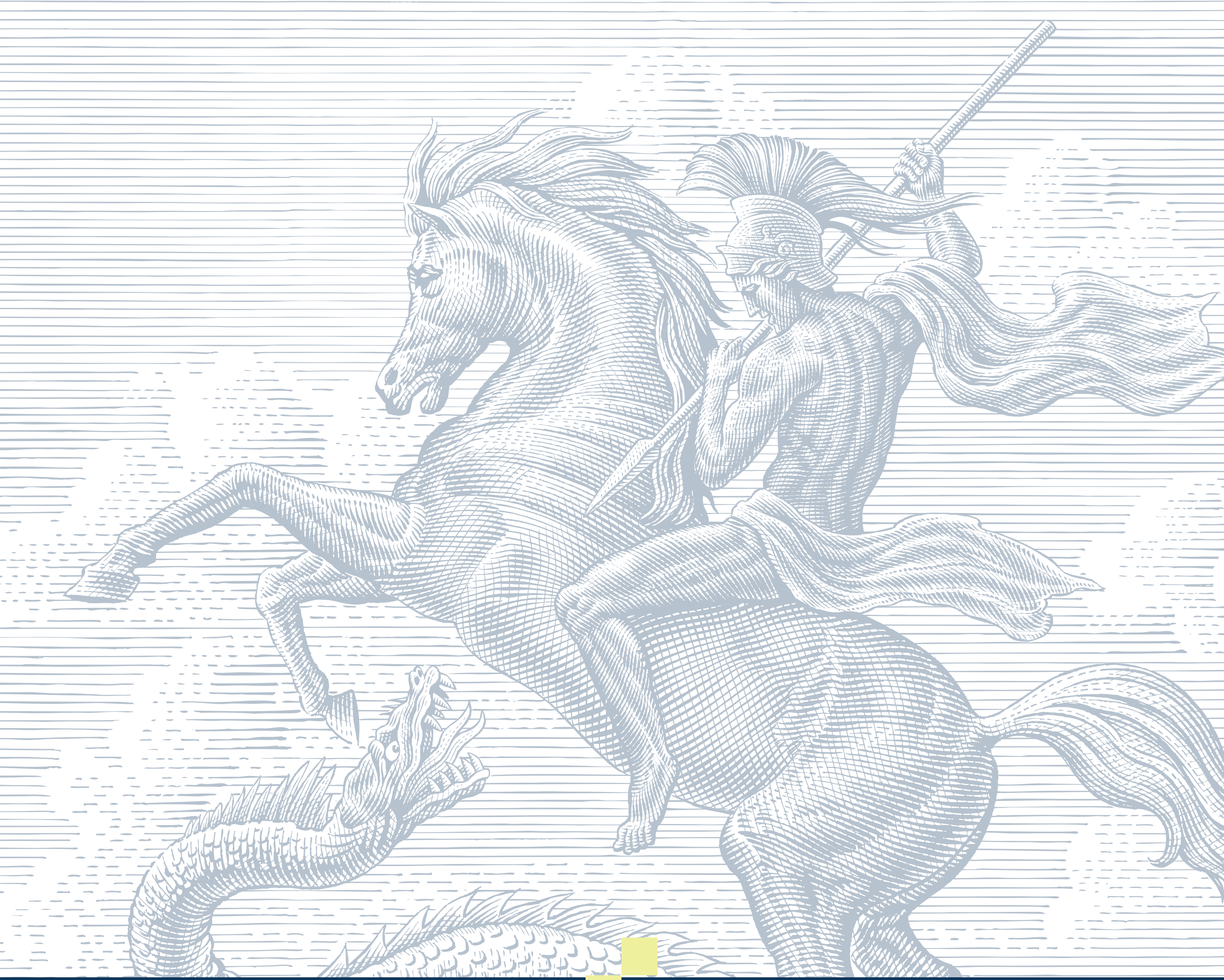

Monthly Tax Update

July 2024

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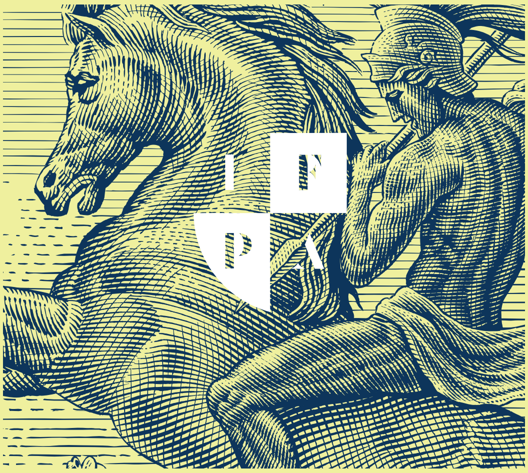

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Monthly Tax Update

July 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,

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Contents

No capital benefit in pre-CGT restructure

What you need to know

There is a first time for everything – in this case it was the Commissioner's decision to litigate the application of the capital streaming rules in s45B ITAA 1936. Given the outcome (thus far), he would not have enjoyed the experience.

Facts

The taxpayers, I and H, conduct a street wear business they founded in 1985 through a unit trust, CBT. Their respective interests in CBT were pre-CGT assets.

The ownership structure included corporate beneficiaries which, following the release by the Commissioner of TR 2010/3, were accumulating complying Division 7A loans owing to them of $52 million by June 2016. These UPEs had previously been used to fund the CBT business. By this time, the loan repayment and interest obligations on these loans were crippling the business and, acting on advice, the taxpayers implemented a restructuring arrangement aimed at unlocking the pre-CGT value of their business as a way of extinguishing the Division 7A loans.

The restructure can be summarised as follows:

Step 1

The incorporation of a new company, M, owned 50/50 by I and H (or associated entities).

Step 2

The issue of 30 million new shares by M, at $2.50 each, which represented the market value of the CBT business, in exchange for the original pre-CGT units in CBT held by I and H. The shareholders in M chose to access Subdiv 615-A ITAA 1997 roll-over relief, thereby preserving the pre-CGT status of their interests in CBT.

Step 3

M then made a selective capital reduction by cancelling 10.4 million shares held by each of I and H, for $2.50 per share, making the cancellation amount payable to each of I and H $26 million.

Step 4

I and H then each agreed to lend $26 million to M, thereby offsetting the cancellation amount that would otherwise have been payable by M.

Step 5

