erroneously stating that it involves a two-step process – firstly proving the amended assessment is excessive and secondly showing what the correct assessments should be.

However, the Court ruled this was mostly a semantic issue and that the Tribunal had done no more than correctly reflect the law as established in cases like *Rigoli* and others. The Commissioner's amended assessment can only be shown to be excessive by comparing the taxable income arrived at by the Commissioner with the correct taxable income. It is not enough to pick apart the Commissioner's asset betterment statement or his bank account analysis.

The appellants' other alleged errors of law were either not accepted by the Court or, if there were errors of law (for example, in relation to the sale of private assets and some confusion around a business overdraft and a home loan), the Court did not consider they were sufficiently material to warrant the case to be remitted to the AAT for a fresh hearing.

McPartland v C of T ***[2023] FCA 1260 (20 October 2023), Charlesworth J***

FBT alternative records

What you need to know

Recent changes to the FBT legislation allow the Commissioner to specify alternative documents or records that employers can rely on, in lieu of preparing statutory evidentiary documents (such as declarations) for FBT record keeping purposes.

The ATO has released five new draft FBT "Adequate Alternative Record" Legislative Instruments (and accompanying Explanatory Statements) for consultation.

Background

An employer is required to keep records that explain all transactions and acts that are relevant for the purpose of determining the employer's FBT liability and must keep these records for five years after the completion of the transaction to which they relate (s 132(1) FBTAA).

Intended to reduce compliance costs, recent changes to the FBT legislation (new s123AA FBTAA) allow the Commissioner to specify alternative records that employers can rely on, in lieu of preparing "statutory evidentiary documents", such as employee declarations, for FBT record keeping purposes.

From 1 April 2024, the Commissioner may make a determination specifying alternative documents and records (s 123AA(2)), provided the Commissioner is reasonably satisfied the specified documents or records are an "adequate alternative" (s 123AA(3)).

What is a statutory evidentiary document?

A "statutory evidentiary document" is defined in s136(1) FBTAA and broadly refers to a declaration, nomination, travel diary, log book or odometer reading etc relevant for the purposes of determining the taxable value of a fringe benefit and in particular those required to support a reduction in taxable value where the employer seeks to rely upon either an FBT exemption or other concession (such as the "otherwise deductible" rule).

The draft Legislative Instruments (Determinations)

The ATO has released five new draft FBT "Adequate Alternative Record" Legislative Instruments (and accompanying Explanatory Statements) for consultation in relation to the following benefits:

- Otherwise deductible benefits (see below)
- Temporary accommodation relating to relocation
- Living-Away-From-Home Allowance – maintaining an Australian home
- Fly-in Fly-out and Drive-in Drive-out employees
- Private use of vehicles other than cars

The Instruments specify records that the Commissioner of Taxation will accept as an alternative to employee declarations for example, for these types of benefits.

Example: LI 2023/D19: *Draft Fringe Benefits Tax Assessment (Adequate Alternative Records - Otherwise Deductible Benefits) Determination 2023*

By way of example, draft Legislative Instrument, LI 2023/D19: *Draft Fringe Benefits Tax Assessment (Adequate Alternative Records - Otherwise Deductible Benefits) Determination 2023,* has been made in relation employers providing expense, property or residual fringe benefits that seek to reduce the taxable value for FBT by relying on the "otherwise deductible" rule (effective for FBT years ending 31 March 2025 and all subsequent years).

In the absence of this Determination, an employer would need to obtain, and retain for 5 years, a signed declaration from an employee "in a form approved by the Commissioner" by the time the FBT return is due to be lodged, or if no return is required, by 21 May (see ATO website at QC 17516).

The new draft Instrument provides that the employer may instead use any type, form (paper or electronic) or number (no minimum or maximum) of business records provided these records are written in English, held by the employer by the date of lodgment of their FBT return, and together contain the following information:

(a) the name of the employee who received the benefit

(b) the dates (inclusive) the benefit was provided

(c) the nature of the expense, property or residual benefit, and

(d) the percentage for which the employee would have been entitled to claim an income tax deduction.

This is basically the same information previously contained in an employee declaration however there is now no need to have it signed, nor a need to create a single purpose use document for tax purposes.

Such alternate records could be in the form of employment contracts, payroll records, job descriptions, employer and employee correspondence (for example, emails or text messages), employer policies and forms, and calculations of private use (see Example below).

Example 2 – information kept in a different document – expense reimbursement form

16. Nancy is an employee of Company Ltd and works from home 3 days a week, incurring internet usage expenses.

17. Nancy pays her internet bill and completes an employer-provided reimbursement form that allows employees to claim a reimbursement for work-related expenditure.

18. The information provided on the reimbursement form includes the name of the employee, the dates covered by the bill, a description of the nature and the purpose of the expenditure, and the calculated work-related percentage.

19. In addition, Nancy provides Company Ltd with a copy of the bill and receipt for the expenditure being claimed.

20. Company Ltd is satisfied that the expenditure claimed is work-related and reimburses Nancy for the portion of the expenditure that was work-related. This information is held by Company Ltd as part of their ordinary record keeping and employee expense reimbursement process.

21. This reimbursement constitutes an expense payment fringe benefit. Under section 24 of the FBTAA, Company Ltd is entitled to reduce the taxable value of the fringe benefit if the requirements of that section are met. Instead of obtaining the declaration required by paragraph 24(1)(e), Company Ltd seeks to rely on section 123AA of the FBTAA.

22. Company Ltd has obtained records containing, in aggregate, the minimum information to be relied upon as an alternative to the declaration, including the reimbursement form containing all the required information.

23. Company Ltd can reduce the taxable value of the expense payment fringe benefit in accordance with section 24 of the FBTAA. Due to the operation of subsection 123AA(1) of the FBTAA, Company Ltd is taken to have kept and retained the relevant declaration and accordingly has satisfied the requirement in paragraph 24(1)(e).

Source: Explanatory Statement to Draft Fringe Benefits Tax Assessment (Adequate Alternative Records - Otherwise Deductible Benefits) Determination 2023

Not to be confused with the FBT "record keeping exemption arrangements"!

These *reduced* (alternate) FBT record keeping requirements are in addition to the existing FBT *record keeping exemption arrangements (RKEA).*

The RKEA is intended to simplify FBT record keeping specifically for small business. RKEA is available to employers whose aggregate fringe benefits (ie before gross-up) do not exceed a threshold amount.

The exemption threshold is as follows:

2023-24 FBT year	2022-23 FBT year
$9,786	$9,181

If an employer qualifies in an FBT year for RKEA the employer will generally not have to keep or retain full FBT records for that year, and their FBT for that year will be determined from an aggregate amount of an earlier year when FBT records were kept. For more information on the RKEA see our *2023-24 Tax Summary* Chapter 25 at 25.1165 and ATO website QC 71176.

Step in the right direction

Any measure intended to reduce the FBT compliance burden is better than none. However, it does appear to be only a small step in the right direction. It will be imperative that sufficiently qualified finance and/or tax staff be involved in establishing new, and reviewing existing, financial information collection processes to ensure the required information is captured. It is especially important to get right as the risk and financial consequences of not having the information falls on the employer.

Note: These and other issues were raised in our submission to Treasury on the then exposure draft legislation – see the IFPA website at *Advocacy & Media*, 20 September 2022.

Source:

LI 2023/D18 *Draft Fringe Benefits Tax Assessment (Adequate Alternative Records - Temporary Accommodation Relating to Relocation) Determination 2023*

LI 2023/D19 *Draft Fringe Benefits Tax Assessment (Adequate Alternative Records - Otherwise Deductible Benefits) Determination 2023*

LI 2023/D20 *Draft Fringe Benefits Tax Assessment (Adequate Alternative Records - Living-Away-From-Home Allowance - Maintaining an Australian Home) Determination 2023*

LI 2023/D21 *Draft Fringe Benefits Tax Assessment (Adequate Alternative Records - Fly-in Fly-out and Drive-in Drive-out Employees) Determination 2023*

LI 2023/D22 *Draft Fringe Benefits Tax Assessment (Adequate Alternative Records - Private Use of Vehicles Other Than Cars) Determination 2023*

Corporate residency - PCG 2018/9 updated

What you need to know

Foreign entities now have more certainty about when the ATO may review their residency position under the central management and control test.

