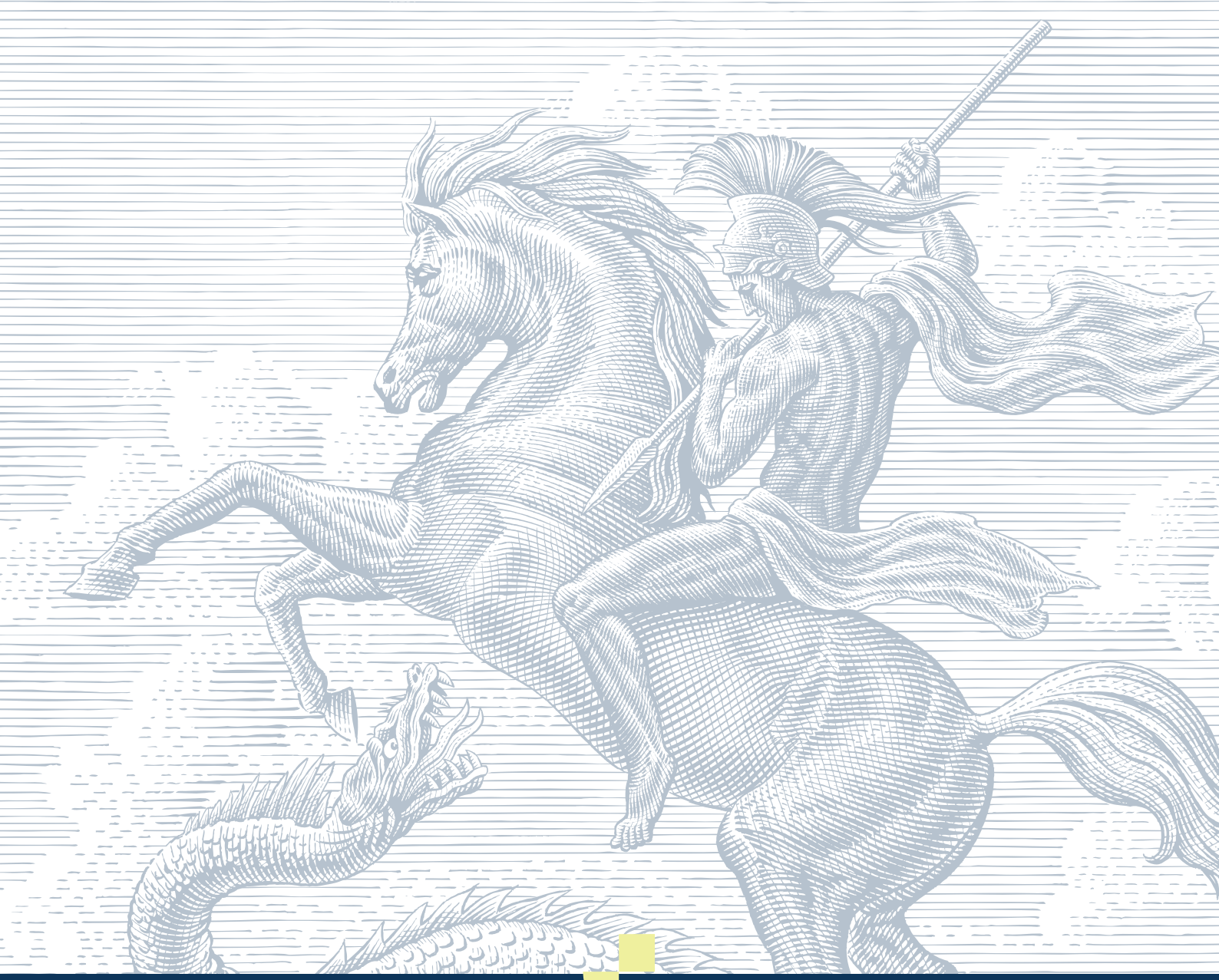
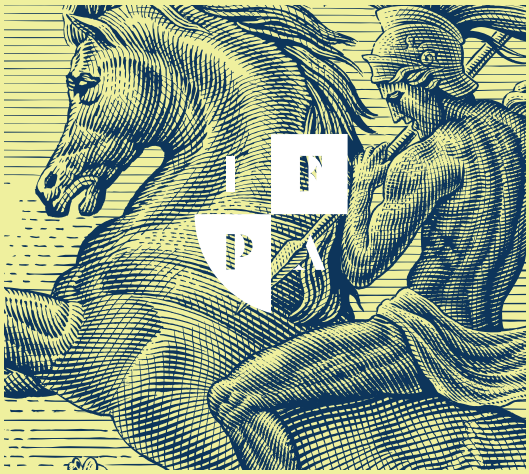


Monthly Tax Update

March 2024

INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA



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Monthly Tax Update

March 2024

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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Tax Agents'registration terminated – but extra time given to get affairs in order

What you need to know

It is somewhat disastrous for a tax agent not to have his/her/its own tax affairs in order – but it is fatal if there is a failure to fully comply with orders of the Tax Practitioners Board in relation to those tax affairs.

Facts

The applicants were a registered individual tax agent and tax agent company of which the individual was a director. The conduct in question involved a lengthy history of late lodgements and tax debts from about 2013, and failure to comply with orders of the Tax Practitioners Board (TPB) made in November 2019.

Specifically, the TPB found that the applicants breached s30-10(2) of the Code of Professional Conduct (the Code) of the *Tax Agent Services Act 2009* (TASA) by, among other things, failing to lodge his personal tax returns for 8 years (ie for the 2011 to 2017 income years) by the required time and failing to have his company lodge tax returns and BASs. The individual agent also failed to pay director penalties of some $480,000.

In December 2021, the TPB terminated the registrations of both applicants (effective from 20 January 2022) for failing to fully comply with an earlier written order to bring their lodgements up to date by 31 December 2019, and for failure to enter into a payment arrangement with the ATO in relation to their tax debts.

Both applicants were advised that they could re-apply for registration in the future, but must demonstrate that they met the eligibility requirements of the TASA prior to any application for re-registration.

The applicants applied to the AAT seeking review of the decision claiming that their failure to maintain their tax affairs up to date was only ever an oversight and not intentional. The individual applicant also pointed out that in the years in question he suffered various hardships including health issues, storm damage to his home and a serious a car accident.