I and H assigned their respective $26 million loan receivables to the Division 7A entities, enabling those entities to extinguish their Division 7A loans.

Step 6

Finally, and probably with the aim of forestalling Division 7A problems going forward, M elected to form a consolidated group with M as the head company and CBT as a subsidiary member.

ATO audit

On audit, the Commissioner determined that s45B applied to the capital reduction and that I and H had received a capital benefit of $26 million each, which were taken to be unfranked dividends in their hands.

In the alternative, the Commissioner argued that Part IVA applied to the scheme, resting on the alternative postulate that the original corporate beneficiary would have paid a fully franked dividend to each of I and H, making them liable to top up tax.

The law

Section 45B was introduced as a specific anti-avoidance measure in 1988, at the time the Corporations Law was amended to apply a solvency test to the payment of dividends. There were concerns these changes could create opportunities for companies to substitute capital returns in lieu of dividends.

Subsection 45B(1) provides as follows:

> *Purpose of section*
>
> *(1) The purpose of this section is to ensure that relevant amounts are treated as dividends for taxation purposes if:*
>
> *(a) components of a demerger allocation as between capital and profit do not reflect the circumstances of a demerger; or*
>
> *(b) certain payments, allocations and distributions are made in substitution for dividends.*

It was the dividend substitution part of the provision the Commissioner invoked in making his determination that s45B applied to the transaction. The provision includes a non-incidental purpose threshold for its application and the relevant circumstances in which it can apply includes an examination of:

> *... the pattern of distributions of dividends, bonus shares and returns of capital or share premium by the company or by an associate . . . of the company.*

Court decision

Section 45B

Given the circumstances of the restructure, the Court had no difficulty in finding that there was simply no scope for the Commissioner's dividend substitution argument to succeed.