Practical Compliance Guideline *PCG 2018/9: Central management and control test of residency: identifying where a company's central management and control is located* sets out the ATO's compliance approach and provides guidance in applying the principles in Taxation Ruling *TR 2018/5 Income tax: central management and control test of residency.*

The updated PCG includes a risk assessment framework incorporating three colour coded risk zones to provide clarification for foreign incorporated companies relying on the central management and control test.

Background

Foreign resident entities are generally taxed in Australia on any income that has an Australian source.

Australian resident entities are generally taxed on their worldwide income.

The definition of a resident for Australian tax law purposes is found in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 36) (which may be different to the definition for other purposes, for example a Double Tax Agreement).

The (Australian) tax law definition

Subsection 6(1) ITAA 36 provides**:**

> ***resident or resident of Australia*** *means:*
>
> *(a) ...*
>
> *(b) a company which is incorporated in Australia, or which, not being incorporated in Australia, carries on business in Australia, and has* ***either****:*
>
> *- its central management and control in Australia, or*
>
> *- its voting power controlled by shareholders who are residents of Australia.*
>
> [emphasis and formatting added]

The Ruling – the "central" issue

Under common or general law, a company's residency is said to be located where its central management and control actually "abides", and this would generally be where the directors meet and make independent judgements and decisions.

This general law principle of residency, however, is overridden by the tax law definition above, which requires that a company both (i) carries on business and (ii) either has its central management and control in Australia or its voting power controlled by residents of Australia.

In its original (now withdrawn) Taxation Ruling TR 2004/15W on corporate residency, the ATO was of the view that the s6(1) test was a two-prong test, that is the requirement to carry on business in Australia was a separate and additional test to the requirement that the company have its central management and control in Australia.

However, the decision of the High Court in the case of *Bywater Investments Limited & Ors v FCT; Hua Wang Bank Berhad v FCT* [2016] HCA 45 confirmed that if on an analysis of the business of a company its business in Australia consists or includes its actual central management and control then *"the company is carrying on business in Australia and its central management and control is in Australia"* (emphasis added – refer TR 2018/5, footnote 5). In effect it means, in relation to central management and control, there it is only really one test. That is, if a company's actual central management and control is factually part of carrying on business and located in Australia, even if the company has no other activities in Australia, it will be considered a resident of Australian for Australian tax purposes.

Following this decision, TR 2004/15W was withdrawn and replaced by Taxation Ruling TR 2018/5 setting out the ATO's view and guidelines for establishing how to apply the central management and control test of residency in light of the *Bywater* decision.

The PCG

The release of Taxation Ruling TR 2018/5 was accompanied by Practical Compliance Guideline PCG 2018/9. The PCG contained practical guidance to foreign incorporated companies in applying the principles in TR 2018/5, assisting these companies to determine whether they are resident under the central management and control test.

Transitional compliance approach

The PCG provided a transitional compliance approach to non-resident foreign-incorporated companies enabling them to maintain their non-resident status where they were not otherwise carrying on business in Australia and had relied upon the ATO's view in its earlier ruling. In such circumstances, the ATO would not review or disturb the company's non-resident status provided the company was actively changing their substantive governance arrangements (but not in a contrived or artificial way) so that its central management and control was exercised outside Australia and the revised principles in TR 2018/5 were met.

The "transitional compliance approach" period was extended multiple times over the years for those companies taking active and timely steps to change their arrangements. The period was also extended for those companies intending to take such steps but were affected by COVID-19, and further considering the technical amendments announced by the former Government to clarify the corporate residency test. (These proposed measures have not been enacted and are noted on the first page of the PCG, but otherwise the current Government has not made any announcement in relation to the proposed technical amendments).

The final extension of the transitional compliance approach period was made in December 2022, where it was also announced the period would not be extended beyond 30 June 2023 (paragraph 104AA).

The updated PCG – a new risk assessment framework

With the transitional compliance approach period ending on 30 June 2023, the ATO released a draft updated PCG for consultation (PCG 2018/9DC1).

The final updated PCG has now been released.

The updated PCG includes a new risk assessment framework (as an Appendix) to assist foreign-incorporated companies in managing their compliance risks, provide certainty regarding the ATO's ongoing compliance approach and to understand the likelihood of the ATO applying compliance resources to review their residency based on the central management and control test of residence (post the "transitional compliance approach" period).

The ATO recommend foreign-incorporated companies previously relying on the transitional approach who may be uncertain of their residency status to:

> *.... read TR 2018/5 and PCG 2018/9 to assess:*
>
> - *how our view on central management and control applies to them*
> - *the risk zone applicable to their residency position based on the central management and control test*
> - *likely compliance treatment they can expect from us.*
>
> (see also ATO website QC 72938)

Similar to the approach adopted by the ATO in its more recent PCGs, the risk assessment framework is a colour coded risk-zone framework with the zones based on a company's circumstances (that is, green zone (low risk), yellow zone (moderate risk) and red zone (high risk).

For example, a company will be in the green (low risk) zone if it is a resident of a foreign jurisdiction (that is not a tax haven), does not have any moderate or high-risk factors, and it meets one or more of the factors below:

> *i. The company ordinarily has their central management and control in that foreign jurisdiction, but has one-off or temporary changes to their established governance practices that result in either meetings being held in Australia or directors attending meetings from Australia via modern communications technology.*
>
> *ii. The company is a subsidiary incorporated in that foreign jurisdiction and is subject to an Australian parent company's policies, proposals or approval processes and there is evidence demonstrating independent consideration and judgment by directors in making high-level decisions in that foreign jurisdiction.*
>
> *iii. The company has a wholly offshore operating business in that foreign jurisdiction, the company's tax position in Australia is sufficiently similar to what it would be if the company was an Australian resident, and a substantial majority of the company's central management and control is exercised in that jurisdiction through*
>
> - *board meetings that are held outside Australia, or*
> - *board meetings (including meetings via the use of modern communications technologies including teleconferencing) where the majority of directors are not present in Australia when such meetings take place, or*
> - *decisions by the board undertaken by circular resolution where the majority of directors are not present in Australia when such decisions are made.*
>
> *iv. The company intended to change its governance arrangements so that central management and control was exercised outside Australia under the transitional compliance approach; however, did not meet all the criteria in paragraphs 102 to 104B of this Guideline, solely because it was unable to change its governance arrangements by the end of the transitional period (30 June 2023). This factor only applies for the transitional period. From 1 July 2023, these companies should reconsider their governance arrangements in line with TR 2018/5 and this Guideline.*

Source: extract from Table 2: Risk zone factors (PCG 2018/9)

Please refer to the Appendix to the PCG, paragraphs 109-118, for details of each risk zone and the contemporaneous documentation and evidence required to support a company's assessment.

Ongoing compliance approach – for public groups

Given the residency of a company is generally considered a low-risk issue for the ATO (see below), in recognition of commercial practicalities and to provide certainty to public groups, the original PCG included a compliance approach specifically for foreign-incorporated companies that were part of public groups.

For these companies, the ATO was of view they would be considered low risk of being a resident under the central management and control test of residency and therefore the Commissioner would not seek to apply resources to review their residency status (provided certain conditions were met - see paragraphs 105-107C for the conditions).

This "ongoing compliance approach" for public groups remains available in the finalised updated PCG, with some additional low-risk circumstances added.

What's the risk?

Not a lot it would seem. The ATO acknowledges the residency of a foreign-incorporated company will often be a "low-risk" issue (paragraph 110).

Paragraph 5B of the (previous and updated) PCG provides:

> *.... it is acknowledged that the residence of a company will often be a 'low-risk' issue for the ATO. This is because, where a company has its operating business wholly offshore but is also a resident of Australia, permanent establishment or branch exemption rules will generally apply in determining the taxation treatment of the profits and losses of the offshore operating business. This may mean that the company's tax position is similar to what it would be if the company were not resident ...*

Nevertheless, it is never not a good idea (and in fact it is necessary to be in the "green zone") to get and retain documentation and evidence that supports a company's risk assessment (see paragraphs 115 and 116).