The applicants also offered, as an alternative to the termination of their registration, that they report to the TPB every six months for two years to confirm ongoing compliance with their tax obligations. They also offered an arrangement whereby only the registration of the individual applicant be terminated, who would then resign as a director of the company, so that it could appoint a new director and continue in operation. This was rejected by the TPB.

Issue

Was termination of the registration of both the individual agent and his company warranted in the circumstances.

Decision

The AAT was satisfied that termination of the registration of the applicants was warranted in the circumstances given the nature and duration of the breaches and the failure to properly comply with the subsequent directions of the TPB.

In particular, the AAT found that the applicants failed to comply with the taxation laws in the conduct of their affairs (per s30-10(2) of the Code) and failed to respond to requests and directions from the TPB in a timely, responsible and reasonable manner (per s30-10(14) of the Code).

The AAT also said that given the serious nature of the breaches (which had occurred over many years and resulted in substantial debts), termination of their registration was appropriate - notwithstanding the difficulties the individual applicant had faced in that period.

In reaching this decision, the AAT also rejected the applicants "compromise" proposals.

Accordingly, the AAT concluded that the breaches of the Code were so serious that the appropriate sanction in each case was the termination of their registration pursuant to s30-30 of the TASA. In these circumstances, the AAT also found that it was unnecessary to determine whether the applicant was a fit and proper person pursuant to s20-5(1)(a) and s20-5(3)(a) of the TASA.

However, the AAT ordered that the termination order not take effect until 1 July 2024 (and not the original date of 20 January 2022) to give the applicants "further time to arrange payment of the outstanding debts and otherwise get their tax affairs in order".

Peroy and Tax Practitioners Board **[2024] AATA 12 (10 January 2024)**

Mixed results in default assessments review

What you need to know

Yet another taxpayer on the receiving end of multiple default assessments has failed to discharge the onus of proving that the amended assessments were excessive, although she did succeed in almost halving the shortfall penalties and escaped the Commissioner grasp altogether in the initial year on the basis there was no evidence of fraud or evasion. The Tribunal also gave her some SIC relief for a 38-months period of apparent ATO inactivity in progressing the objections.

As many of these cases have in common, the applicant's lack of records left her unable to demonstrate that numerous deposits into her bank accounts did not represent assessable income.

Facts

The applicant was a unit holder, director or limited partner in nine group entities in a complex financial planning, wealth management and real estate group controlled by her husband. She also worked in the business as an office administrator, which included having responsibility for making MYOB entries for numerous group transactions. She had no formal accounting qualifications and relied on professional advisers where considered appropriate.

Over the years in dispute (2009 to 2013) an ATO audit identified multiple deposits into the applicant's bank accounts, sourced from group entities. These amounts had not been included as assessable income in the applicant's income tax returns as lodged and after making extensive enquiries the ATO concluded that more than $6 million in deposits represented the applicant's assessable income. There were also interest deductions totaling almost $600,000 that were disallowed.

In due course amended assessments for the five years were raised, including for the 2009 year which by then was out of time and required a finding of fraud or evasion. Base penalty amounts were imposed at the rate of 75% (deliberate disregard of a taxation law), with the "repeat offender" 20% surcharge added in the 2010 to 2013 income years.

The objections were eventually disallowed (after a 5½ year delay) and the taxpayer sought a review of the objection decisions on both the taxable income adjustments and the penalty assessments.

Onus on applicant to establish her correct taxable income

Unlike the proceedings in *Haritos* (2015), there was no agreement with the Commissioner in this case to narrow the issues in dispute. The Tribunal therefore ruled that it wasn't enough for the applicant to pick holes in the Commissioner's analysis of bank deposits. She was required to positively prove what her correct taxable income was for each of the years in question – *Dalco* (1990), *Gashi* (2013), *Bosanac* (2019), *Ross* (2021) and *Buzadzig* (2023). This was a hurdle she was unable to surmount.

Analysis of deposits

Showing an impressive grasp of the evidence before her, senior Tribunal member Grigg embarked on the excruciatingly detailed exercise of considering each of the disputed deposits over the five-year period. Almost without exception, the Tribunal concluded that the applicant had failed to demonstrate the deposits were not her assessable income. One wonders whether, armed with better business records and some support from witnesses that were never called, she might not have achieved a better outcome.

The applicant was relying mainly on two strands of argument:

- some of the deposits represented loans made to the applicant or the repayment of loans she had previously made to the various group entities; and
- other deposits represented the proceeds from the redemption of units in various unit trusts, which gave rise to concessionally taxed capital gains.

As regards the alleged loans, the Tribunal was not convinced by the various journal entries made.

> *"The most persuasive evidence of the existence of a loan is a written loan agreement. If that does not exist, other written communications between the parties to the loan (such as email correspondence or text messages) can be supportive of the existence of a loan. Here there are no loan agreements, no other written documentation to confirm loan agreements were entered into, and no corroborative evidence of any oral arrangement."* [at 257]

On the purported redemption of units, the Tribunal was not even convinced the allegedly redeemed units had been issued in the first place. No evidence was offered regarding any applications for units, any determinations by the trustee to issue units, the issue of unit certificates, the maintenance of a register of unit holders or any written applications for the redemption of units. All these steps were prescribed under the relevant trust deeds, but were not apparently followed.

The failure to create these basic records probably lay at the feet of others, but the applicant has ended up paying the price.

Interest deductibility

Interest deductions were claimed in relation to a number of Westpac commercial bill facilities. These facilities were either for the issue of new units in the unit trusts or the refinancing of units previously issued.

However, because of the Tribunal's strong doubts about whether the units were ever issued, the Tribunal was not disposed to allow any claims for interest expenses without further and better corroborating evidence from the applicant or other witnesses.

Fraud or evasion – 2009 year

Relying on PS LA 2008/6, the Tribunal held this was not a case of fraud or evasion and the Commissioner was therefore not authorised to amend the applicant's 2009 year of income.

In particular, the Tribunal felt that the applicant had not deliberately concealed or omitted assessable income; she had not concealed assets; she had not falsified any documents or otherwise engaged in

illegal activities. The bulk of the income adjustments fell into the later years, but this is a useful partial victory for the applicant.