As a newly incorporated company, M had no pattern of distributions for the Commissioner to hang his hat on. Nor did any of the other related companies associated with I and H have a pattern of distribution which would support the argument that the $52 million capital reduction was in any way in substitution for the distribution of profits. Rather, the capital reduction was entirely attributable to M's share capital account, which in economic terms represented the substantial accretion in the value of I and H's pre-CGT investments in the CBT business.

Nor did the Court find anything nefarious about I and H relying on the Div 615-A roll-over relief to preserve the pr-CGT nature of their investment in CBT – something that was legitimately open to them under the law.

Part IVA

The Court held that the alternative postulate on which the Commissioner's Part IVA determinations were based was unsound, as there was nothing in the evidence to suggest that the original corporate beneficiary (prior to the restructure), nor indeed any of the other companies in the group, would have paid out anywhere near the $52 million in Division 7A liabilities which had been accrued up to 2016. In fact, the evidence was that paying out that level of dividends would have created significant security issues with third party lenders.

> *The Commissioner's alternative postulate is just not reasonable. Indeed, and with all due respect, it does violence to the evidence as to the environment in which the City Beach business was conducted. [222]*

The Court concluded that neither I nor H had obtained a tax benefit, and Part IVA could not apply.

For good measure, the Court added that there was no dominant purpose to obtain a tax benefit:

> *Objectively, the dominant purpose was always to use pre-CGT assets, namely units in the CBT, to repay the Division 7A loans. This purpose was overarching. [233]*

Comment

It seems slightly ironic that the impetus for the restructure in this case was the release by the Commissioner of TR 2010/3, causing all sorts of financing problems for businesses conducted by trusts running up UPEs with their corporate beneficiaries. As readers will know, the question of whether those UPEs are in fact Division 7A loans is currently at large following the recent (non-binding) AAT decision in *Bendel*. It would be quite a turn up (and not just for I and H) if the AAT decision were to be upheld by the Court.

Appeals?

While it seems like a well-reasoned decision and there is no news about the Commissioner appealing as at the time of writing, it would not be surprising if he were to ask the Full Court to venture a view on this matter.

Ierna v Commissioner of Taxation [2024] FCA 592 (6 June 2024), Logan J

Billabong founder caught by Part IVA and dividend stripping rules

What you need to know

The Commissioner may not win them all, but he doesn't lose them all either.

In a restructuring case that probably has more of a tax avoidance flavour than the previous one, the Federal Court has held that Part IVA applies to a scheme under which a family trust crystalised a capital loss on the transfer of listed shares to an associated self-managed superannuation fund and that the forgiveness of certain debts by associated entities amounted to a scheme in the nature of dividend stripping.

Background

M founded the Billabong surf wear group in 1973, taking it public with an ASX listing in 2000 (as BBG). Following a downturn in market conditions and after reporting significant losses, BBG was delisted in 2018. BBG had stopped paying dividends in 2012.

Throughout the period BBG was publicly listed, M maintained a significant share holding which entitled him to a board seat, although he left it to others to manage the business. M's substantial investments in listed shares (including BBG shares), cash and other assets were held in a family trust (MFT). M was the sole director of the corporate trustee of MFT. M also had a direct 100% interest in a number of other companies, including GSM and Tironui.

In 2000 MFT acquired 100% of the shares in a start-up company, Plantic, which was developing plant-based biodegradable food packaging materials. Plantic required more financial support than M had anticipated, and by 2014, some $55 million had been lent to Plantic, mainly by GSM and Tironui.

Concerned about where things were headed, M determined to sell Plantic, and negotiations commenced with prospective buyers.