Source: PCG 2018/9 – Central management and control test of residency: identifying where a company's central management and control is located

Composite items – revised draft ruling

What you need to know

Draft TR 2017/D1 was published on 18 January 2017 and set out the Commissioner's preliminary view how to determine whether a composite item is itself a depreciating asset or whether its components are separate depreciating assets.

Due to the time that elapsed since the release of the draft Ruling and subsequent developments in tax law, a revised draft TR 2023/D2 has been released.

Apart from the inclusion of rules specific to Managed Investment Trusts and some clarification in relation to jointly owned assets, there have been no significant changes from the original draft.

Background

Division 40 of the *Income Tax Assessment Act 1997* (ITAA97) provides a deduction for the decline in value of "depreciating assets" based on their effective life (eligible small businesses can optionally elect to apply the concessional rules in Division 328).

A depreciating asset is defined in section 40-30(1) as:

> *.... an asset that has a limited effective life and can reasonably be expected to decline in value over the time it is used, except:*
>
> *(a) land; or*
>
> *(b) an item of trading stock; or*
>
> *(c) an intangible asset, unless it is mentioned in subsection (2).*

Subsection (2) includes the following intangible assets as "depreciable assets" (provided they are not trading stock): items of intellectual property; in-house software; mining, quarrying or prospecting rights and information; spectrum licences; indefeasible rights to use a telecommunications cable system and telecommunications site access rights.

Composite items

If a depreciating asset consists of a number of separate or different components, it is necessary to determine whether the "composite item" is itself a depreciating asset or whether its components are separate depreciating assets.

Definition of composite item

Whilst the concept of a "composite item" is found in s40-30(4):

> *...Whether a particular **composite item** is itself a depreciating asset or whether its components are separate depreciating assets is a question of fact and degree which can only be determined in the light of all the circumstances of the particular case...*

the term "composite item" is not defined in the tax legislation. The definition adopted by the ATO is from case law and is included at paragraph 6 of TR 2023/D2 as follows:

> *.... an item that is made up of a number of components that are each capable of separate existence ...*

Why is the identification of a "composite item" important?

Identifying whether a composite item is a depreciating asset or whether its components are separate depreciating assets is important in applying the capital allowance (and other) provisions of the tax law. For example, the cost and timing of acquisition of a depreciable asset often determines its eligibility for certain tax write-offs and concessions, such as the instant asset write-off threshold or whether it is eligible for the Technology Investment boost bonus 20% deduction.

A composite item's effective life may also be different to its individual component or components.

Guiding principles

Like the earlier draft ruling, the revised draft ruling provides guidelines to assist in identifying the relevant depreciating asset, be it the composite item or its individual components.

According to the ATO, for an individual component to be a separate depreciating asset, it is necessary the item (paragraph 8):

(a) is capable of being separately identified, and

(b) is recognised as having commercial and economic value.

Based on case law and the Explanatory Memorandum to the Bill that inserted s40-30(4), the ATO view that purpose or functionality is a useful guide to the identification of an item.

The ATO's main guiding principles are set out in paragraphs 10-16 as follows:

1. The depreciating asset will ordinarily be an item that performs a **separate identifiable function**.
    - The relevant function is the actual (and relative) function of the time in the taxpayer's income-producing activity - any theoretical function in other circumstances is irrelevant. A composite item may be a single depreciating asset in one taxpayer's circumstances but not in another's.
    - A single depreciating asset is not necessarily the smallest possible component which can be identified within a composite item. Several components or parts of a composite item which work together with other components may be parts of a larger functional item, particularly where those components are integrally linked.
2. An item may be identified as having a **discrete function without necessarily being self-contained** or used on a stand-alone basis.
    - The fact an item cannot functionally operate on its own in a practical or commercial sense

unless linked or connected to another item or items, does not preclude it from being a separate depreciating asset so long as it is capable of fulfilling an independent function.

- Where items are designed to be used in a range of settings or in conjunction with a wide range of equipment or systems and are not acquired with other items as part of system (see point 4 below), this may indicate they are separate depreciating assets.

3. The greater the **degree of physical or functional integration** of an item with other component parts, the more likely the depreciating asset will be the composite item.
   - The absence of a fixed physical connection between separate components of a composite item tends to indicate that each separate component is a depreciating asset.
4. When the **effect of attaching** an item to another item (which itself has its own independent function) **varies the function or operational performance** of that other item, the attachment is more likely to be a separate depreciating asset (see *Modifications and alterations* below).
5. When various components are **purchased** (whether via one or multiple transactions) **to function together as a whole or as a system** and are necessarily connected in their operation, the depreciating asset is usually the system (the composite item).
   - If an element is purchased or installed at a different time to the system and has a separate identifiable function, that element may be a separate depreciating asset.

Modifications and alterations

Modification or an alteration to an existing depreciating asset can itself be a separate depreciating asset. This will generally be the case where an attachment or addition substantially alters an original asset, the original asset continues to perform its function and the addition serves its own function.

A modification or alternation may also result in a new (composite) depreciating asset where the new asset has a different purpose or function than the original depreciating asset.

Other modifications and alternations that simply improve, restore or repair existing depreciating assets without changing the overall function of the existing asset may not be separate assets, nor create a new (composite) asset. Such costs would be either second element costs (s 40-190) of the original asset or deductible (s8-1 or s25-10) as appropriate. (And like the original draft ruling, the revised draft does not address the issue of repair or improvement but rather refers taxpayers to Taxation Ruling TR 97/23. We note the potential relevance of, and possible confusion caused by, the concept of "composite item" in cases of expenditure on repairs, and in particular whether there has been a replacement of a part or an entirety).

Jointly-held assets

Where a tangible depreciating asset is held by one or more parties, each party applies the capital allowance provisions to their interest in the asset as if it is the depreciating asset (s 40-35). (This section is what allows joint owners of a non-business asset (for example, a rental property asset) whose total cost exceeds $300 to deduct their expenditure outright provided their *share* of the asset costs is less than $300 (s 40-80(2)).

The ATO acknowledges s40-35 is to be read broadly, so provided there is more than one taxpayer which holds the same depreciating asset, s40-35 can apply where a taxpayer has an interest (part or all) in a discrete component part of a composite asset or where the taxpayer has an interest (together with others) in the overall composite asset (see Example 7).

Intangible assets may not be able to be treated in the same manner depending on the type of legal right and the relevant statutes relating to those rights, as some statutes do not permit certain bundles of rights to be divided into individual rights despite s40-30(4) (see paragraphs 31 -33 if relevant).

A sample of examples

Like many areas of tax law, the concepts and principles above sound reasonable in theory. However, the number of cases and amount of ATO guidance over the years addressing whether an item is a "unit of property" in the context of the former general investment allowance would suggest the issue can, and has, proven difficult in practice.