Penalties

Owing to the applicant's financial illiteracy and her reliance on external advisors, the Tribunal found she had been reckless rather than shown intentional disregard of a taxation law, and reduced the base penalty amount to 50%.

After noting that the imposition of the 20% uplift in the base penalty amount happens automatically and is not a matter for discretion, the Tribunal then used the general remission powers under s298-20 Schedule 1 TAA 1953 to reduce the uplift to nil, consistent with PS LA 2012/5:

> *"17E. As noted in paragraph 15K and Example 8 of this Practice Statement, remission of the 20% uplift is usually given where:*
>
> - *a BPA is increased because 2 or more penalties were assessed at the same time*
> - *the entity has not been advised of a previous penalty (usually because of concurrent calculation), and*
> - *the behaviour is not intentional disregard of the law."*

The Tribunal also held that the "safe harbour" provision in s284-75(6) Schedule 1 TAA 1953 did not apply as the applicant had not demonstrated that she had provided her accountant with "all relevant taxation information".

Shortfall interest charge (SIC)

And finally, in another small win for the applicant, the Tribunal remitted 38 months' worth of SIC to nil on the basis that the Commissioner had seriously delayed the finalisation of the objections.

Comment

An over reliance on journal entries can be dangerous. Practitioners should note the Tribunal's comments about the need to be able to produce evidence of underlying transactions such as loans that the journal entries record in the books of the entity.

***WYVW v C of T* [2023] AATA 4242 (21 December 2023) Senior Member DK Grigg**

Work related expenses? Not without substantiation.

What you need to know

A taxpayer has failed to have amended assessments overturned as he was unable to provide evidence to support the deductions claimed.

Facts

The taxpayer, Robert Copley, is the Managing Director and 50% shareholder of The Vines Real Estate (WA) Pty Ltd (Vines Real Estate). He is also a director and 50% shareholder of Copley & Associates Pty Ltd (Copley & Assoc).

For the income years 2018, 2019 and 2020 the taxpayer received income as a result of his employment with Vines Real Estate as well as director's fees of $5,400 from Copley & Assoc, and claimed tax deductions against his income.

The ATO conducted a pre-issue audit for the 2020 income year which delayed the issuance of assessments for all three years. During the audit supporting documents were requested to substantiate the deductions claimed, but the supporting documents were never provided. Therefore, on 10 August 2021, the ATO issued amended assessments for all three income years denying all deductions claimed.

On 5 October 2021 the taxpayer's tax agent lodged an objection and took the opportunity to claim additional "other work-related expenses" attaching supporting documents including bank and credit card statements, vehicle expenses and telephone bills. The additional claims almost doubled the deductions in each of the three income years.

On 12 January 2022 the ATO allowed some of the deductions, but continued to deny work related car expenses, other work-related expenses, and gifts and donations.

The taxpayer appealed the denial of these claims to the AAT, claiming $151,189.55 in total deductions, being:

Income Year	Car Expenses	Other work expenses	Gifts and donations
2018	$6,309.00	$42,273.55	-
2019	$8,123.00	$41,893.00	$593.00
2020	$7,109.00	$44,682.00	$207.00

ATO

The ATO submitted that Mr Copley had not met his burden under s14ZZK as he had failed to establish that the expenses were incurred by him, and that he had failed to establish a nexus between the wages that he derived from employment with Vines Real Estate or from the director's fees that he received from Copley & Assoc, and the expenses claimed as deductions.

Taxpayer

The taxpayer submitted that the expenses that he claimed were legitimately incurred to earn his income. He stated that he would not make any claims that were not genuine.

He explained that Copley & Assoc was "non-operational" but that it submitted an income tax return each year. He would pay his own money into Copley & Assoc as that it did not derive income.

Vines Real Estate generated the sales income and claimed business expenses such as advertising. However, the taxpayer claimed any personal expenses in his individual income tax return. His evidence was that he was personally paying for all the expenses claimed regardless of whether they were in the name of Vines Real Estate or Copley & Assoc.

AAT

The three issues for the AAT to determine were whether:

- The expenses claimed were incurred in gaining or producing assessable income (as required by s8-1(1) of the ITAA97).
- The expenses claimed were of a capital, private or domestic nature (if so, no deduction is allowable pursuant to s8-1(2) of the ITAA97).
- The taxpayer can substantiate the expenses pursuant to the record keeping requirements in Division 28 and Division 900 of the ITAA97.

The AAT's task was complicated by the fact that the taxpayer was unable to substantiate many of the expenses, making it difficult to assess whether the expenses were incurred in gaining or producing assessable income or were of a private or domestic nature.

Work-related car expenses

- The expenses were being claimed for a vehicle that was owned by Copley & Assoc. ITAA97 s28-90 was not met because the taxpayer did not hold the car, Copley & Assoc did. The expenses were incurred by Copley & Assoc and not the taxpayer.
- The taxpayer's logbook did not comply with ITAA97 Subdivision 28-G. For example, the start and finish times encompassed a whole day, and the purpose was described as "work-various/ personal" "work-various" or "personal". This is insufficient to satisfy Subdivision 28-G, which requires, amongst other things, an entry for each "journey" (unless two or more journeys are made in a row which can be recorded as a single journey) and specification of why the journey was made.
- The taxpayer did not have any receipts to substantiate fuel expenses. He only had bank account transaction statements in his name and in the name of Copley & Assoc showing purchases at petrol stations. A transaction statement does not comply with ITAA97 s900-115 because it is not clear what goods or services were acquired. That is, bank account transaction statements are an insufficient substantiation that the expenses were incurred (see page 831 of our *Tax Summary 2023-24* for further discussion around the inadequacies of bank statements).

Other work-related expenses

- The taxpayer claimed interest on seven credit cards, which the taxpayer was basically using as working capital. However, he did not and was unable to apportion charges on the cards between work expenses or personal expenses, despite some of the charges being clearly of a personal nature. In short, the interest expenses were not sufficiently substantiated or apportioned.
- The taxpayer claimed telephone expenses which he stated comprised a work-related component of 70% - 80%, although he "conservatively" estimated 40% - 50%. However, the phone bills were in his wife's name.
- PS LA 2001/6 Verification approaches for electronic device usage expenses, states that a taxpayer needs "to establish that expenditure has been incurred and the extent of deductibility". In limited cases taxpayers can calculate "the work use proportion of expenses, by providing a reasonable estimate. This will only be accepted where the claim is small and the taxpayer can demonstrate to your satisfaction that their estimate was reasonably likely under their given circumstances" [PS LA 2001/6 para. 4]. However, the AAT was not satisfied the estimate was reasonable given the account was in the wife's name and the lack of a log book or any other documentation to apportion business or personal use.
- The taxpayer sought to deduct other expenses. However, these were either, only supported by bank statements, or were paid by Copley & Assoc, not the taxpayer.