Sale of Plantic

M's accountants, EY, provided detailed advice on how to structure the proposed sale, including an important preliminary step designed to trigger a CGT loss in MFT that could be offset against the CGT gain that was expected to arise from the Plantic sale.

Over the years, MFT had participated in numerous share issues offered by BBG and as a result it was holding a large parcel of high cost BBG shares. While these high cost shares could be offloaded in the market without much tax risk, M had concerns about showing the financial markets that he continued to have confidence in BBG's future.

Accordingly, it was decided that the high cost BBG shares would be transferred to M's self-managed superannuation fund, GMSF, at market value. While an email from EY sent about that time alluded to the risk the transfer could be seen by the Commissioner as a wash sale, there was no evidence that this issue was considered any further. In September 2014 MFT transferred 10.3 million BBG shares to GMSF for $5.8 million, creating a CGT loss of $57 million in MFT.

Another important preliminary step suggested by EY and implemented by M was for GSM and Tironui to forgive their $55 million in loans to Plantic for no consideration. A buyer acquiring Plantic shares unencumbered by debt would pay more for the shares than if the debt remained in place. An email trail between M, M's financial adviser and EY emphasised the tax advantage of structuring the sale of Plantic in this way.

In April 2015, the $55 million in loans owing by Plantic were forgiven by way of a Deed of Release, which had the immediate effect of increasing the value of the Plantic shares and boosting the amount of the CGT gain to be offset against the $57 million in CGT losses. The losses created in GSM and Tironui by forgiving the loans for no consideration reduced the remaining profits they had available for distribution to M.

Once the two preliminary steps had been taken, the sale of the Plantic shares went ahead. The consideration was calculated as $111 million with a cost base of $26 million, creating a CGT gain of $85 million.

ATO audit

After reviewing the transactions that occurred and all the related evidence, the Commissioner made a Part IVA determination that the dominant purpose for transferring the BBG shares from MFT to GMSF was to realise a CGT loss in MFT in anticipation of the CGT gain expected to arise from the upcoming sale of the shares in Plantic. As the only presently entitled beneficiary in MFT, GSM was the entity whose taxable income was increased by reason of the cancellation of the $57 million CGT loss. A 50% penalty was also imposed on the scheme shortfall amount.

Further, the $55 million debt forgiveness by GSM and Tironui for no consideration was seen by the Commissioner as being *"by way of or in the nature of dividend stripping"*, and that s 177E ITAA 1936 applied to include the amount in M's assessable income as an unfranked dividend in the 2014-15 income year.

Part IVA issue

It was common ground that there was a scheme and a tax benefit, and that Division 6 operated to tax GSM on 100% of the net income of MFT. The issue was about dominant purpose, with M arguing that the transfer of BBG shares was all about providing funds for MFT so that it could continue to provide financial support for Plantic. M also claimed that acquiring the BBG shares represented a good investment for GMSF because in his view BBG shares had been oversold by the market.

The Court was having none of it, however, since all the evidence (including email trails) pointed the other way:

> *Having regard to the evidence as a whole, it is clear that the BBG Share Sale was undertaken for the purpose of the sale of Plantic, not for the purpose of funding the MFT. Unlike the other transactions referred to, the BBG Share Sale was a transaction between related parties, albeit at market value. I do not accept that the BBG Share Sale was undertaken for a purpose of funding any cash shortfall in the MFT. [295]*

And:

> *I do not accept that a substantial reason for the transfer of the shares from the MFT to the GMSF was for a purpose of providing a good investment to the GMSF. It was done for the predominant purpose of crystalising a capital loss in the MFT. [335]*

As the next case shows, the Court's comments about investing in BBG shares perhaps not having been in the best interests of GMSF raised some superannuation regulatory issues.

Two of the eight s177D(2) factors which were weighed up by the Court seem particularly influential:

Section 177D(2)(a) the manner in which the scheme was entered into or carried out

The Court observed that the transfer of the BBG shares took place in the context of the anticipated sale of the Plantic shares, in concert with the forgiveness of Plantic's debts owing to the M group. All the evidence suggested the BBG shares were transferred as part of an overall scheme to reduce the tax cost to the M group of the sale of the Plantic shares.