To assist, the revised draft ruling includes 14 examples setting out how the ATO view the rules apply in practice. A sample of the more commonly occurring examples are summarised in the table below (example numbers are taken direct from the draft ruling for ease of reference):

Separate asset	Not separate asset
Example 1 – industrial storage racks • Storage racks where multiple racks make up a single row. Each row is physically separate from each other row and capable of storing goods independently of other rows. Racks within each row rely on other racks within that row for their structural stability and therefore to perform their storage function • Each row is functionally complete in itself -> separate depreciating asset • New rows added later -> separate depreciating assets	*Example 1 – industrial storage racks* • Each rack within a row is not functionally complete in itself -> not a separate asset (see first column) • Existing row lengthened -> modification to existing asset -> not a separate asset. Cost included in the second element of cost
Example 2 – desktop computer package • Desktop computer, monitor, wireless keyboard and mouse bought as package –> single depreciating asset (notwithstanding items easily separated and may have been acquired from different suppliers, they were purchased to provide a single, integrated system to function as a whole) • Replacements items -> separate depreciating assets • Printers -> separate depreciating assets (regardless whether purchased as part of package or later as performs separate function, capable of independent existence etc)	*Example 2 – desktop computer package* • Desktop computer, monitor, wireless keyboard, and mouse acquired as a package – not separate assets (see first column) • Items physically incorporated into a computer or computer system eg processors, memory, hard drives -> not separate assets (lack of physical separation outweighs other factors). Costs included in the second element of cost of the computer

Separate asset	Not separate asset
Example 3 – mainframe computer • New mainframe with dependent terminals • Terminals receive/transmit data to/from any connected compatible controlling unit but do not have own base unit or CPU so only functional when connected to mainframe -> single depreciating asset • Additional terminals purchased later off-the-shelf which are easily connected to any compatible mainframe computer system, including existing system – each new terminal -> separate depreciating asset (separate existence, not part of the system originally acquired, adaptable to work with range of controllers)	*Example 3 – mainframe computer* • Dependent terminals purchased with new mainframe –> not a separate depreciating asset (see first column and contrast to Example 4 below)
Example 4 – local area network • Local area network (LAN) links server to 10 computers • Computers access shared database on server, but also operate independently on own software without connection to server • Each computer has a separate identifiable function - > separate depreciating asset (connection to the LAN, although increasing functionality, does not cause them to be collectively subsumed into a different larger asset) • The server has its own identifiable function to enable database sharing -> separate depreciating asset	*Example 4 – local area network* - The LAN as a whole -> not a separate depreciating asset (see first column)

Separate asset	Not separate asset
Example 13 – solar power system • Installation of solar power system consisting of solar panels, mounting frames, wiring and inverters. • System purchased and installed with purpose or function of supplying electricity. While each component has function of own, that function is subsumed and contributes to function or purpose of overall system. The function can only be derived from the integration of all the components in a particular way. Based on this functionality, the system, rather than each of its components -> a single depreciating asset	*Example 13 – solar power system* • Individual components in original system - > not separate depreciating assets (see first column) • Later expansion of system eg purchase two additional solar panels designed to work with the original system and connected to the system already in operation. This is a modification – not a separate depreciating asset (the addition does not substantially alter operational function of original asset. Additional panels are a modification to an existing depreciating asset and cost is included in second element of cost

Source: TR 2023/D2 - Income tax: composite items - identifying the relevant depreciating asset for capital allowances

Decision Impact Statement: "Taxi Reform Fairness Fund" payments not assessable income

What you need to know

The ATO has issued a Decision Impact Statement on an August 2023 AAT case which ruled that payments received from the Victorian Taxi Reform Fairness Fund were not assessable as income according to ordinary concepts.

Facts

[TDG Notes October 2023]

The taxpayer held three taxi licences before he exited the Victorian taxi industry following significant changes and government reforms that adversely affected taxi licence holders. These included the emergence of Uber services and new laws which had had the effect of revoking existing tradeable taxi licences and replacing them with non-tradeable licences.

To address the disruption caused by this, the Victorian Government provided various forms of financial relief, including the "Victorian Taxi Reform Fairness Fund" (the Fund) which was set up to provide support to persons facing significant financial hardship because of the reforms. The taxpayer received a payment of $250,000 from this fund. The sole issue for determination was whether this payment was subject to income tax as income according to ordinary concepts.

AAT Decision

The AAT concluded that matter was finely balanced, but it considered the better view was that the payment was made for the alleviation of the "unfairness of licence holders suffering financial hardship from the reforms" and that "such hardship was not limited to financial implications for the business or from loss of income". Rather, the payment was a one-off discretionary payment paid as a matter of public policy for the relief of unfair financial hardship, and not a product of the taxpayer's business or as a substitute for income forgone.

ATO view of decision

- The ATO accepts that payments from the Fund are not income according to ordinary concepts and will administer the law in that way
- The ATO was quick to point out that the Tribunal did not consider payments from the Victorian Taxi Reform Hardship Fund or the Victorian Transition Assistance payments and that the Tribunal also did not consider other payments made as a result of the taxi industry reforms in the other Australian States

- Therefore, the ATO does not consider that the AAT decision impacts its position on the other types of financial assistance payments made to Victorian taxi licence holders
- The ATO will provide remediation pathways to taxpayers impacted by the Tribunal's decision, and these will be published in due course at: *Taxi licence holders – industry assistance payments and passenger movement levies*
- The ATO is reviewing the impact of this decision, if any, on related advice and guidance products, including:
  - Fact sheet *Victorian taxi industry Fairness Fund payments*
  - Taxation Ruling TR 2006/3 *Income tax: government payments to industry to assist entities (including individuals) to continue, commence or cease business*

Bains and Commissioner of Taxation (Taxation) *[2023] AATA 2477 (11 August 2023)*

Decision Impact Statement: GST exemption melts

What you need to know

The ATO has issued a Decision Impact Statement on a September 2023 AATA case which considered the difference between, and the GST treatment of, a prepared meal versus a meal component.

Facts

[TDG Notes November 2023]

Simplot supply and import several products as part of its Birds Eye SteamFresh product range, which are considered to be, or at least are marketed as, a meal component, using marketing such as "complete side of plate solution – simply serve with a protein or add to a salad" [38], rather than a complete meal in itself.

The crux of the matter was whether the products were "food marketed as a prepared meal", and therefore subject to GST (GST Act Schedule 1), or a "meal component" (as alleged by Simplot) and therefore tax free.

AAT Decision

The Court stated that the attributes of a "prepared meal" are to be discerned from common experience and include:

- **quantity** – a meal connotes a quantity of substance, even if it may be termed a small meal;
- **composition** – a prepared meal connotes food consisting of more than one ingredient or element. Whether a combination of foods constitutes a meal is a question of fact and degree. A dish comprised solely of vegetables can be a meal. However a serving of a mix of vegetables (eg peas and corn) may not be a meal;
- **presentation** – a prepared meal connotes a combination of foods that is complete. Matters such as seasoning, sauces and flavourings may all be relevant in determining whether foods are of a kind marketed as a prepared meal.

In concluding that all the products in question were "food marketed as a prepared meal", and therefore subject to GST, the Court said:

> *Foods of a kind marketed as a prepared meal therefore refers to foods of a sufficient quantity, mix and seasonings as to be regarded by the ordinary person as being of a kind that are marketed as a prepared meal.*

In handing down its decision the AATA expressed its frustration of the construction of the exemptions in the GST Act.

ATO view of decision

This decision confirms the ATO's classification of these particular products.

A product is taxable as "food of a kind marketed as a prepared meal" if it is within a class or genus of food marketed generally as having the attributes of a prepared meal (including quantity, composition and presentation). The Court has left open that a prepared meal may have attributes additional to the three stated.

As the concepts of "meal" and "meal component" are not mutually exclusive, a product which is regarded as a "meal component" may yet be taxable as "food of a kind marketed as a prepared meal" in some situations.

This does not mean that everything which is a meal component or any particular meal component will be taxable. Whether or not a meal component is taxable will depend on application of the statutory test as a "single composite question".

In practice, it will be the facts, circumstances and evidence which determine whether a meal component is "food of a kind marketed as a prepared meal".

It will be rare that, as a result of the decision, a meal component not previously taxable will now come within a class or genus of food marketed generally as having the attributes of a prepared meal (including quantity, composition and presentation).

For example, many prepared meals include peas, but the supply of only frozen peas is not "food of a kind marketed as a prepared meal". The decision does not now make a supply of frozen peas taxable. Frozen peas are not a mix of ingredients, and are not seasoned, flavoured or presented as a complete meal. They do not have the attributes necessary to make them "food of a kind marketed as a prepared meal". The same will apply for products like frozen mixed vegetables, frozen crumbed chicken pieces, and frozen fish pieces.

Taxpayers should review food products to ensure they are classifying them consistently with the decision in Simplot.

Simplot Australia Pty Limited v Commissioner of Taxation *[2023] FCA 1115*

DIS: Unpaid present entitlements owed to companies are not loans for Div 7A purposes

What you need to know

The ATO has issued a Decision Impact Statement on a September 2023 AAT case which considered whether unpaid present entitlements held by a beneficiary company constituted loans from the company to the trust for the purposes of Division 7A.