Gifts and donations

- Again, the taxpayer was unable to provide sufficient evidence or supporting documentation to substantiate any of these expenses.

Decision

- The taxpayer failed to satisfy the burden under s14ZZK of the *Taxation Administration Act 1953* (Cth) to establish that the amended assessments were excessive or otherwise incorrect and what they should have been.
- Additionally, the taxpayer failed the record keeping requirements in Division 28 and Division 900 of the ITAA97.

The reviewable decision was affirmed and amended assessments stood.

Comments

The AAT did note that:

- The taxpayer "was acting honestly and that he was only attempting to claim for expenses he thought he was entitled to"; and
- The taxpayer is now aware of his record keeping requirements and has restructured his affairs to help his compliance".

One wonders if the taxpayer's tax agent took any learnings out of the decision.

Copley and Commissioner of Taxation (Taxation) **[2024] AATA 8 (8 January 2024)**

Basketball shoes and R&D

What you need to know

The manufacture and testing of prototype basketball shoes for Matthew Dellavedova (MD), the former NBA and Australian Olympic basketball player who is now with Melbourne United, was held by the AAT not to qualify as eligible R&D activities since it was not a scientific process, but more like a trial and error problem solving exercise that led to a customised shoe which met the MD's personal requirements.

Facts

Active Sports Management (ASM) conducts a business of importing and selling sports apparel, footwear, accessories and similar items, as well as the design of products that are uniquely Australian. During the 2016 and 2017 income years ASM conducted prototyping tests and experiments on shoes that would best suit the needs of MD.

The process involved making incremental changes to the outsole, insole, a revised mesh upper, the toe box, ankle support and tongue. In all, six prototypes were manufactured by PEAK, a Chinese shoe supplier, with each new iteration incorporating feedback on the previous versions. For each new prototype Mr. Bickley (a director of ASM) would wear the shoes first before providing them to MD for testing and evaluation in playing conditions. Around 40 pairs of the prototype shoes were given to other elite basketball players for their evaluation. The sixth prototype is also the production version and the Delly1 is currently available from sports stores and on-line.

ASM sought to register its activities in relation to the development of the Delly1 with the respondent, Industry Innovation and Science Australia (IISA) as core R&D activities. However, IISA declined to grant the registration on the basis that the claimed activities were neither core nor supporting R&D activities.

That decision was confirmed following an internal review and the applicant has sought a review of that decision by the AAT.

Law

The legislation, in Division 355 ITAA97, refers to the conduct "in a scientific way, experimental activities for the purpose of generating new knowledge or information." – object clause in s355-5(2).

Core R&D activities are defined in s355-25 as:

> *"... experimental activities:*
>
> *(a) whose outcome cannot be known or determined in advance on the basis of current knowledge, information or experience, but can only be determined by applying a systematic progression of work that:*
>
> *(i) is based on principles of established science; and*
>
> *(ii) proceeds from hypothesis to experiment, observation and evaluation, and*

leads to logical conclusions; and

(b) that are conducted for the purpose of generating new knowledge (including new knowledge in the form of new or improved materials, products, devices, processes or services).”

Consideration

While there was evidence of incremental improvements to the prototype based on successive evaluations of each version by Mr. Bickley and MD, the Tribunal had some reservations about whether the process was scientifically based. Nor was it clear what hypothesis was being tested, other than whether the process can result in a bespoke basketball shoe that met MD’s subjective requirements:

> *“It is accepted that the requirements of Mr Dellavedova could not have been determined in advance. However, I am not convinced that this is an outcome directed to a technical or scientific uncertainty. It is a subjective outcome and one outside of the control of the applicant.”*

and

> *“There is no evidence about how Mr Dellavedova actually tested each prototype, other than that he wore each prototype either in training conditions or during play. The testing undertaken by Mr Dellavedova did not consist of repeatable, verifiable tests capable of isolating the effects of each of the design modifications actually being tested.”*

The Tribunal ultimately upheld the decision by IISA, ruling that the claimed activities were not eligible R&D activities.

Active Sports Management Pty Ltd v Industry Innovation and Science Australia **[2023] AATA 4078**
Senior Member A Poljak

Property development an enterprise with GST attaching

What you need to know

The AAT has held that development activities by a property owner constituted an enterprise and therefore the sale of the property was subject to GST.

Facts

The taxpayer, Mr Paul Lance, owned a historic property in Western Australia known as Sutton Farm & Graveyard (Sutton Farm). Sutton Farm comprised of a single parcel of land of approximately 1.47 hectares at 15 Apollo Place Halls Head. The taxpayer purchased the property on 13 June 2013 for $1,600,000 and settled the purchase on 15 December 2013.

At the time of purchase there were some ultimately unhelpful local newspaper articles, including one claiming that the taxpayer planned to develop and lease out Sutton Farm as a restaurant, wine bar or coffee house.

According to the Western Australian Register of Heritage Places, Sutton Farm consists of the following three structures:

a. a homestead located roughly in the centre-eastern portion of the lot;

b. a large barn towards the north-west boundary; and

c. a single men's quarters located towards the south-west of the lot.

All three structures were built in the Victorian Georgian style together with a graveyard which are of cultural historical significance for a number of reasons, including rarity value as a collection of farm buildings dating from the 1860s built of local limestone.

Sutton Farm was not capable of being occupied and did not provide shelter and basic living facilities. The buildings were at best empty shells that could have provided rudimentary shelter only.

As a result of the heritage and historical value of Sutton Farm within the small Halls Head community, the taxpayer faced seemingly never-ending obstacles to any sort of development of the property.

After three years of ownership, in 2017 the taxpayer attempted to sell Sutton Farm. He stated his decision to sell was due to the delays, setbacks, and seemingly constant discussions with the Council and other government departments. However, there was no interest in purchasing the property.