Section 177D(2)(b) the form and substance of the scheme

> *The form of the scheme was an off-market transfer of shares at market value, the substance of which included that Mr Merchant would retain the economic ownership of the BBG Shares, but crystallise a capital loss which could be used to offset significant capital gains which were then anticipated to arise in the MFT. [369]*

The remaining s 177D(2) factors all favoured the conclusion that the BBG share transfer was undertaken for the dominant purposes of enabling someone (GSM)to obtain a tax benefit. The Part IVA determination was therefore upheld.

There was also a non-trivial dispute about how the capital proceeds from the sale of the Plantic shares were calculated that was resolved in M's favour. This involved the valuation methodology applied to determine the market value of certain future payment rights MFT stood to receive post sale under the terms of the sale agreement. The Court decided it preferred the evidence of M's expert valuer to that of the Commissioner's valuer, resulting in a reduction in the sale proceeds of about $11 million.

Dividend stripping issue

Under the mechanical provisions of s177E, the Commissioner formed the opinion that the disposal of the debts by GSM and Tironui was a disposal of property and represented a distribution of the profits of those companies to MFT.

The Commissioner also identified that if, immediately before the debt forgiveness occurred, GMS and Tironui had declared and paid dividends to M to the extent of the forgiven amounts, those amounts would have been included in M's assessable income in the relevant income year.

The dividend stripping line of attack in fact caused the most serious financial damage to M, as he was assessed on a notional amount of about $55 million.

M sought to argue that forgiving intra group debts was just a normal step that many vendors take when undertaking a share sale. This is based on the premise that most buyers would prefer the target company to be debt free. M also argued that the debt forgiveness was undertaken to help facilitate the arm's length commercial sale of a business to an unrelated third party

The Court gave these arguments fairly short shrift. For one thing, there was no evidence to suggest that the buyer had demanded or requested that the loans be dealt with before settlement. That decision was solely driven by the M group. Moreover, the debt forgiveness for no consideration had the potential to create tax problems for the creditor company (Plantic). These issues were alluded to in advice from EY, although it is not clear whether and how they were resolved.

The Court found there were no logical commercial reasons for the debts to be forgiven for no consideration, the main effect of which was to shift retained earnings from GSM and Tironui to MFT (by reason of the higher price the buyer was expected to offer for a debt-free Plantic). It also reduced the potential top up tax that would fall on M in the event the retained earnings of the two companies were to be paid out to M as dividends in the future.

> *Mr McGrath [M's financial adviser], and through him Mr Merchant, were advised that the Debt Forgiveness Schemes are "what gives Gordon the big [tax] benefit from the share sale": CB261. The evidence did not suggest that any genuine commercial consideration was given to following what might be thought to be the common commercial practice of repaying loans. [557(a)]*

The requirements for s177E to be applied were all met, and M had not discharged the onus of proving that the debt forgiveness schemes were not in the nature of dividend stripping.

TOFA provisions

This case has a bit of everything, including a dispute about the potential application of the TOFA rules to the expiration of MFT's future payment rights under the sale agreement. These rights are in the nature of either milestone amounts or earn-out amounts. MFT was looking at deductions under the TOFA rules at the time the rights expire.

The Court was somewhat equivocal about whether and how the TOFA rules might apply to expired rights, but held, in any event, that at the time there was an exception to the application of the TOFA rules in cases where the benefits are contingent only on the economic performance of the business in the period after the sale of the business. The TOFA part of the proceedings were accordingly dismissed.

Comment

The taxpayer's spin on what really happened and why was not accepted by the Court, and EY's fingerprints were all over the tax planning process, including the transfer of the BBG shares to create the CGT loss and the debt forgiveness that had little commercial justification and which shifted profits out of the two companies into MFT where they would be taxed at a much lower rate.