Facts

[TDG Notes November 2023]

Distributions were made by a discretionary trust to its beneficiaries, one of whom was a company, for the years 2013 to 2017. The distributions to the corporate beneficiary remained substantially unpaid by the beneficiary's lodgement day for each of its 2013 to 2016 income year tax returns.

The Commissioner issued amended assessments to the Applicants for each of the 2014 to 2017 income years. Those assessments reflected additional amounts included in their assessable income under section 97, on the basis that:

- the outstanding amounts represented loans from the corporate beneficiary to the Trust within the meaning of subsection 109D(3) that were taken to be dividends paid to the Trust under subsection 109D(1), and
- the beneficiaries entitled to the Trust's income had a corresponding proportion of each deemed dividend included in their assessable income by section 97.

AAT Decision

The AAT set aside the Commissioner's objection decision finding:

> *"The balance of an outstanding or unpaid entitlement of a corporate beneficiary of a trust, whether held on a separate trust or otherwise, is not a loan to the trustee of that trust ..."*

In reaching the decision the AAT addressed the need to consider the statutory context and effectively agreed with the taxpayers in their view that the application of Division 7A to UPEs is confined to subdivision EA which can only apply when there is both a UPE owed by a trust to a company and a loan by that trust to a shareholder (or associates) of the company.

The AAT also noted that in the circumstances where subdivision EA does apply, in the absence of a "tiebreaker rule", if a UPE itself was a "loan" within the meaning of section 109D(3), deemed dividends would be taken to be paid to both the trust and the shareholder (or associate) with no relief from this double taxation.

ATO view of decision

On 15 November 2023 the ATO released an interim Decision Impact Statement on the case. In that statement the ATO advises that:

> *"until the appeal process is finalised, the Commissioner does not intend to revise the current ATO views relating to private company entitlements to trust income, as set out in Taxation Determination* TD 2022/11 Income tax: Division 7A: when will an unpaid present entitlement or amount held on sub-trust become the provision of 'financial accommodation'?"

Further:

> *"... the Commissioner does not propose to finalise objection decisions in relation to objections to past year assessments (for which no settlement was reached) where the decision turns on whether or not a UPE was a subsection 109D(3) loan. However, if a decision is required to be made (for example, because a taxpayer gives notice requiring the Commissioner to make an objection decision), any objection decisions made will be based on the existing ATO view of the law."*

This position was reiterated by website guidance issued by the ATO on 21 November 2023 (QC 73681).

Curiously, in the Decision Impact Statement the ATO did also say:

> *"In addition to the application of section 109D, the basis on which private company beneficiaries deal with unpaid entitlements to trust income may have implications under other taxation laws, such as* ***section 100A****"*
>
> *(emphasis added)*

If the ATO loses on their Division 7A position, do they intend to fall back on section 100A? Is section 100A now their go-to weapon against what they may perceive to be tax-biased trust distributions?

Bendel and Commissioner of Taxation (Taxation) ***[2023] AATA 3074***

Registered tax agents providing legal services or financial services:

What's allowed, what's not allowed, and the uncertainty in between

Most financial professionals are no doubt aware that only registered tax agents can provide 'tax agent services' for a fee in Australia. The purpose of this article is to provide an explanation of a related but perhaps less universally well understood topic, being the various rules which govern who can provide legal services and financial services in Australia and the exclusions from those rules which apply for registered tax agents.

Tax agent services

Only 'registered tax agents', being those registered with the Tax Practitioners Board (TPB), can provide 'tax agent services' for a fee in Australia[1]. Whether a particular service is a 'tax agent service' is also relevant to the exclusions which apply for registered tax agents from the rules restricting the provision of legal services and financial services in Australia.

The meaning of 'tax agent service' is defined in the *Tax Agent Services Act 2009* (TASA) as any service that relates to:

- Ascertaining liabilities, obligations or entitlements of an entity that arise or could arise under a 'taxation law', or
- Advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise or could arise, under a 'taxation law', or
- Representing an entity in their dealings with the Commissioner of Taxation, and
- That is provided in circumstances where the entity can reasonably be expected to rely on the service to satisfy liabilities or obligations (or to claim entitlements) that arise or could arise under a 'taxation law'[2].

The meaning of 'taxation law' broadly includes any legislative act (or part of one) under the administration of the Commissioner of Taxation[3], specifically the Commonwealth Commissioner of Taxation.

Because the Commissioner of Taxation does not administer state or territory tax laws, only a service provided with respect to Commonwealth tax laws can be a 'tax agent service'.

1 Sec 50-5 TASA
2 Sec 90-5 TASA
3 Sec 3-5 TASA (as read with 995-1 *Income Tax Assessment Act 1997*)

Providing legal services in Australia

The specifics of the rules included in the laws which regulate who can provide legal services in Australia vary between its states and territories. However, the laws operating in all states and territories each include a restriction that only legal practitioners, broadly being qualified lawyers with a current practicing certificate, can provide legal services in that state or territory.

For example, the *Legal Profession Uniform Law Application Act 2014*, which applies in Victoria and New South Wales, includes the following provision:

> *An entity must not engage in legal practice in this jurisdiction, unless it is a qualified entity*[4].

The meaning of 'qualified entity' for this purpose broadly covers individual legal practitioners and law firms[5] but also contains an extension relevant to registered tax agents as discussed below.

The provision of tax advice or other services typically provided by registered tax agents, particularly when it involves the interpretation and application of tax laws to a particular client, transaction, or other specific scenario, will often also amount to the provision of legal advice or other legal services.

The carve-out relevant to registered tax agents

As described above registered tax agents are authorised by provisions in the TASA, which is a Commonwealth law, to provide services within the meaning of 'tax agent services'.

The rules operating in each state or territory, other than South Australia, all have provisions which have the effect that the general rule (that only legal practitioners can provide legal services) does not apply to the extent that the person providing the legal services is authorised to do so under a Commonwealth law.

For example, the *Legal Profession Uniform Law Application Act 2014* does so by including the following in the meaning of 'qualified entity':

> *An individual engaged in legal practice under the authority of a law of the Commonwealth or of a jurisdiction...*

Australia's constitution also includes a provision[6] that Commonwealth laws prevail over state or territory laws in the event of any inconsistencies. Therefore, someone authorised to provide services under a Commonwealth law that are also legal services would be able to rely on the constitution in the absence of any specific exclusions in the relevant state or territory law such as the ones outlined above.

The practical outcome of all of this is that there is effectively a carve-out from the general rule (that only legal practitioners can provide legal services) which allows registered tax agents to provide legal services to the extent those services are also within the meaning of 'tax agent services'.

Registered tax agents who are also legal practitioners are of course able to provide legal services regardless of whether they are within the meaning of 'tax agent services'.

4 Sec 10(1) of Schedule 1
5 Sec 6(1) of Schedule 1 (Definitions of qualified entity, Australian legal practitioner, and law practice)
6 Sec 109

When legal services are and are not also 'tax agent services'

Because the carve-out for registered tax agents is limited to 'tax agent services' it cannot be relied on with respect to providing any legal advice or other legal services related to state or territory tax laws (such as Stamp Duty, Land Tax, and Payroll Tax).

Which services can be provided without straying into the provision of legal advice or other legal services is somewhat of a grey area. However, because no services provided with respect to state or territory tax laws can come within the carve-out, there is an inherent risk in registered tax agents providing services in this area.

General guidance (such as advising of the rates which apply for a specific state or territory tax, or the types of transactions that attract a specific tax) can be provided with minimal risk but as soon as an analysis or interpretation of a law and how it applies to a specific client or transaction is necessary it is probably time to consult a legal practitioner.

The carve-out does apply to legal advice or other legal services provided by registered tax agents with respect to Commonwealth tax laws (such as Income Tax, Goods and Services Tax (GST), Fringe Benefits Tax (FBT), Pay as you go (PAYG) withholding, and Superannuation Guarantee). However, such legal services must also otherwise be within the meaning of 'tax agent services' which in practice broadly means that they must be related to ascertaining or advising on liabilities, obligations, or entitlements under the relevant tax laws.

