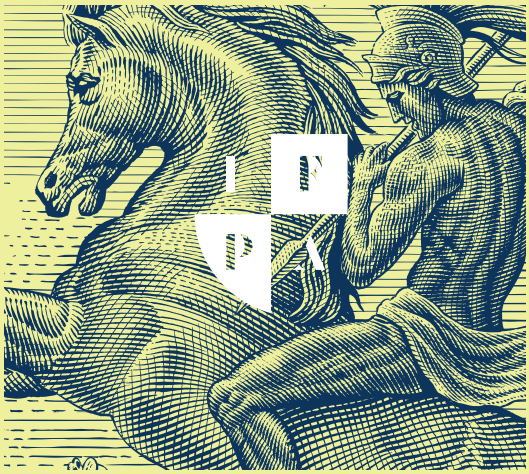
Monthly Tax Update

August 2024

INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA



Published by the Institute of Financial Professionals Australia
ABN 96 075 950 284
Reg No: A0033789T

Each issue has been researched, authored, reviewed and produced by the team at the Institute of Financial Professionals Australia.

Monthly Tax Update

August 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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Full Federal Court finds for Commissioner on dividend strip

What you need to know

In an important case clarifying what is meant by the term "dividend stripping", the Full Federal Court has upheld an appeal by the Commissioner from an AAT decision that went in the taxpayer's favour in relation to the complex restructuring of a rural business run by four brothers.

Facts

We have previously reported on the AAT decision in November 2023. The facts are complex but important, so they are restated here.

The Hayes family has conducted a rural transport, fuel storage and distribution and primary production business for many years. Their business was carried on by way of several Hayes operating companies (HOCs) with family trusts for each of the four Hayes brothers as shareholders. By 2019-10 the HOCs had significant retained earnings and accompanying franking credits.

After their accountant attended a conference on asset protection in late 2009, he put the Hayes family in touch with a firm of solicitors, which resulted in a major reorganisation of the group.

Four fixed trusts, four trading trusts and four rural unit trusts were established in 2010. Importantly, the trading trusts were eligible to be treated as companies for some tax purposes, including the receipt of franked dividends. The law has since changed in this regard and corporate tax treatment is now only available for public trading trusts.

Each of the four HOCs then issued new Z class shares. In accordance with the Corporations Law those shares were first offered to the existing shareholders (the four corporate trustees of the four Hayes brothers' family trusts). After that offer was formally declined and on the same day, the new Z class shares were offered to new shareholders, being the corporate trustees of the four trading trusts, who took up the offer to buy 10 shares each at a cost of $1 per share. This turned out to be the best investment of all time, as later on the same day the HOCs paid out fully franked dividends totaling $8 million – quite a return on a $40 investment.

The funds representing the dividends were then mostly directed back to the HOCs or related entities by way of the repayment of loans or the making of new loans using Bearer Promissory Notes that were later cancelled.

The Commissioner contended these arrangements amounted to a "dividend stripping operation", while the applicants argued otherwise.

The AAT decision

Based on case law guidance, the Tribunal posed three questions which had to be answered:

1. Did the new shareholders receive the dividends tax-free?

The applicants argued that the trading trusts (which were treated as companies) received dividends which were fully taxable in their own right and the availability of the tax offset should be regarded as an entirely separate matter.

The Tribunal did not accept that argument, however, instead preferring to regard the dividends as having been received free of tax by reason of the associated franking credits and that in a net sense a fully franked dividend received by a corporate entity does not bear taxation. The Commissioner cleared the first hurdle, but that was as good as things got for him with the Tribunal.

2. Did the original shareholders receive non-taxable or capital amounts in full or sufficiently partial substitution for the dividends paid to the new shareholders?

The tribunal noted that the Hayes brothers as the original shareholders received only 30% of the dividends paid in the form of loans, which is substantially less than the dividends paid. Through their family trusts the Hayes brothers also maintained substantially the same economic interests in the Hayes group before and after the 2010 reorganisation. In the Tribunal's view, this condition was not met.

3. Was there a sole or dominant purpose to avoid tax?

This was also answered in the negative by the Tribunal, although perhaps not for the reasons one might expect. The applicants went to some pains to explain that the main reason for the restructure was to achieve better asset protection and a more streamlined business, but the tribunal was somewhat skeptical about those claims.

Instead, the tribunal made the observation that, unlike what typically happens in a dividend strip, the latent tax liability of the undistributed profits has just been moved from one group of associated corporate entities to another. If the trading trusts were to ever distribute their franked profits beyond a corporate environment, the Hayes family would be facing the same top-up tax problem as the HOCs were facing before the restructure. The corporate profits remain within the Australian tax net and that is not a dividend strip.

Full Court

What did the Full Court make of the Tribunal's reasoning?

While acknowledging the case law applied by the Tribunal, the Full Court also said:

> *"one must not lose sight of the statutory language"*, and
>
> *"The phrase "by way of, or in the nature of" are words of enlargement."* [both at 31]

These comments seem to be signaling a broad approach to the question of whether something is in the nature of dividend stripping.

Were non-taxable amounts received by the shareholders?

Notwithstanding that the Hayes brothers only received 30% of the dividends paid to the new shareholders in the form of loans, the Full Court noted that most of the balance was paid to companies associated with them. The scheme was not necessarily precluded from being a dividend strip merely because the non-taxable receipts were not received by the original shareholders directly. The Tribunal had failed to consider this in the context of the Full Court's "words of enlargement" observations.