Sutton Farm was eventually sold for $4,250,000 under a contract for sale of land dated 24 November 2020 which settled on 3 February 2021, without heritage agreements or access management plans being completed.

On the first page of the sale contract, the box adjacent to the statement "GST is NOT applicable to this Contract" had been ticked. The taxpayer did not report the sale of the property in his Business Activity Statement for the month of February 2021.

Taxpayer

The taxpayer made two arguments to counter the ATO's GST assessment.

1. The supply was not a taxable supply on the basis that it was an input taxed supply of residential premises

This argument fell away rather quickly due to the dilapidated state of the Sutton Farm buildings, as described above. Indeed, the taxpayer had moved a caravan onto the land in which to stay from time to time which had solar power, ablution facilities and a kitchen. Not something that would have been necessary if the Farm buildings were "capable of being occupied, as a residence or for residential accommodation".

2. That the sale of Sutton Farm was not made in the course or furtherance of an enterprise carried on

In his oral evidence the taxpayer stated:

a. He always intended to subdivide Sutton Farm into four lots.

b. He intended to live in the heritage farmhouse in the centre lot with his wife.

c. One subdivided lot would be given to each of his son and daughter to build houses.

d. He wanted to renovate the farmhouse and retire there and was not interested in commercialising Sutton Farm.

e. He agreed that he sold Sutton Farm for a profit but maintained that he only sold it reluctantly because he was tired of dealing with the Council and the stress was affecting his health.

AAT

As the taxpayer conceded that the property was not "residential premises" the AAT did not need to consider this argument.

On the second question the AAT determined that the taxpayer's development works were in "the form of a business", in particular, because of the scale of the operations that the taxpayer was involved in, including the rezoning and subdividing of Sutton Farm, as well as the amount of capital invested by the taxpayer in the purchase of the property and development works.

As such, the sale of Sutton Farm was a commercial transaction as it was undertaken "in the course or furtherance" of the "carrying on" of an enterprise. This was because the sale was for the purpose of achieving the goal of realising the value that had been added to Sutton Farm.

As a result, the AAT found that the supply of Sutton Farm was a taxable supply in respect of which the taxpayer was liable to pay GST.

Comments

While this case has drawn some media attention speculating that this is a sizeable shift in interpretation which may have significant consequences for property owners, the writer would temper that concern somewhat.

The case reeked of a taxpayer who had made poor (tax) plans from the outset and then wanted to backtrack on everything when it started to go pear shaped.

The newspaper articles made at the time the taxpayer purchased the property may have reported flippant remarks made to, as the taxpayer claimed, attract prospective purchasers [61]. However, the subsequent actions taken by and on behalf of the taxpayer, including plans to further subdivide the property into approximately 15 lots, speak to this being his intention (for GST purposes) at the time of acquisition and for a significant period thereafter.

And although the purpose may change overtime, no subsequent amendments were made to correct overclaimed input credits. Indeed, evidence from the taxpayer's accountants spoke of an enterprise which commenced at the time of the first subdivision [73] and that the taxpayer "would be entitled to claim GST on the subdivision of Apollo place as he was going to sell several blocks of land that would be subject to GST".

Additionally, the taxpayer's evidence contradicted statements his own lawyers had made to the ATO around the intended purpose of the property.

But most telling was a statement the taxpayer had provided to the ATO in June 2021 which the AAT found to be

> *"...a more authentic account of events as it is coherent with other contemporaneous documents, including those lodged with the Council for the subdivision of Sutton Farm allowing for further development down the track. It also lines up with the fact that Mr Lance attempted to sell and eventually sold Sutton Farm and repaid his loans"* [77]

Finally, the AAT found that the taxpayer "not a reliable witness" and that there were "numerous inconsistencies and shortcomings in his claims".

This is a story we have heard all too often. Had the purported change of purpose been documented and steps been taken to rectify past input tax claims at that point, the taxpayer's assertions would have carried more weight. Being on the same page as his accountants and lawyers would also have helped. However, once again, a taxpayer has been found wanting when it comes to evidence supporting their actions and assertions.

The writer feels this is more of the same rather than a new direction.

Lance and Commissioner of Taxation (Taxation) **[2024] AATA 11 (5 January 2024)**

NSW Supreme Court upholds Departure Prohibition Order

What you need to know

A plaintiff who had previously breached a freezing order and (together with associates) owed the Commissioner almost $45 million was unsuccessful in having the court set aside a Departure Prohibition Order (DPO) preventing him from leaving Australia without first settling his tax debt.

Background and facts

The ATO has been actively chasing Mr. Gazal for this tax debt for some years now, with freezing orders over various assets being made by the NSW Supreme Court in late 2020 and early 2021. The tax debts arose from irregularities around input tax credits claimed by Mr. Gazal and associated entities involved in the construction industry.

The freezing orders were breached on a number of occasions, with some $6.5 million being withdrawn from frozen bank accounts after the orders were made. Contempt of court proceedings have not so far been instituted for those breaches, and the Commissioner may yet have recourse to recover some or all of these funds from the recipient entities.

Eager to get the debt off its books, the ATO negotiated a deed of settlement with the plaintiff in September 2023 under which payment of $18 million would be accepted in full satisfaction of the $45 million tax debt. The $18 million was to be paid in three equal instalments of $6 million in December 2023, January 2024 and February 2024. Not a bad deal if Mr. Gazal can get his hands on that sort of money. It turns out he couldn't (or wouldn't).

In the meantime, the ATO thought it would be prudent to prevent Mr. Gazal (who has a Lebanese background) from absconding without clearing up his tax debt by issuing a departure Prohibition Order. This litigation is about the validity of the DPO.

The DPO also triggered off a medical emergency, with Mr. Gazal suddenly having to travel to Switzerland and Slovenia by 4 January 2024 for urgent lifesaving medical treatment involving stem cells. His legal representatives urged the Commissioner to allow their client to undertake this vital travel by issuing a Departure Authorisation Certificate (DAC), but by the time of the hearings (2nd and 3rd January 2024) this had not been actioned by the Commissioner – possibly because of the holidays or because the Commissioner was not inclined to issue the DAC, or both.

The law

The law around DPOs is to be found in Part IVA of the *Tax Administration Act 1953* – not to be confused with its better known cousin that resides in the *Income Tax Assessment Act 1936* (ITAA36).