Situations where legal advice or other legal services with respect to Commonwealth tax laws might go beyond the meaning of 'tax agent services' include where legal documents (such as trust deeds or sales contracts) are created, amended, or interpreted as part of the services provided. Relevantly, there are also specific restrictions which apply to limit the provision of legal documents to legal practitioners operating in some states and territories.

Providing financial services in Australia

Generally only individuals who hold an Australian Financial Services Licence (AFSL) or who are representatives of an AFSL licensee (providing the services on their behalf) can provide 'financial services' in Australia[7].

The meaning of 'financial services' for this purpose includes providing 'financial product advice'[8].

The broad meaning of 'financial product advice' is a recommendation or a statement of opinion, or a report of either of those things, which is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products[9].

A 'financial product' is a facility through which, or through the acquisition of which, a person makes a financial investment, manages financial risk, or makes non-cash payments[10].

There is an exclusion from the meaning of 'financial product advice' which applies specifically to registered tax agents as discussed below.

There are other 'financial services' and exclusions to the rules which are relevant to financial professionals. However, this commentary is limited to the rules as they apply to registered tax agents specifically. More information about this broader application can be found in ASIC Information Sheet 216 (INFO 216).

7 Sec 911A *Corporations Act 2001*
8 Sec 766A *Corporations Act 2001*
9 Sec 766B *Corporations Act 2001*
10 Sec 763A *Corporations Act 2001*

The exclusion which applies specifically to registered tax agents

Tax advice and other services commonly provided by registered tax agents and involving 'financial products' may include or be taken to include recommendations or opinions with respect to those products. For example, written advice on which of two courses of action involving the acquisition or disposal of 'financial products' has the more favourable tax outcome may be seen to be a recommendation of which asset to acquire or dispose of regardless of whether it is expressed as such. Therefore, in the absence of the below exclusion, services provided by registered tax agents will sometimes also be 'financial product advice'.

However, the meaning of 'financial product advice' specifically excludes advice provided by a registered tax agent which is given in the ordinary course of activities as such an agent and that is reasonably regarded as a necessary part of those activities[11].

Any advice within the meaning of 'tax agent services' will likely be given in the ordinary course of activities as such an agent, and if a tax agent service cannot be competently provided unless such advice is given, it will likely also be reasonably regarded as a necessary part of such activities.

In practice this means that there is a carve-out from the need to be covered by an AFSL for registered tax agents who provide 'financial product advice' to the extent that advice is within the meaning of 'tax agent services' and is necessary to competently deliver a particular 'tax agent service' they provide.

Registered tax agents who are also covered by an AFSL are not limited to the meaning of 'tax agent services' in providing 'financial product advice' or other 'financial services' (though the relevant licence may otherwise limit the particular services they can provide).

Limitations on the exclusion specifically for registered tax agents

Because the carve-out for registered tax agents relies on the meaning of 'tax agent services' it does not extend to 'financial services' provided with respect to state or territory tax laws.

However, there is another relevant carve-out which is not limited to 'tax agent services' or otherwise exclusive to registered tax agents. This additional carve-out having application does not prevent the need for the 'financial services' to be provided by a legal practitioner if they are also 'legal services'.

The additional carve-out excludes from the meaning of 'financial services', and therefore the requirement to be covered by an AFSL, 'financial product advice' provided as a part of advice on taxation issues[12].

To rely on this additional carve-out all of the following conditions must be met:

- Providing the 'financial product advice' must be both reasonably necessary to and an integral part of providing the advice on taxation issues.
- The individual providing the advice must not receive a benefit (other than the fee received from the person they provided the advice to) if that person acquires a financial product mentioned in the advice.
- The advice must be accompanied by a written statement advising that:
    - The person providing the advice is not licensed to provide financial product advice under the *Corporations Act*; and

11 Sec 766B(5)(c) *Corporations Act 2001*
12 7.1.29(4) of the *Corporations Regulations 2001*

- Taxation is only one of the matters that must be considered when making a decision on a financial product; and
- The client should consider taking advice from an individual covered by an AFSL before making a decision on a financial product.

While this additional carve-out isn't tied to the meaning of 'tax agent services' or otherwise exclusive to registered tax agents it is clearly relevant to services they commonly offer. Consequently, there is considerable overlap between this additional carve-out and the carve-out which applies exclusively to registered tax agents.

Providing financial services with respect to SMSFs

Self-managed superannuation funds (SMSFs) are themselves 'financial products' as are many of the types of assets they typically invest in. Therefore, advice with respect to SMSFs is an area where caution particularly needs to be exercised.

Despite the *Superannuation Industry (Supervision) Act 1993* (SISA) (as it applies to SMSFs) being administered by the Commissioner of Taxation, and therefore services related to it within the scope of 'tax agent services', advice provided with respect to SMSF regulatory provisions is not generally accepted to be included in the carve-out from the meaning of 'financial product advice' which applies for registered tax agents.

This may be because, despite the rules regulating SMSFs being within the meaning of 'taxation law' advice with respect to them is otherwise not considered to be included in the meaning of 'tax agent services'. For example, perhaps such advice is thought not to be with respect to ascertaining or advising on obligations, liabilities, or entitlements.

Alternatively, it may be accepted that providing advice on SMSF regulatory provisions is a 'tax agent service' but providing such advice may be considered not to be necessary to providing a competent tax agent service and, therefore, otherwise fails to meet the conditions for the carve-out.

Though the carve-out specifically for registered tax agents does not include SMSF regulatory advice, other carve-outs relevant to financial professionals more broadly include services related to SMSF regulatory provisions (see ASIC Information Sheet 216 (INFO 216)).

Consequences of non-compliance and the key takeaway

Someone who does not comply with the rules regarding who can provide legal services or financial services in Australia may be found guilty of an offence and significant monetary penalties and even terms of imprisonment may be imposed as a result.

Such a conviction would also have indirect consequences including the possibility of invalidating the professional indemnity insurance the services were provided under and potential disciplinary action for a breach of the TPB Code of Professional Conduct or other relevant professional standards.

The key takeaway from the above explanation should be that, whilst there are carve-outs for registered tax agents from the restrictions on who can provide legal services and financial services in Australia, it is important to be aware of the context and limitations of these carve-outs in order to avoid the potentially significant consequences of inadvertently providing legal services or financial services which go beyond the exclusions for registered tax agents.

Summary: Legal services and financial services registered tax agents can provide

Legal services and financial services registered tax agents can provide			
	Not allowed	**Allowed**	**What else you need to know**
Legal Services			
The general rule as it applies to registered tax agents	Only legal practitioners (qualified lawyers with a current practising certificate) can provide legal services in Australia	There is a carve-out from this general rule for legal services that are also 'tax agent services' provided by registered tax agents	The TPB Code of Professional Conduct requires that registered tax agents only provide 'tax agent services' in areas of tax where they have the expertise to do so competently Registered tax agents should therefore always assess whether they have the knowledge and skills to competently provide a particular legal service in addition to determining if it is within the meaning of 'tax agent services'
Legal services and Commonwealth tax laws	Legal services which are related to Australian Commonwealth tax laws but that are not otherwise within the meaning of 'tax agent services' are not covered by the carve-out for legal services provided by registered tax agents	The carve-out for registered tax agents is relevant to services provided with respect to any 'taxation law' being a Commonwealth law (or part of one) administered by the Commissioner of Taxation This includes Income Tax, FBT, GST, PAYG, Superannuation Guarantee, etc	Scenarios where legal services with respect to Australian Commonwealth tax laws could fall outside the meaning of 'tax agent services' and therefore not within the carve-out for registered tax agents might include: • Taking action to produce the outcome advised on (e.g. preparing business sale agreements) • Creating or amending documents that establish or control legal rights (e.g. trust deeds) • Advising on very complex tax matters such as those requiring a detailed consideration of the principles of general law or other legal skills beyond simply interpreting and applying a 'taxation law' to a specific scenario • Interpreting legal documents (e.g. contracts of sale or will) to establish the facts and circumstances for which tax advice is being provided
Legal services and state or territory tax laws	The meaning of 'tax agent services' and therefore the carve-out for registered tax agents does not extend to any legal services provided with respect to state and territory tax laws This includes Stamp Duty, Payroll Tax, and Land Tax	General guidance or other services that are not legal services can be provided with respect to state and territory taxes	Because the carve-out for registered tax agents does not apply to any services with respect to state and territory tax laws there is an inherent risk in providing any specific or tailored advice in this area Caution should be exercised in providing any services which include interpreting state or territory tax laws to establish the specific rights or obligations that arise under them for a particular client or transaction Circumstances where advice or other services may be able to be provided on state or territory tax laws without straying into the provision of legal services could include: • Advising the rate that applies for a particular tax • Advising of the general transaction types that attract a particular state or territory tax • Providing general guidance that can be given without an analysis of the relevant state or territory tax law as it applies to the specific circumstances