Did the latent future tax liability mean there was no dominant tax avoidance purpose?

The Full Court held that it was wrong for the Tribunal to assume that top up tax might be paid at some stage in the future because the profits remain in the Australian tax net. The point is that tax has already been avoided by reason of the fact that dividends were paid to the new shareholders rather than to the Hayes brothers. That was seen as sufficient to warrant the conclusion that the requisite tax avoidance purpose was present. The fact that the profits remained in the Australian tax net was not a determinative factor and in any event, the relevant profits remained capable of being accessed by the original shareholders in a tax free way.

On the basis of these two errors of law, the dispute was remitted back to the AAT for redetermination.

C of T v Michael John Hayes Trading Pty Ltd as trustee of the MJH Trading Trust [2024] FCAFC 80 (14 June 2024)

Bromwich, Thawley and Hespe JJ

Federal Court reverses AAT decision on residency

What you need to know

In one of the quickest turnarounds of a tax appeal we have seen for some time, the Federal Court has set aside a February 2024 AAT decision that a mechanical engineer who was posted to Dubai for a period of six years and followed by a posting to Thailand continued to be an Australian resident for tax purposes.

Facts

We wrote this case up for the *April 2024 Tax Discussion Group Notes*, so if you can remember it you can skip the next bit.

Mr. Quy is a mechanical engineer who commenced employment with CBI Constructions in 1986. He accepted a posting to Dubai in 1998, when his wife and three young daughters accompanied him there. When the Dubai work of the firm declined as a result of the GFC, the taxpayer and his family returned to Perth in 2009 to continue his employment with CBI. He bought a home in Perth in 2010 and also owned two investment properties in Sydney.

In 2015 the Appellant accepted a new posting to Dubai, but this time his daughters remained behind in Perth as the eldest two were at university and the youngest was completing High School. Mrs. Quy did accompany her husband to Dubai initially, but ended up spending far more time in Perth over the years in question in order to support her daughters and also to care for her sick mother. In Dubai Mr. Quy lived in accommodation provided by his employer where his employer was the lessee of the apartment.

The taxpayer returned to Perth when taking leave and stayed in the family home when he did. According to immigration records he spent 47 days, 29 days, 34 days and 41 days in Australia in the 2017, 2018, 2019 and 2020 income years respectively, having left for Dubai in September 2015. With so little time in Australia, this clearly takes the 183-day test off the table. The Dubai assignment came to an end in 2021, when the applicant accepted a posting to Thailand. During his time in Dubai, CBI paid his salary into a Dubai bank account.

Mr. Quy supported his family financially throughout this period, allowing his daughters to reside in the Perth property rent-free while paying the mortgage and all other costs, including utilities.

While living in Dubai, he also maintained registration for three cars and a motorcycle, and renewed his driver's licence using his Perth home as the address. He maintained private health insurance in Australia for the entire period, even though his employer provided health cover in Dubai.

AAT decision

The Tribunal had noted the Applicant's continuous family ties to Australia (he financially supported his wife and daughters who were living in Perth), as well as his failure to establish personal ties in Dubai while he was living there in holding that he remained an Australian resident under both the ordinary concepts test and the domicile test.

Federal Court decision

Logan J took a different view in deciding the appeal, however. In applying the ordinary concepts test, he held that the relevant intention is one to treat a place as home for the time being, but not necessarily forever.

Likewise, the word "permanent" in the term "permanent place of abode" in para 6(a)(i) ITAA 1936 was misconstrued by the Tribunal. It has to be worked out in relation to a particular year of income and it doesn't mean a taxpayer has to have the intention of living in a particular location forever.

The case has been remitted back to the Tribunal to reconsider the residency issue in light of the errors of law the Federal Court has identified.

Comment

We're not saying we told you so, but we did observe back in April that six years in Dubai followed by a stint in Thailand was a long stretch of time away from Australia. We also ventured the view that expecting expats to establish community ties in a place like Dubai as one of the tests for residency was perhaps a little unrealistic.

Quy v Commissioner of Taxation (No 3) **[2024] FCA 726 (28 June 2024) Logan J**

CGT: Market value includes any "special value" peculiar to arm's length purchasers and vendors

What you need to know

The market value of an asset for CGT purposes includes any "special" value factored in by either of the parties to a transaction – provided they are dealing with each other at arm's length – and contrary to the Commissioner's current guidelines, there is no "carve out" for such a "special" amount that may be of unique value to one of the parties.

Facts

The taxpayers were individual beneficiaries of three family trusts that owned shares in a company (Punters) that carried on business in relation to an on-line platform for gambling in connection with horse racing.

In 2016, the respective family trusts each sold their shares to News Corp Australia Investments Pty Ltd ("News Aust") for a total amount of some $31m. Note: Australian News Corp was part of a group of companies whose ultimate holding company was News Corporation which was resident in the United States.

The Commissioner issued assessments to the taxpayers on the basis that the respective family trusts received their shares of the capital gain arising from the sale of the shares for $31m, which then formed part of trust distributions made to the respective individual beneficiaries.

The taxpayers objected to the assessments on the basis that the capital proceeds "market value substitution rule" in s 116-30 of the ITAA 1997 should apply to impose ***lesser*** capital proceeds on the basis that the parties did not deal with each other at arm's length in relation to the share sale. (This, in turn, would have enabled the trusts to each potentially qualify for the CGT small business concessions.)