Where someone has a tax debt, and the Commissioner reasonably holds the belief that issuing a DPO is desirable to prevent that person from leaving for foreign shores without wholly discharging that tax debt or at least making satisfactory arrangements to do so, the Commissioner may issue a DPO.

In interpreting the law, the court quotes Young J in *Dalco* (1987):

> *"The Commissioner is to believe on reasonable grounds that it is desirable to stop a person leaving Australia because it is necessary to collect the tax that is owed to the government and that that discharging of the tax liability will be affected by the person going overseas."*

Arguments and consideration

The plaintiff argued, among other things, that the Commissioner had issued the DPO for an improper purpose, namely, to punish Mr. Gazal for a range of financial misdemeanors rather than to fulfil the statutory mandate of s14S TAA 1953.

A briefing note prepared for the ATO decision maker includes what could be regarded as derogatory remarks about the plaintiff's earlier conduct:

> *"We recommend that the issue of the DPO to Nahi Gazal be approved. His egregious behaviour has demonstrated a significant and blatant disregard of the tax system. He and his accomplices represent a significant risk to revenue; the fraudulent GST refunds they have claimed have been funnelled to multiple accounts, some of which may still be accessible to the Gazal Group. We believe there is likelihood that he would flee to Lebanon [REDACTED] where he maintains close family ties."* [at 44]

The court rejected those arguments, merely noting that the requisite elements in the law were present as long as the Commissioner reasonably held the required belief.

Somewhat ingeniously, Mr. Gazal's representative also submitted that preventing her client from leaving Australia will not make a scrap of difference to the Commissioner's prospects of collecting any part of the debt since Mr. Gazal (allegedly) has no money nor access to any money.

The court responded to this argument by noting that there is nothing in the law to support the argument that the Commissioner should bail out of a DPO just because a taxpayer has minimal or no assets. The court also observed that there is nothing in the law to suggest the moneys sought to be recovered have to be met out of the taxpayer's own resources.

Advantages for Commissioner from DPO

The court may well have shared the Commissioner's suspicion about the existence of undisclosed assets, although it didn't say that in so many words. However, the court did set out various ways in which the Commissioner's prospects of collecting some or all of the tax debt would be enhanced by keeping the plaintiff on Australian soil. These include:

- pursuing contempt of court proceedings over the breach on the earlier freezing order, which could result in imprisonment;
- serving notices under Division 353 Schedule 1 TAA 1953 requiring Mr. Gazal to disclose information about assets being held on his behalf; and/or
- bankrupting the plaintiff and asking his trustee in bankruptcy to examine him under the *Bankruptcy Act 1966* with the aim of identifying undisclosed assets. [at 74]

None of these possible steps could be taken unless Mr. Gazal remains in Australia and is able to be served with legal process to initiate them.

Medical issue

Preventing someone from undertaking travel in order to receive life preserving medical treatment that may not be available in Australia is a very serious matter. Yet the court has supported the Commissioner's decision on this point.

The reasons become apparent from the judgement – there were far too many inconsistencies in the written evidence submitted in support of the claimed urgent medical treatment for the plaintiff to be believed.

The court also wondered why he waited 10 days after the DPO was issued on 11 December 2023 before raising the issue of the urgent need for the lifesaving medical treatment. Instead, he first renegotiated the due date the first $6 million payment from 23 December 2023 to 19 January 2024 and only then did he put his hand up and asked for permission to travel to Slovenia for urgent medical treatment by 4 January 2024. The court also noted a reference in the ATO's internal briefing note to Mr. Gazal's previous form in "openly and deceitfully claiming illnesses".

One can only hope that the Commissioner and the court have got this one right. Otherwise one is reminded of the Gaelic inscription on the gravestone of the late Irish comic Spike Milligan, which translates into English as:

> *"I told you I was ill"*

Gazal v Deputy Commissioner of Taxation [2024] NSWSC 1 (8 January 2024) Slattery J

INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA – WEBINARS

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:
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Stage 3 tax cuts – an opportunity?

As widely anticipated, in his address to the National Press Club on 25 January the Prime Minister announced the following changes to the Stage 3 tax cuts:

- Reduce the 19% tax rate to 16% (for incomes between $18,200 and $45,000).
- Reduce the 32.5% tax rate to 30% (for incomes between $45,000 and the new $135,000 threshold).
- Increase the threshold at which the 37% tax rate applies from $120,000 to $135,000.
- Increase the threshold at which the 45% tax rate applies from $180,000 to $190,000.

The *Treasury Laws Amendment (Cost of Living Tax Cuts) Bill 2024* was tabled in the House on 6 February 2024 and is expected to receive little resistance on its passage through Parliament.

Therefore, following the announcements and assuming legislation is passed as first read, the Australian resident personal income tax rates from 1 July 2024 will be:

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

Planning opportunities?

As the saying goes, change brings opportunity, and that is true in this case. Every individual taxpayer should receive a tax benefit to some degree from the Stage 3 tax cuts. Therefore, with income being taxed at lower rates from 1 July 2024 what should you be doing now?

Well firstly taxpayers must remember that the tax laws have anti-avoidance provisions to prevent activity, the sole or dominant purpose of which is to gain a tax advantage. So, the following thoughts should be read in that context.

Bringing deductions forward

Bringing deductions forward into the 2024 income year will give you a lower tax bill this year and higher taxable income next year, but in a lower taxed environment, with any tax savings being permanent. So, what can you do?

Gifts and donations

If you have a tradition of gifting and donating, maybe to telethons and appeals that occur later in the year, consider making those donations to the charities before June. You may not get the kudos of your name on TV, but all charities are happy to receive donations regardless of the time of year, and if the taxman can give it an extra boost, why not?

Rental properties

Do you have a rental property that's looking a bit sad and could do with a coat of paint, or perhaps just needs the gutters cleaned out after a windy summer. Why not get on to it now? You'll be bringing the deduction into 2024 reducing your rental income, and keeping your tenants happy at the same time.

Superannuation

Consider making after-tax contributions into your superfund. But be mindful of contribution caps, Division 293 tax on contributions and seek financial advice prior to taking any action.