Legal services and financial services registered tax agents can provide			
	Not allowed	**Allowed**	**What else you need to know**
Financial Services			
The general rule as it applies to registered tax agents	Only individuals who hold an Australian Financial Services Licence (AFSL) or who are representatives of an AFSL licensee (providing the services on their behalf) can provide 'financial services' in Australia The meaning of 'financial services' relevantly includes 'financial product advice'	There is a carve-out from the meaning of 'financial product advice' for advice provided by registered tax agents in the ordinary course of activities as such agents (and which is reasonably regarded as a necessary part of those activities)	There are additional exemptions from this general rule which have relevance for registered tax agents who also provide other accounting related services ASIC Information Sheet 216 (INFO 216) provides information with respect to these exemptions
Financial services and Commonwealth tax laws	'Financial product advice' provided by registered tax agents but not in the ordinary course of their activities as such agents or reasonably regarded as a necessary part of those activities is not within the carve-out	The carve-out relies on the meaning of 'tax agent services' so again has application to any law (or part of one) administered by the Commissioner of Taxation	Any 'financial product advice' provided by registered tax agents is likely to meet the condition of being in the ordinary course of their activities as such agents if it is with respect to an area of tax in which they ordinarily provide services and is within the meaning of 'tax agent services' The provision of 'financial product advice' by registered tax agents will likely meet the condition of being reasonably regarded as a necessary part of their tax agent activities if they would be unable to competently deliver the 'tax agent services' they offer without providing it

Legal services and financial services registered tax agents can provide			
	Not allowed	**Allowed**	**What else you need to know**
Financial services and state or territory tax laws	Because the carve-out from the meaning of 'financial product advice' for advice provided by registered tax agents relies on the meaning of 'tax agent services' it does not apply to financial services with respect to any state or territory tax laws	Whilst the carve-out for registered tax agents does not apply there is an additional carve-out relevant to providing advice on state or territory tax laws Individuals who provide 'financial product advice' as a part of providing advice on taxation issues will be considered not to be providing 'financial services' if certain conditions are met What is meant by 'providing advice on taxation issues' is not connected with the meaning of 'tax agent services' or otherwise defined	The conditions for this additional carve-out are: • Providing the 'financial product advice' must be both reasonably necessary to and an integral part of providing the advice on taxation issues • The individual providing the advice must not receive a benefit (other than the fee for the advice from the person they provided it to) if that person acquires a financial product mentioned in the advice • The advice must be accompanied by a written statement advising that: - The person providing the advice is not licensed to provide financial product advice under the *Corporations Act*; and - Taxation is only one of the matters that must be considered when making a decision on a financial product; and - The client should consider taking advice from an individual covered by an AFSL before making a decision on a financial product Whilst this additional carve-out does not apply exclusively to registered tax agents it applies with respect to services they typically provide and there is therefore significant overlap between this exclusion and the one that applies specifically to registered tax agents Where the conditions for this additional carve-out are met advice on state or territory tax laws which also amounts to 'legal services' remains limited by the rules requiring that only legal practitioners can provide such advice

Legal services and financial services registered tax agents can provide			
	Not allowed	**Allowed**	**What else you need to know**
Financial services and SMSFs	Interests in SMSFs themselves as well as many of the types of assets they typically invest in are 'financial products' so SMSF related services will often be 'financial product advice' Although the Commissioner of Taxation administers the SISA it seems that advice on SMSF regulatory rules (such as borrowing and investment restrictions and illegal early release) are excluded from the carve-out for registered tax agents	Advice on Commonwealth tax laws as they apply to SMSFs are generally within the carve-out for registered tax agents This includes general provisions that apply to all entities (income tax, GST etc) as well as superannuation specific ones (such as contribution caps, non-arm's length income, and exempt current pension income)	Despite the *Superannuation Industry (Supervision) Act 1993* (SISA) as it applies to SMSFS being a 'taxation law' and therefore applicable to the meaning of 'tax agent services', generally discussions about the specific exclusion for registered tax agents from the requirement to be covered by an AFSL if providing 'financial product advice' do not consider that the carve-out can extend to advice on the SMSF regulatory provisions This may be because despite the SISA being a law for which 'tax agent services' can be provided, it is considered that SMSF regulatory advice is otherwise not within the meaning of 'tax agent services' (e.g. because it is considered to not be or to extend beyond ascertaining or advising on liabilities, obligations or entitlements that arise or could arise the SISA) Alternatively, if advice on provisions in the SISA as they apply to SMSFs is accepted to be within the meaning of 'tax agent services' it may instead be considered not to meet the other conditions for the carve-out for registered tax agents (e.g. it is not provided in the ordinary course of, or reasonably regarded as a necessary part of, the activities of a registered tax agent) Regardless, it is evident that the carve-out from the meaning of 'financial product advice' for advice provided by registered tax agents is generally accepted not to extend to SMSF regulatory advice There are exclusions relevant to financial professionals more broadly that include additional services provided to SMSFs (See ASIC INFO 216)

Tax reform in Australia: an impossible dream?

With plenty of commentators having their say about the Stage 3 tax cuts that are due to kick in on 1 July 2024, tax reform as a broader issue is likely to come into sharper focus over the coming months.

The Grattan Institute's CEO Danielle Wood, who has since moved across to head up the Productivity Commission, recently gave a compelling speech about the tax reform process which might be of interest to readers.

In a Melbourne University Freebairn Lecture on 31 October 2023, Ms Wood canvassed the following issues:

- **The need for broad tax reform**

  Basically, Australia's current tax base is not sufficiently robust to generate the level of revenue required to fund the outlays the community expects. Also, some taxes have a more detrimental impact on economic activity than others. Australia's tax mix relies too heavily on inefficient taxes and not enough on more efficient ones. Failing to grasp the nettle on tax reform now would be to impose an unfair burden on future generations.

- **Why tax reform is so hard**

  One powerful barrier to tax reform stems from the fact that for any measure or package of measures the losers tend to be concentrated and highly vocal, while the winners are a lot more diffused and disengaged. Vested interests stoke the outrage felt by the perceived losers, while the media and politicians do the rest.

- **Political scare campaigns and the media**

  As we have seen in recent years, politicians are quick to weaponise tax reform ideas, often with scant regard to the actual merits of a particular idea for the broader community over time. If one side of politics proposes (or may even be thinking about proposing) a particular tax policy setting, the other side reflexively and instantly drums up an opposing scare campaign. We've seen it around the mining super profits tax, negative gearing, the CGT discount and refundable franking credits. There was also a major fairness and cost of living campaign against the GST back in the day, resulting in John Howard's narrow election victory in 1998. And who can forget Paul Keating's shameless attack on John Hewson's GST in 1993 after supporting a consumption tax as Bob Hawke's Treasurer back in 1985?

  The media, of course, love nothing better that a good tax scare campaign and waste no time sympathetically portraying the perceived losers.

- **History of tax reform**

  The speech traverses previous efforts at major tax reform, spanning from Asprey (1975), the 1985 National Tax Summit, A New Tax System (1988), the Henry Review (2009). Tax reform is a long game - many of the major recommendations for reform were either never implemented (Henry) or not implemented for many years (Asprey). The States don't warrant much of a mention since they have implemented few real reforms.