The taxpayers' objections to the assessments were disallowed and the taxpayers appealed to the Federal Court.

Taxpayers' argument

The taxpayers argued that the parties were not dealing at arm's length because of the "internal championing" by two employees of News Aust (who were known to the taxpayers). The taxpayers also provided evidence of their expert valuations which valued the shares at between $13m to $21m (being less than the capital proceeds of $31m actually received).

In particular, the taxpayers relied on the fact that their valuations took into account the Commissioner's own valuation guidelines – which, as relevant, provided that the "market value" of

an asset should not include amounts which reflected features that were of value to the vendor or purchaser alone which were not available to other buyers in the market.

As a result, the taxpayers claimed the sale price of the shares had been incorrectly "inflated" by the wrongful inclusion of an amount for the "special" or "strategic" price factor.

Issue

Whether the term "market value" as used in s 116-30 does or does not include this "special value" in the market value of the shares sold.

Decision

The Federal Court found that the taxpayers and News Corp Aust dealt with each other at arm's length in connection with the Share Sale Agreement.

In doing so, the Court emphasised that the evidence exposed the internal decision-making processes in relation to the purchase of the shares was not just of News Aust but was also undertaken within the News Corp group hierarchy up to News Corp's Head Office in New York. Moreover, that evidence revealed that the decision to purchase the shares was made in New York, following significant internal analysis within the News Corp group of companies of the worth of the shares.

In short, the share acquisition was at a corporate group-level, strategic decision made at a corporate group headquarters, not subordinate, Australian operational level. Furthermore, in this Head Office decision, there was neither collusion with any of the beneficiaries nor Punters' appointed agent. Nor was there any mere rubber-stamping of an analysis offered by a not disinterested, local operational level subordinate within News Aust.

In dismissing the taxpayer's argument that any "special" or "strategic" price element should be excluded from "market value, the Court noted that the exclusion of such special value was an 'economic paradox' and a 'contradiction in terms'" – and that the "special" or "strategic" price element was just part of the "market value".

Specifically, the Court said that there was nothing in the text of the [relevant] provisions in the ITAA 1997 (nor in case law precedent) that "dictates, either expressly or by necessary implication, that one must exclude from this hypothetical market a particular willing purchaser present in that market who sees value particular to that purchaser in acquiring the asset concerned". Accordingly, it said that a purchaser "cognizant of all circumstances which may affect its value, either advantageously or prejudicially" might well be cognizant of an advantage peculiar to that purchaser and be willing to pay for that advantage.

Finally, the Court also noted the irony that the Commissioner's argument that the disposal of the shares in Punters has not been proved not to have been at market value revealed an error in the valuation guidelines published by the Commissioner.

Comment

When the CGT regime was introduced in 1985 only a few realised the significance of the market value concept – and the need to ascertain it in so many instances. This case, among several recent ones, illustrates its profound significance once again.

***Kilgour v FCT* [2024] FCA 687, 26 June 2024**

Breaking up by text is hard to do

What you need to know

A recent decision by the Full Federal Court around a man's tragic death by suicide clarifies the standing of a de facto spouse in the context of a non-lapsing death benefit nomination on a life insurance policy made by the deceased person.

Facts

Just prior to C's death in September 2019 the death benefit under his insurance policy was valued at $1.1 million, with the death benefit nomination in favour of his de facto spouse, N, having been made in December 2018. On the night of his death, C sent a text message to his sister, purporting to be his last will and testament and indicating his wish that all his assets should pass to his family, with N receiving nothing. The text was not copied to N and it was later established that it was sent while C was under the influence of cocaine and alcohol.

The trustee of the policy took the view that the de facto relationship had continued right up to the time of C's death and that N was therefore entitled to the death benefit. This decision was challenged by C's family before the Australian Financial Complaints Authority (AFCA), arguing the text was evidence that the relationship between C and N had ended before C's death. The 13-year relationship between C and N had been steadily deteriorating for some years and the family argued the text confirmed that the two were no longer a couple.

However, AFCA decided that relationships have their ups and downs and people say and write a lot of things they don't mean all the time. This meant the trustee was right, the relationship remained ongoing just prior to C's death and N was entitled to receive the death benefit.

Appeals to Federal Court and Full Federal Court

The family then appealed to the Federal Court, where a single judge ruled that AFCA had erred in law in not construing the text message as proof that C's relationship with N had come to an end, meaning that N was not a valid beneficiary after all.

Finally (one would think), N appealed to the Full Federal Court, which held unanimously that in the absence of communication from C to N, there needed to be some other course of conduct, such as a refusal to cohabitate, which would clearly be inconsistent with a continuation of the relationship. Since there was no evidence about such conduct, the Full Court ruled in favour of N. The Full Court also noted that C had nominated N under the death benefit nomination only nine months before his death, which was inconsistent with the family's claims about the fraught state of the relationship even before that time. The original decision by AFCA was therefore upheld.

This case, with its own peculiar facts, highlights the importance of keeping things like binding death benefits nominations and formal written wills up to date and being clear about spousal relationships, especially when couples live apart.

Nguyen v Australian Financial Complaints Authority **[2024] FCAFC 77 (13 June 2024)**
Snaden, McElwaine and Meagher JJ

Luxury cars provided to beneficiaries not subject to FBT

What you need to know

The corporate trustee of a discretionary family trust was found not to be liable for FBT in respect of the taxable value of the private use of luxury vehicles provided to three brothers who were beneficiaries of the trust and also directors of the trustee company. The AAT decided the three brothers were not employees of the trustee company, but even if they were, the non-cash benefits were not provided as a reward for such employment.