Sole traders

Do you have a small business which you operate through your own name? Consider some of these possibilities:

- **Depreciation:** Could you do with a new laptop or other tools and equipment? Currently small business entities can immediately deduct the business portion of 100% of the cost of most depreciating assets costing up to $1,000. However, with the *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023* currently before Parliament, this threshold may soon increase to $20,000 for the 2023-24 income year.
- **Bad debts:** Have a receivable you know isn't going to pay, but you just haven't wanted to admit it? Consider writing it off and take the deduction now. But remember, the debt must be more than simply doubtful and there are requirements in section 25-35 of the *Income Tax Assessment Act 1997* which must be met (see our *Tax Summary 2023-24* at paragraph 14.160).
- **Obsolete stock:** Is that box of polaroid cameras really going to move anywhere other than a museum? Write it out of stock before 30 June 2024 and take the deduction.
- **Logbook:** When was the last time you kept a logbook to record your business kilometres? Has your business travel increased post-COVID? Your car expenses claim may be higher than you think. Consider starting a new logbook. Whilst a logbook must be kept for 12 weeks, the 12 weeks may overlap two income years provided it includes part of the year. And make sure you have recorded your odometer readings.
- **Bring forward deductible expenses:** Buying two boxes of printer paper? Buy three. Stock up on printer ink, you never know when you're going to have that big print run you hadn't accounted for. Consider what other consumables you use and stock up for your short term needs before 30 June 2024.
- **Prepay deductible expenditure:** All taxpayers may claim deductible prepaid expenditure where the expenditure is below $1,000 (excluding GST) or the expenditure is required by law (e.g., car registration fees). Where the expenditure is $1,000 or more, small business entities can deduct the full amount of prepaid expenditure if it relates to a period of 12 months or less.

  Note that this is also available to non-business expenditure of individuals (e.g., work-related expenses or rental property expenses).
- **Insurance:** Would your business insurance really cover your losses in a disaster? Consider your level and type of cover now and take out new or increase existing policies before 30 June 2024 if inadequate.
- **Employee bonuses:** Confirm commitments to pay employee bonuses are made by 30 June 2024, and don't forget that PAYG withholding must be withheld when the bonuses are paid.

- **Skills and training:** Take advantage of the small business entity skills and training boost before it ends on 30 June 2024. The Boost provides enables SBE's to deduct an additional 20% of expenditure that is incurred for the provision of eligible external training courses to their employees by registered providers in Australia.
- **Energy Incentive:** Take advantage of the small business entity energy incentive which provides a bonus deduction of 20%. Eligible assets include heat pumps and electric heating or cooling systems, and demand management assets such as batteries or thermal energy storage. Eligible assets or upgrades will need to be first used or installed ready for use by 30 June 2024.

  Note: this incentive is provided for in the same Bill as the $20,000 instant asset write-off provisions, which is currently before Parliament.

Defer income

Push income into the 2024-25 year where it will be taxed at lower rates.

Salary sacrifice

Consider salary sacrificing into super before 30 June 2024. As above, be mindful of the contribution caps, Division 293 tax on contributions and seek financial advice prior to taking any action.

Interest

Ensure term deposits mature after 30 June 2024.

TR 2024/1: Composite items – finalised ruling

What you need to know

Draft TR 2017/D1 (the original draft) 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 original draft and subsequent developments in tax law, a revised draft TR 2023/D2 (the revised draft) was released on 4 October 2023.

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

The revised draft has now been finalised as TR 2024/1 (the finalised ruling).

The finalised ruling sees the examples being transferred into Appendix 1 with some minor clarification in these examples, however, there has been no significant changes from the revised draft.

[TDG Notes December 2023]

Background

Division 40 of the *Income Tax Assessment Act 1997* (ITAA97) provides a deduction for the decline in value of "depreciating assets"[1] 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.

1 Note the concept of "plant" for depreciation purposes was replaced with the concept of "depreciating asset". However the former is still relevant for other provisions of the tax law (for example, the cost of "plant" is excluded from Division 43 capital works (building depreciation) provisions (see s43-70)(2)(e)).

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" itself 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 2024/1 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 original and revised draft rulings, the finalised 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) is:

(a) capable of being separately identified, and

(b) 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 9-16 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 alteration to an existing depreciating asset can itself be a separate depreciating asset. This will generally be the case where the 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.

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 could be either second element costs (s 40-190) of the original asset or deductible (s 8-1 or s25-10). (And like the original and revised draft ruling, the finalised ruling does not address the issue of repair or improvement but rather refers taxpayers to Taxation Ruling TR 97/23. We note the potential relevance and possible confusion caused by the concept of "composite item" in cases of expenditure on repairs - 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 finalised 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 finalised ruling for ease of reference):

Separate asset	Not separate asset
Example 1 – industrial storage racks • Multiple racks make up a single row. • Each row 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 assets (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 assets (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)
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 2 additional solar panels specifically 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 2024/1 - Income tax: composite items - identifying the relevant depreciating asset for capital allowances

PCG 2024/2: Electric vehicle home charging rate – calculating electricity costs when charged at home

Practical Compliance Guideline PCG 2024/2 provides that for both FBT and general deductibility purposes a taxpayer can use a short-cut "cents-per-kilometre" method for calculating electricity costs if an electric vehicle ("EV") is charged at an individual's home (instead of having to determine the actual cost of the electricity used).

The "cents-per-kilometre" method applies on a per vehicle basis and applies for the whole income or FBT year (but it can be changed by the employer or individual from year to year).

However, the "cents-per-kilometre" method is only available to vehicles that are solely fuelled by electric power. It does not apply to an EV that is a plug-in hybrid vehicle which has an internal combustion engine. Nor is it available for electric motorcycles or electric scooters.

The Guideline applies retrospectively from 1 April 2022 for FBT purposes, and from 1 July 2022 for income tax purposes.

Reliance on the Guideline

Individuals can rely on the Guideline to calculate electricity costs of charging an EV at their home if they:

- use a zero emissions EV in gaining or producing their assessable income;
- incur electricity expenses when charging their EV at home, and
- have kept the relevant records for the income year.

However, if EV charging costs are incurred at a commercial charging station and the home charging percentage cannot be accurately determined, individuals can choose to either:

- use the EV home charging rate, but only if the commercial charging station cost is disregarded, or
- use the commercial charging station cost, but only if the EV home charging methodology set out in this Guideline is not applied.

On the other hand, where an EV has the functionality to accurately report the percentage of a vehicle's total charge based on the type of charging location, EV charging costs can include both home charging and commercial charging station costs.