- **Putting tax reform on the agenda**

  The government's claims that ill-targeted tinkering with superannuation and squeezing large multinationals ever more tightly represent tax reform are not plausible. Getting broad based tax reform on the agenda requires a concerted push from a variety of sources, including academic, business and civil society leaders, as well as those in the parliament with sufficient interest and courage. A decent financial crisis in the background wouldn't hurt either.

- **Building a coherent package**

  Labor's 1985 reforms, consisting of base broadening measures (CGT, FBT) bundled with income tax cuts and anti-avoidance measures formed a coherent story that politicians could sell to the public. Even the GST came as part of a package that saw the abolition of a suite of inefficient State taxes, shored up State budgets (at least for a time) and provided compensation for low income families.

  Packages that share the initial pain of reform broadly across the community and which provide a measure of compensation for the losers are more likely to be seen as fair than just a few targeted measures.

- **Making reforms stick**

  Even after hard fought tax policy changes are adopted by governments and enacted by parliament, reformers need to protect their apparent gains. Labor in opposition, for example, thought it was on a political winner in promising to repeal the GST coming into the 2001 election. They narrowly lost that election (mainly for reasons unrelated to the GST) but did not reprise the policy in 2004. The Hawke/Keating government lost its nerve and ditched its own negative gearing reforms after just two years in 1987, following the release of some inconclusive data on house prices. And more recently, Labor in NSW has pulled the plug on the previous government's tentative first steps towards introducing stamp duty reforms.

- **Avoiding the rule in/rule out game**

  This is perhaps the hardest but most important part of the process. Typically, vested interests get wind of a tax measure that might perhaps be under consideration and with the aid of the media begin to pressure politicians to rule out any changes to the GST/the CGT discount/negative gearing/rent taxes/refundable franking credits/insert your pet tax topic. Before long, governments crack under the pressure and promise not to touch any of these sacred cows, thereby severely limiting the scope of any tax reforms they might be courageous enough to contemplate. The challenge is for everyone to hold their nerve, leave everything on the table and debate issues on their merits.

Ms Wood concludes that while comprehensive tax reform is difficult, it is not impossible.

The States and the Commonwealth have recently made strong commitments to boost the supply of housing through politically challenging reforms to planning laws, showing that some issues do occasionally get taken out of the "too hard" basket – but perhaps only when there is broad agreement that there is a serious social and economic crisis that demands some action.

We would hope that Ms. Wood will continue to push the case for tax reform in her new role. While the Productivity Commission has a broader remit than just tax, having the right tax mix is an important ingredient for boosting productivity.

Ms Wood's paper can be accessed on the following link:

[Tax reform in Australia: an impossible dream? - Grattan Institute]

2024 TRUST SERIES

Fundamentals of trusts in Australia

8 March: **12:30-1:30pm**

The inaugural webinar in this series provides a comprehensive introduction to the core tenets underpinning the concept of trusts – for example, why they exist, types of trusts, advantages and disadvantages, essential principles, key roles and characteristics of a trust. Intended to establish a robust foundation for subsequent sessions in the series, this initial webinar also aims to enlighten those who are relatively new to the subject matter, and offer seasoned practitioners timely and crucial refreshers on indispensable trust concepts.

How trusts are taxed in Australia

22 March: **12:30-1:30pm**

The second webinar will cover the tax impact of the three types of income: capital gains, franked distributions (and franking credits) and any other net income (which is assessable to the trustee unless included in the assessable income of a beneficiary). Given the complexity and intricate nuances that typify taxation principles related to trusts in Australia, this session is designed to distil these complexities into essential, easily understandable components. The objective is to equip participants with the critical knowledge required to manage and optimise the taxation aspects of trusts and their respective income streams within the Australian fiscal landscape.

Trust losses and key CGT events impacting trusts

5 April: 12:30-1:30pm

The third webinar focuses on trust loss rules. The first part of this webinar will explain the different trust loss rules, when they may apply and how they can be satisfied to ensure that a trust does not inadvertently forfeit future use of tax losses. It will also cover the impact of family trust elections on the trust loss rules.

The second segment of the webinar shifts focus to the ways in which CGT events that practitioners are likely to encounter can impact trust structures, equipping attendees with the knowledge to navigate these complexities within Australian tax law.

The integrity and anti-avoidance rules applicable to trusts

19 April: 12:30-1:30pm

The concluding session tackles the anti-avoidance provisions as they apply to trusts. This will include a discussion around Section 100A, the law as it stands, the ATO's view of the law and what it means for you in practice. The ATO has targeted trust arrangements, but they may still be used effectively. There are a number of lesser known (but equally relevant) anti-avoidance provisions, as well as the general anti-avoidance provision in Part IVA, that can impact trusts. The aim of this final session is to empower participants to navigate these regulatory intricacies within the context of Australian tax law.

Presented by
Joshua Goldsmith

8 March | 22 March | 5 April | 19 April | 2024
12.30-1.30pm

$350 (members)
$500 (non-members)

TPB CPD hours: 4 hours
Legislated CPD hours:
To be confirmed

For booking and more information scan code or go to IFPA.com.au or call 03 8851 4555

Status of Tax Matters @ 24 November 2023

(This table is not intended to be comprehensive)

Status of Tax Matters @ 24 November 2023	
Legislation	**Status**
Treasury Laws Amendment (2023 Measures No 1) Bill 2023 • Aligns the tax treatment of off-market share buy-backs undertaken by listed companies with the treatment of on-market buy-backs. • Prevents some distributions funded by capital raisings from being frankable. • Annual registrations for tax practitioners and limitations on the use of disqualified entities by registered practitioners. • Last minute amendments by the Greens to require tax or BAS agents to "dob in" other tax or BAS agents where the first tax or BAS agent has become aware of a "significant" breach of the Code of Professional Conduct by the second tax or BAS agent.	Assented 27 November 2023.
Treasury Laws Amendment (Making Multinationals Pay Their Fair Share – Integrity and Transparency) Bill 2023 • Requires Australian public companies to disclose information about their subsidiaries in their annual financial reports for financial years commencing from 1 July 2023. • Tightens the thin capitalisation rules for MNEs to limit debt deductions to 30% of EBITDA in most circumstances, also commencing from 1 July 2023.	Before the Senate (since 9 August). Contains the important changes to the thin capitalisation rules.
Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023 • $20,000 instant asset write-off for small business entities • Small business energy incentive • New class of deductible gift recipients • Deductible gift recipients—specific listings • Exemption for Global Infrastructure Hub Ltd • Income tax amendments for updates to the accounting standard for general insurance contracts • Non-arm's length expenses of superannuation funds • AFCA scheme	Before the House of Representatives (since 15 September).

Status of Tax Matters @ 24 November 2023	
Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 • PwC response — Promoter penalty law reform • PwC response — Extending tax whistleblower protections • PwC response — Tax Practitioners Board reform • PwC response — Information sharing • Petroleum resource rent tax deductions cap Note: The Information Sharing Bill gives the ATO and TPB the ability to disclose protected information with prescribed professional disciplinary bodies (to be defined) where the ATO or TPB reasonably suspects acts or omissions may constitute a breach of the prescribed disciplinary body's code of conduct or professional standards (EM p4).	Before the House of Representatives (since 16 November)
Scheduled Parliamentary sitting days	
The final Parliamentary sessions for 2023 is in the week of 4th December with the Senate sitting 4th – 6th and both Houses sitting on 7th.	
Appeals	
Bechtel Australia Pty Ltd v FC of T [2023] FCA 676 (see TDG Notes August 2023)	The taxpayer has appealed to the Full Federal Court against Logan J's Federal Court decision.
Automotive Invest Pty Limited v FCT [2023] FCAFC 129 (see TDG Notes September 2023)	The taxpayer has applied to the High Court for special leave to appeal against the decision of the Full Federal Court.
Buzadzic v FCT [2023] FCA 954 (see TDG Notes September 2023)	The taxpayer has appealed to the Full Federal Court against the decision of the Federal Court.
Bendel and Commissioner of Taxation [2023] AATA 3074 (see TDG Notes November 2023) (*Commissioner of Taxation of the Commonwealth of Australia v Steven Bendel & Anor* VID903/2023)	The Commissioner has appealed to the Full Federal Court against the AAT decision.