Facts

The three brothers controlled the affairs of a large group of businesses established by their late father and which were operated through the family trust. Each of the brothers was heavily involved in managing the various businesses, but they were not paid salary or wages and were not entitled to annual leave. There was no evidence of any resolution made by the corporate trustee to enter into contracts of employment with any of the brothers. They were all three beneficiaries under the family trust and said they conducted themselves as owners of the business.

The terms of the trust deed authorised the use of chattels of the trust by beneficiaries. The luxury vehicles were paid for by the corporate trustee, and while the Reasons for Decision do not explain how those costs were treated in the trust for tax purposes, they do mention that the private luxury vehicle expenses were "debited through the trust against the directors' mother's account", the mother also being a beneficiary under the trust deed [at 2].

The Commissioner raised FBT assessments for the 2016-2020 income years on the basis that the corporate trustee had provided car fringe benefits to the brothers in their capacity as directors and employees. The Applicants referred the objection decisions to the AAT.

Consideration

The oldest of the three brothers gave evidence at the hearing which was accepted by the Tribunal as being truthful and reliable (if a little self-serving at times). The key takeaway from the evidence was that at all times the brothers acted more like owners than as paid managers, operating with a high degree of autonomy. Given the terms of the trust deed, they felt they were entitled to enjoy the partly private use of the luxury vehicles (which were also partly used for business purposes).

Relying on the High Court decisions in *Personnel Contracting*, *Jamsec* and *Hollis v Vabu*, the Tribunal found there was no employment relationship between the corporate trustee and the three brothers. In particular, the Tribunal based its conclusion on:

- *"The absence of any evidence of a board resolution to establish a contract of employment in circumstances where I would expect there would be a record of a resolution to that effect if it was intended;*

- *the evidence of control – a typical feature of a contract of service – was of limited value given the control that was potentially exercisable was referable to the underlying corporate contract and did not of itself point to an underlying employment contract;*
- *the directors were not integrated into the hierarchy of the applicant but appeared to sit at the apex of that company and a wider network of family businesses;*
- *the other indicia of an employment relationship do not clearly point in that direction." [72]*

For the sake of completeness, the Tribunal found that, even if it is wrong in its finding there was no employment relationship, the non-cash benefits were not provided as a reward for their work as directors or employees.

Have the brothers chanced on a loophole?

Not really.

It might seem odd that the private use of luxury vehicles escapes the tax net, but that is only on the FBT front. The *in specie* distribution represented by the private use of the luxury vehicles and which was permissible under the terms of the trust deed appears to have been accounted for as a trust distribution:

> *"Those benefits were reported and taxed appropriately as distributions under the trust, I was told." [4]*

So the question is whether the Commissioner stood ready to adjust the trust distribution had he succeeded with his FBT arguments. One assumes so – the Commissioner doesn't usually try to tax the same amount twice, at least not in the long run.

BQKD v Commissioner of Taxation **[2024] AATA 1796 (10 May 2024) McCabe DP**

Early stage investor tax offset

Innovation test applies to a specific company - not a company group

What you need to know

Eligibility for an early stage investor (ESI) tax offset requires the taxpayer to invest in the early stage innovation company (ESIC) that actually carries out the relevant development or other activity – and not in any entity that may otherwise just from part of the group.

Facts

The taxpayer was an individual who, together with others, was involved in the development of cloud based communication software.

Following professional advice, they adopted a structure for the development and operation of the software whereby a holding company would own 2 wholly owned subsidiaries - one of which would own and further develop the software, and the other would carry on a trading business in respect of it. Note also it was recommended that the group be "consolidated" - with the holding company being the "head company", but this did not happen.

The taxpayer's family trust was then issued shares in the holding company.

In the 2017 year, the taxpayer's family trust claimed an early stage investor (ESI) tax offset of $39,700 in respect of its investment in the holding company – the benefit of which was distributed to the taxpayer as the primary beneficiary of the trust. (Note that the taxpayer was a "sophisticated investor" who held net assets of at least $2,500,000 as required.)

The ESI offset was claimed on the basis that the holding company that the family trust invested in was an early stage innovation company (ESIC) under s 360-40 of the ITAA 1997.

However, the Commissioner disallowed the ESI offset claim on the basis that the Holding Co was not a specified ESIC as required under s 360-40 – which required (as relevant) that: "at the test time, the company is genuinely focussed on developing for commercialisation one or more new, or significantly improved, products, processes, services or marketing or organisational methods".

The taxpayer applied to the AAT in respect of its disallowed objection to the matter.

Taxpayer's arguments

The thrust of the taxpayer's arguments was that the overall activities of the corporate group itself, as a whole, should be taken into account in determining whether the taxpayer had made an investment in an ESIC – given that the various entities were, in effect, carrying on the same business and had the same common purpose of developing and commercialising cloud based software.

The taxpayer also argued that the application of conventional legal principles concerning parent company/subsidiaries does not preclude a finding that a parent company (by close involvement/ direction) and its 100% subsidiary were participating in a common enterprise or jointly conducting the business or a relevant part of the business

Finally, the taxpayer also claimed that his construction of the provisions would give effect to, and advance, the purpose of the legislation – namely, to encourage investment in ESICs.