The cents per kilometre rate

The "EV home charging rate" for these purposes is set at ***4.2 cents per km***.

This is applied to odometer records in either the applicable FBT or income year for the relevant kilometres travelled.

Record keeping

For an employer choosing to apply the Guideline and the EV home charging rate for FBT purposes, a valid logbook must be maintained if the operating cost method is used.

For individuals choosing to apply this Guideline and the EV home charging rate for income tax purposes, they must have:

- a valid logbook to use the logbook method for work-related car expenses; and
- one electricity bill for residential premises in the applicable income year to show they have incurred electricity costs.

Transitional approach

If odometer records have not been maintained as at the start of the 2022-23 or 2023-24 FBT or income tax years (ie as at 1 April or 1 July 2022, or 1 April or 1 July 2023), a reasonable estimate may be used based on service records, logbooks or other available information.

Auditor-General criticises ATO over GST fraud prevention

What you need to know

A rather critical report by the Australian National Audit Office in the wake of Operation Protego has set off a reflex defensive response from the ATO which has the potential to further add to delays in businesses obtaining the net GST refunds they need to stay afloat.

The audit

The ANAO audit report has labeled the ATO's GST fraud control systems and processes as only partly effective and not fit for purpose – fairly strong language for the ANAO to use.

Operation Protego identified 150 people who had worked at the ATO at some stage, including 12 who were suspected of having committed fraud while working there.

The report includes a number of structural and administrative recommendations that have been accepted by the ATO. What seems to be lacking, however, is a focus on developing better analytics to enable fraud prevention rather than trying to clean things up after the fraud has already occurred.

Why so many GST refunds?

While in a broad economic sense the GST is a tax on final consumption in Australia's economic zone, its multi-stage design involves a pass the parcel system of paying and claiming (by recipient businesses) of hundreds of billions more than the net GST collected of $81.4 billion in 2022-23.

Every other country with a VAT or a GST shares this design feature, but why not leave business-to-business transactions alone and just charge 10% GST on final consumption?

The main reason for the multi-stage approach is that it is impossible in practice for most suppliers to be certain about the status of their recipients. Bunnings is not always going to know whether the tools and other hardware it sells is being bought by tradies or home handy persons.

So we're stuck with a system that involves churning a lot of gross debits and credits with many refunds, some of them quite substantial. This feature draws shysters and fraudsters like bees to a honeypot

ATO response

Appearing before Senate Estimates on 14 February 2024, Commissioner Jordan blamed the current 14-day turn-around period for most GST frauds, saying it is not enough time to apply adequate scrutiny. He indicated at the hearing that the ATO will consider increasing the 14-day turn-around performance standard going forward.

The ATO's view on all this is that 14 days means they have allowed frauds to occur in the interests of not delaying legitimate refund claims for the vast majority of businesses. Going forward, they might stop being Mr. Nice Guy and set a longer turn-around period, but given how long it took them to tumble onto the Protego fraud, how much extra time will they need to prevent most future frauds – six months or more?

Always the political animal and just before vacating the premises, Jordan has set up a nightmare scenario where a petulant ATO holds up thousands of legitimate refunds so that it can painstakingly verify them all.

We have heard anecdotally that the ATO already delays refunds where one-off refunds present as anomalies from the usual BAS patterns. For example, where a transport business buys a number of rigs in a single BAS period, or where a retailer buys extra stocks ahead of the expected Christmas rush. Or where it takes a while for the penny to drop with the ATO that an entity is solely engaged in export sales each and every BAS period.

We believe practitioners and their clients would be most concerned about an over reaction by the ATO in response to political pressure. The better approach is surely to be more clever about things and develop more sophisticated analytics to help sort out the wheat from the chaff.

Member experiences

We would be interested in hearing from members about their BAS refund experiences, particularly in the context of the ATO's highly defensive reaction to ANAO criticism.

Status of Tax Matters @ 23 February 2024

(This table is not intended to be comprehensive)

Status of Tax Matters @ 23 February 2024	
Legislation	**Status**
Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 • Contains provisions introducing several changes to the workplace relations framework, including undoing the High Court decisions in in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.	Passed both Houses on 12 February 2024.
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 Senate (since 27 November).

Status of Tax Matters @ 23 February 2024	
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 since 7 December 2023.
Administrative Review Tribunal Bill 2023 *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023* *Administrative Review Tribunal (Consequential and Transitional Provisions No. 2) Bill 2024* • Replaces the AAT with an Administrative Review Tribunal and an Administrative Review Council.	Before the House since 7 December 2023.
Treasury Laws Amendment (Cost of Living Tax Cuts) Bill 2024 • Contains the amendments to the Stage 3 tax cuts.	Passed third reading stage in the House.
Treasury Laws Amendment (Cost of Living—Medicare Levy) Bill 2024 • Changes the various Medicare thresholds for the 2023-24 year.	Passed third reading stage in the House.
Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2024 Treasury Laws Amendment (Foreign Investment) Bill 2024 • triples the foreign investment fees for the purchase of established homes; • doubles vacancy fees for all foreign owned dwellings purchased since 9 May 2017; • enhances the ATO's compliance regime to ensure foreign investors comply with the rules, including selling their residence when required.	Passed third reading stage in the House.
Scheduled Parliamentary sitting days	
Both Houses will be sitting 26th – 29th February, and then again 18th – 21st and 25th – 28th March.	

Status of Tax Matters @ 23 February 2024	
Appeals	
***Automotive Invest Pty Limited v FCT* [2023] FCAFC 129** (see TDG Notes September 2023) (*Automotive Invest Pty Limited v Commissioner of Taxation* S170/2023)	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) (*Danny Buzadzic v Commissioner of Taxation* VID709/2023)	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.
***Sladden and FCT* 2023 ATC [2023] AATA 3815** (see TDG Notes February 2024) (*Julie Ann Sladden v Commissioner of Taxation* QUD560/2023)	The Commissioner has appealed to the Full Federal Court against the AAT decision.
***QQRK v C of T* [2023] AATA 3493 (27 October 2023)** (see TDG Notes December 2023) (*QQRK & Anor v Commissioner of Taxation* NSD 1430/2023)	The Commissioner has appealed to the Full Federal Court against the AAT decision.