Decision

The AAT ruled that the holding company was not an ESIC as defined in s 360-40(1) and therefore an ESI tax offset was not available to the taxpayer in relation to its investment in the holding company.

In arriving at this decision, the AAT noted the following matters:

- the difficulty in treating the activities of individual companies within the group as if they were activities for the group as a whole is that they are three separate legal entities which do not have an agency, partnership or joint venture agreement in place;
- on the evidence, there are three separate legal entities each with a distinctive role – and it could not be said that one company undertook their role for and on behalf of one of the other companies or that its actions were attributable to that other company;
- the extensive case law referred to by the taxpayer regarding activities and treatment of company groups was not relevant given that s 360-40(1) was clear in that it required a company who at the test time was engaged in the appropriate activities;
- the holding company's income was either dividends from the owning subsidiary or from the trading subsidiary – and not from a development business it operated;
- the primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute – and the meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole"; and
- the Explanatory Memorandum to the relevant Bill provides several examples while dealing with the requirements of s 360-40(1), none of which make reference to a company and its subsidiaries meeting the specific requirements and, instead, they relate to a particular company.

Finally, the AAT emphasised that the holding company did not at the test times hold an interest in the software subsidiary, nor develop its software – so it could not in any way claim that it carried on the required activities.

Comment

It was hinted at during the course of evidence that if the company group had been "consolidated" for tax purposes – with the holding company as head company of the consolidated group - the taxpayer may have succeeded.

***ZWBX v FCT* [2024] AATA 2065, 18 June 2024**

Trustee in bankruptcy liable for CGT on sale of properties

What you need to know

Pursuant to s 254(1) of the ITAA 1936, a trustee in bankruptcy will be liable for any CGT liability for a capital gain the trustee makes in their "representative capacity" in relation to an asset formerly owned by the bankrupt person. This is the case notwithstanding s 106-30 of the ITAA 1997 which provides, among other things, that the CGT rules apply to "an act done in relation to a CGT asset by a trustee in bankruptcy as if the act had been done by the individual owner, instead of by the trustee". Someone has to pay the tax!

Facts

The applicant was appointed as the trustee in bankruptcy for a bankrupt estate. After his appointment, he sold two properties owned by the bankrupt person. He then applied for a private ruling in relation to his liability as a trustee in bankruptcy for the payment of any CGT in respect of the sale of these properties (and any related retention obligations).

The trustee received an adverse private ruling which said that he was liable for CGT in his capacity as the trustee for the bankrupt estate in view of s 254 of ITAA 1936 (which provided that "every trustee was …answerable as taxpayer for the doing of all such things as are required to be done.. in respect of the income, or any profits or gains of a capital nature, derived by him or her in his or her representative capacity").

The trustee unsuccessfully objected to the ruling and then appealed to the Federal Court.

Trustee's argument

The trustee argued that the capital gain was not "derived" by him in a "representative capacity" because the capital proceeds constituted money received in his representative capacity as trustee for the bankrupt's creditors and therefore s 254(1) did not apply.

He also argued that s 106-30(2) of ITAA 1997 created a carve-out for a trustee in bankruptcy from the operation of s 254(1) and made the bankrupt person liable for CGT. Section 106-30(2) provides that (as relevant to this case), the CGT rules apply to "an act done in relation to a CGT asset by a trustee in bankruptcy applies as if the act had been done by the individual owner, instead of by the trustee".

The trustee also sought to challenge his liability on the basis that "it would cause a substantial alteration to the order of priorities by which debts are payable under the Bankruptcy Act.. [and that] the Commissioner is afforded "preferential treatment" because there is a preference for the payment to the Commissioner of the whole of the tax debt.. and which payment is made before payment is made to those creditors with provable debts".

Decision

The Federal Court dismissed the trustee's appeal and affirmed the primacy of s 254 in making him liable for the CGT on the sale of the properties.

In doing so, the Court emphasised that the proceeds from the sales were derived by him in his "representative capacity" and therefore s 254(1) applied. This was because it found that, in terms of s 254(1), the concept of the "receipt of a capital gain in a 'representative capacity' was broad enough to capture a trustee in bankruptcy who derives a capital gain in that capacity" (albeit, the gain was calculated as if made by the bankrupt, pursuant to s 106-30).

Other matters the court noted in this regard included:

- the trustee "derived" the gain given the broad nature of the term "derive" and its application to entities that fell within the definition of "trustee" in s 6 of ITAA 1936;
- a trustee in bankruptcy means a trustee "in the ordinary sense of the word" and the opening words of s 254(1) state that it applies to "every trustee"; and
- the term the trustee "shall be answerable as taxpayer.. for the payment of tax" on income, profits or gains derived by him in his representative capacity creates a personal liability in the trustee which is akin to the liability of the beneficiary.

In relation to the taxpayer's claim that s 106-30 created a carve-out for a trustee from the operation of s 254(1), the Court emphasised that the operation of s 106-30 is limited to CGT rules only and that, as a result, neither s106-30 nor the fact that the primary liability falls on the bankrupt prevents s 254 from imposing an ancillary liability on the trustee in bankruptcy. It also said the carve-out for a trustee in s 106-30 is not for the purposes of s 254 because s 254 is a liability-imposing and collecting provision in relation to "every trustee" for any income, profits or gains of a capital nature which are derived in their representative capacity.

Finally, in relation to the trustees claim that the effect of applying s 254(1) in the manner contended by the Commissioner would be to cause a substantial alteration to the order of priorities by which debts are payable under the Bankruptcy Act and that it afforded the Commissioner "preferential treatment", the Court said

> *"... the liability of a trustee to pay tax under s 254(1) is a personal liability that arises in the course of disposing of an asset and is, in substance, made by s 254 to be part of the cost of selling that asset. Section 109 of the Bankruptcy Act empowers the trustee to apply proceeds to cover that expense, being the tax liability, as a priority payment. There is nothing remarkable about a trustee in bankruptcy being indemnified for an expense or payment that the trustee is required to make in the administration of the bankrupt's estate. If the payment of the capital gains tax can be somehow characterised as a "preferential payment", then so be it.*

The Court also noted that "this argument appears to be an attack on the policy behind the legislation (which is outside the remit of a court of law), rather than an argument which relates to the proper construction of it".

Comment

The outcome is sensible and reasonable – because if the trustee does not pay the CGT on the capital gain realised, then who does?

Robson as trustee for the bankrupt estate of Lanning v FCT [2024] FCA 720, 4 July 2024

Promissory note or bill of exchange cannot discharge tax liability

What you need to know

You can't discharge a tax liability by way of promissory note and/or a bill of exchange – but the ATO presumably still accepts cheques!

Facts

The Federal Court has ruled that a taxpayer cannot discharge a taxation liability with a promissory note and a bill of exchange. Instead, it ruled that the only means by which tax-related liabilities could be discharged were specified by reg 21 of the *Taxation Administration Regulations 2017* – and these did not contain either a promissory note or a bill of exchange as an approved method for the payment of taxation liabilities.

As a result, the Court dismissed the taxpayer application to set aside a statutory demand for some $45,000 (being the tax debt in issue for which the taxpayer claimed it had effectively discharged by way of issuing the promissory note and bill of exchange).

Comment

But the ATO will, presumably, still accept cheques for payment of tax debts (if anyone uses them anymore!) as a cheque is a three-party instrument where the signer of the check directs a third-party (eg a bank) to pay a sum to the payee, whereas a promissory note is a two-party instrument made by the maker who promises to pay back money to the second party.

Mesha Feet Pty Ltd v Allen acting as DCT [2024] FCA 680, 24 June 2024

TASA Code of professional conduct – legislative instrument

Hereunder is the full Legislative Instrument (LI) released by Assistant Treasurer Jones on 2 July 2024. It's quite a read, but it is in your interests to be across it.

There have already been discussions with the TPB about (non-binding) guidance material that will clarify some things and take the hard edge off the law in others. While not ideal, we might have to accept some of these work arounds to move forward. The professional bodies, including IFPA, are fighting hard to at least defer the start date of the LI to give us time to make the new rules workable.

Take a close look at:

- Section 15(2)(c), which requires you to dob in a client who refuses to correct or clarify a false or misleading statement.
- Section 35(2), which requires you to satisfy yourself about the technical competence of a specialist tax advisory firm whose help you have sought on a complex tax consolidation issue on behalf of a client.
- Section 40, which requires you to establish, document and maintain (by 1 August 2024) a quality management system that provides assurance that you have not breached the Code.
- Section 45, which requires you (again by 1 August 2024) to inform current and prospective clients about any matters (going back to 1 July 2022) that could significantly influence a decision of a client to engage you, or to continue to engage you, to provide a tax agent service.

If you haven't done all the things specified by 1 August 2024 you are in breach of the Code, which then technically requires you to self-report under the breach reporting rules.

Contents

Part 1—Preliminary

1 Name

This instrument is the *Tax Agent Services (Code of Professional Conduct) Determination 2024*.

2 Commencement

(1) Each provision of instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	**Column 2**	**Column 3**
Provisions	**Commencement**	**Date/Details**
1. The whole of this instrument	1 August 2024.	

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

(2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under the *Tax Agent Services Act 2009*.

4 Definitions

Note: Expressions have the same meaning in this instrument as in the *Tax Agent Services Act 2009* as in force from time to time—see paragraph 13(1)(b) of the *Legislation Act 2003*.

In this instrument:

the Act means the *Tax Agent Services Act 2009*.

Part 2—The Code of Professional Conduct

Division 1—Additional obligations of general application

Subdivision A—Preliminary

5 Additional obligations relating to the professional and ethical conduct of registered tax agents and BAS agents

Under section 30-12 of the Act, the obligations relating to professional and ethical conduct of registered tax agents and BAS agents set out in this Part are determined for the purposes of subsection 30-10(17) of the Act.

Note: Section 30-10 of the Act sets out the Code of Professional Conduct applying to registered tax agents and BAS agents. The Minister may determine further obligations under the Code which registered tax agents and BAS agents must comply with. This instrument sets out those further obligations.

Subdivision B—Honesty and integrity

10 Upholding and promoting the ethical standards of the tax profession

Independently, and in cooperation with other registered tax agents and BAS agents, you must:

(a) uphold and promote the Code of Professional Conduct; and

(b) *not* engage in any conduct that you know, or ought reasonably to know, may:

(i) undermine public trust and confidence in the integrity of the tax profession (including conduct that discredits the tax profession or brings the tax profession into disrepute); or

(ii) undermine public trust and confidence in the integrity of the tax system; and

(c) *not* engage in any conduct that you know, or ought reasonably to know, may undermine the collective work of registered tax agents and BAS agents, as a tax profession, to uphold and promote:

(i) the Code of Professional Conduct; and

(ii) public trust and confidence in the integrity of the tax profession and tax system; and

(iii) each member of the profession being held accountable for their individual conduct.

Note: A registered tax agent or BAS agent has an obligation to notify the Board of significant breaches of the Code–see Subdivision 30-C of the Act.

15 False or misleading statements

Statements made to the Board or the Commissioner

(1) You must *not*:

(a) make a statement to the Board or the Commissioner; or

(b) prepare a statement that you know, or ought reasonably to know, is likely to be made to the Board or Commissioner by an entity; or

(c) permit or direct someone else to make or prepare such a statement;

that you know, or ought reasonably to know, is false, incorrect or misleading in a material particular, or omits any matter or thing without which the statement is misleading in a material respect, in your capacity as a registered tax agent or BAS agent or in any other capacity.

Note: For further obligations relating to false or misleading statements to the Commissioner see section 5020 of the Act.

(2) As soon as possible after you become aware that a statement given to the Board or Commissioner was false, incorrect or misleading in a material particular at the time it was made, or omitted any matter or thing without which the statement is misleading in a material respect, you must take all reasonable steps to:

(a) where you made the statement (or permitted or directed someone else to make the statement)—correct the statement; and

(b) where you prepared the statement (or permitted or directed someone else to prepare the statement)—advise the maker of the statement that the statement should be corrected; and

(c) where you prepared the statement and the maker does not correct the statement within a reasonable time—notify the Board or Commissioner that the statement is false, incorrect or misleading in a material particular, or omitted some matter or thing without which the statement is misleading in a material respect.

Statements made to other Australian government agencies

(3) You must not:

(a) make a statement to an Australian government agency (other than the Board or the Commissioner); or

(b) prepare a statement that you know, or ought reasonably to know, is likely to be made to an Australian government agency (other than the Board or the Commissioner) by an entity; or

(c) permit or direct someone else to make or prepare such a statement;

that you know, or ought reasonably to know, is false, incorrect or misleading in a material particular, or omits any matter or thing without which the statement is misleading in a material respect, in your capacity as a registered tax agent or BAS agent or in any other capacity.

Subdivision C—Independence

20 Conflicts of interest in dealings with government

In relation to any activities you undertake for an Australian government agency in a professional capacity, you must:

(a) take reasonable steps to identify and document any material conflicts of interest (real or apparent) in connection with an activity undertaken for the agency; and

(b) disclose the details of any material conflict of interest (real or apparent) that arises in connection with an activity undertaken for the agency to the agency as soon as you become aware of the conflict; and

(c) take reasonable steps to manage, mitigate, and where appropriate and possible, avoid, any material conflict of interest (real or apparent) that arises in connection with an activity undertaken for the agency (except to the extent that the agency has expressly agreed otherwise).

Subdivision D—Confidentiality

25 Maintaining confidentiality in dealings with government

Disclosure

(1) Unless you have a legal duty to do so, you must not disclose any information you have received, directly or indirectly, from an Australian government agency, in connection with any activities you undertake with the agency in a professional capacity, except to the extent that all of the following apply:

(a) it is reasonable to conclude that the information received from the agency was authorised by that agency for further disclosure; and

(b) any further disclosure of the information is done consistently with the agency's authorisation.

Note: This subsection would not prohibit disclosure information released by an agency to the general public as it would be reasonable to conclude that such information was authorised for further disclosure. However, further disclosure of that information may be subject to conditions that are expressly imposed by an agency (such as limits on how the information is to be reproduced if attributed to the agency).

Use for personal advantage

(2) You must *not* use any information you have received, directly or indirectly, from an Australian government agency, in connection with any activities you undertake with the agency in a professional capacity, for your personal advantage, or for the advantage of an associate, employee, employer or client of yours, except to the extent that all of the following apply:

(a) it is reasonable to conclude that the information received from the agency was authorised by that agency to be used in a way that may provide for such an advantage; and

(b) any further use of the information was done consistently with the agency's authorisation.

Subdivision E—Competence

30 Keeping of proper client records

(1) You must keep records that correctly record the tax agent services you have provided, or that are provided on your behalf, to each of your clients, including former clients.

(2) The records must:

(a) be in English, or readily accessible and easily convertible into English; and

(b) be retained for at least 5 years after the service has been provided; and

(c) show the nature, scope and outcome of the tax agent service provided; and

(d) include all relevant information considered in the provision of the tax agent service (including information exchanged with the client, advice provided to the client, and for more complex matters: the relevant facts, assumptions and reasoning underpinning any advice provided to the client).

35 Ensuring tax agent services provided on your behalf are provided competently

(1) You must ensure that each entity providing tax agent services on your behalf maintains knowledge and skills that are relevant to the tax agent services the entity is providing.

(2) You must ensure that each entity providing tax agent services on your behalf is appropriately supervised, having regard to knowledge and skills of the entity, the tax agent services being provided by the entity, and your system of quality management.

Subdivision F—Other responsibilities

40 Quality management systems

(1) You must establish and maintain a system of quality management, in relation to the provision of tax agent services by you, or on your behalf, which is designed to provide you with reasonable confidence that you are complying with the Code of Professional Conduct.

(2) You must document and enforce the policies and procedures of your system of quality management.

Note: A system of quality management includes policies and procedures relating to governance and leadership, monitoring of performance, adherence to the Code of Professional Conduct, client engagement, proper keeping of records, protecting confidentiality of information, the management of conflicts of interest, and the recruitment, training and management of employees.

45 Keeping your clients informed of all relevant matters

Obligation

(1) You must advise all current and prospective clients, in the manner and form set out in subsection (2), of all of the following:

(a) any matter that could significantly influence a decision of a client to engage you, or to continue to engage you, to provide a tax agent service;

(b) that the Board maintains a register of tax agents and BAS agents and how they can access and search the register;

(c) how they can make a complaint about a tax agent service you have provided, including the complaints process of the Board.

Manner and form requirements

(2) Where you are required to advise clients of information covered by subsection (1), you must do so:

(a) by giving the information mentioned in a paragraph in subsection (1), in writing, to current and prospective clients in a prominent, clear and unambiguous way; and

(b) for information mentioned in paragraph (1)(a):

(i) if a client makes inquiries to engage or re-engage you to provide tax agent services, and you are aware of the matter at that time—at the time of the inquiry; or

(ii) otherwise—within 30 days of becoming aware of the matter; and

(c) for information covered by either paragraph (1)(b) or (1)(c)—upon engagement or re-engagement of a client (as the case requires), or upon receiving a relevant request.

Example Whilst not limiting the ways in which a registered tax agent or BAS agent could satisfy subsection (2), an agent who does all of the following, in the form and within the times mentioned in subsection (2), will have given information to all their current and prospective clients as required under this section:

(a) the agent publishes the information on a publicly accessible website that they use to promote the tax agent services they offer, and

(b) the agent includes the information in letters of engagement or reengagement (as case the requires) given to each of their clients.

Part 3—Application and transitional provisions

Division 1—Application

100 Application—instrument as originally made

(1) Except as otherwise provided in this instrument, the obligations included in this instrument on the day it commences, apply on or after the day this instrument commences.

(2) To avoid doubt, section 30 (about the keeping of proper client records) applies to tax agent services provided on or after the day this instrument commences.

Division 2—Transitional

151 Transitional—instrument as originally made

Keeping clients informed of all relevant matters

Despite section 100, section 45 applies in relation to matters that have arisen on or after 1 July 2022. However, clients should be advised of a matter that arose on or before the day this instrument commenced within 90 days from that day.

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- How the market value substitution rule applies
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- Tips to avoid the NALE provisions applying to an SMSF's business real property acquisition from a member or related party
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Presenter: Phil Broderick

Phil is a principal of Sladen Legal and a member of The Tax Institute's superannuation committee and the chair of the Institute of Financial Professionals Australia (IFPA) technical and policy committee.

He is also a member of number of the ATO's superannuation liaison groups including the Superannuation Industry Relationship Network (SIRN) and the Superannuation Industry Stewardship Group (SISG). Phil is also heavily involved in liaising with Treasury and ATO in relation to the implementation of new super laws and administrative practices.

Phil was listed in the 2020 to 2023 Best Lawyers Australia for superannuation law and was the winner of the SMSF Association's SMSF Specialist Advisor (SSA) Top Achiever Award in 2019. His articles have featured in The Tax Institute's Taxation in Australia Journal and CCH's Super News. He has presented at seminars and conferences conducted by The Tax Institute, the SMSF Association, TEN The Education Network, Legalwise and various accounting bodies.

Status of Tax Matters @ 24 July 2024

(This table is not intended to be comprehensive)

Status of Tax Matters @ 24 July 2024	
Legislation	**Status**
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	The Bill was passed by both Houses on 25 June 2024 and received Royal Assent on 28 June 2024. Act No 52 of 2024
Superannuation (Objective) Bill 2023 • This bill enshrines the objective of superannuation in legislation and requires that any future changes to superannuation laws are consistent with the legislated objectives. • The main objectives are the preservation of savings and the delivery of income to fund retirement.	Before the Senate
Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024 The Bill introduces the following tax measures which have been previously announced: • the extension of $20,000 Instant Asset Write-off to 30 June 2025 • the Build-to-Rent measures • a Medicare Levy exemption for lump sum payments; • country-by-country reporting by certain large MNEs, and • changes to the listing of Deductible Gift Recipients.	The Build-to-Rent measures have been split off into a separate Bill, *Treasury Laws Amendment (Build to Rent) Bill 2024.* The new Bill reproduces the contents of Schedule 1 of the original Bill. The two Bills will now make their separate ways through the Parliamentary process. The Build-to Rent Bill is currently before the Senate, as is the Responsible Buy Now Pay Later Bill.

Status of Tax Matters @ 24 July 2024	
Scheduled Parliamentary sitting days	
Parliament resumes after the winter recess, with both houses sitting for two weeks from 12th to 15th August and from 19th to 22nd August 2024.	
Appeals	
Merchant v FCT [2024] FCA 498	The taxpayer had appealed to the Full Federal Court against a decision that Part IVA applied to the wash sale of shares by a family trust to a related SMSF and that the forgiveness of certain debts for no consideration amounted to a dividend strip.
Ierna v FCT [2024] FCA 592	The Commissioner has appealed to the Full Federal Court after a single judge held that a selective capital reduction undertaken as part of a restructuring arrangement implemented to overcome a Div 7A issue was not a scheme to provide a capital benefit under s45B ITAA 1936, nor that Part IVA applied to the arrangement.