Merchant v Commissioner of Taxation [2024] FCA 498 (14 May 2024), Thawley J

SMSF trustee's disqualification overturned

What you need to know

You need to have at least scanned the previous Part IVA/dividend strip case to make sense of this brief report.

Adding insult to injury, the Commissioner took a dim view of M's behaviour as sole director of the corporate trustee of the GMSF. His use of GMSF to create a CGT loss in MFT, which was struck down by Part IVA, was considered by the Commissioner to fall foul of a number of provisions, and warranted him being disqualified from acting as a trustee or as a responsible officer of a corporate trustee, of a superannuation fund.

M applied to the AAT to review the decision. In the interests of efficiency Thawley J, as the judge overseeing the Part IVA and dividend stripping appeal, presided over the review as a Deputy President of the AAT.

Alleged breaches

M was treated by the Commissioner as having breached a number of provisions in the *Superannuation Industry (Supervision) Act 1993* (the SIS Act). The Tribunal made the following findings in relation to those alleged breaches:

Section 34(1) – giving effect to the fund's investment strategy

GMSF had a detailed investment strategy, but its guidelines were not followed on the acquisition of just over 10 million BBG (Billabong) shares in September 2014. The Court decision on the Part IVA issue was that the dominant purpose of the BBG share transfer was to realise a CGT loss in MFT rather than representing a particularly sound investment for GMSF – the share price was on the skids and BBG had not paid a dividend since April 2012. There was no evidence that anybody involved in the matter thought the BBG shares were a sound investment for GMSF. The purchase of the 10 million BBG shares pushed up GMSF's holding in the class "shares in listed companies" to just over 74%, when the Investment Strategy Document specified a 0 to 40% range. The Tribunal was satisfied there had been a breach of s34(1).

Section 62(1) – sole purpose rule

In the overall scheme of things, the main reason for GMSF acquiring BBG shares from MFT was to trigger a CGT loss in MFT ahead of the anticipated sale of MFT's shares in Plantic. Another significant purpose was to retain ultimate economic ownership of the BBG shares within the M group, which is why MFT did not dispose of the BBG shares on-market.

Neither of those two purposes was a core purpose for GMSF, which put M in breach of s62(1).

Section 65(1) – financial assistance prohibition

The purchase of BBG shares by GMSF increased the financial resources available to MFT (although they would have increased to the same extent by selling on-market), and through MFT to one of its discretionary objects, M. That was sufficient to breach the prohibition against providing financial assistance.

Decision on disqualification

The AAT acknowledged these were serious breaches. Notwithstanding that, the Tribunal held that disqualification was not an appropriate outcome, mainly due to the low risk of M committing future breaches. The Tribunal's reasons took the following factors into account in reaching its decision:

- M was a fit and proper person (something the ATO agreed with after initially saying otherwise)
- M could be forgiven for thinking the transaction was not in breach of any regulatory provisions since the plan was brought to him by the auditor of GMSF
- M has given certain undertakings, including the appointment of an independent director to the corporate trustee
- these were not multiple breaches, but arose from a single course of conduct – namely the steps leading up to the sale of Plantic by MFT, and
- protecting investors in general was not really a consideration and M was only ever likely to be a director of the corporate trustee of his own super fund.

The Tribunal stopped just short of labeling the events relating to GMSF as a victimless crime, but we won't.

Merchant v Commissioner of Taxation [2024] AATA 1102 (16 May 2024), Justice T Thawley, DP

Taxpayers satisfy CGT small business threshold test: Their expert valuation accepted

What you need to know

If the Commissioner challenges a taxpayer's valuation of CGT assets for the purposes of accessing the CGT small business concessions under the $6m maximum net value asset (MANV) test, then the onus is on the taxpayer to show what their valuation is more correct than the Commissioner's valuation. It is not an impossible task.

Facts

The taxpayers, two brothers and their wives, were the beneficiaries of a family trust that operated a freight haulage business. The brothers were the directors and shareholders of its corporate trustee.

Following a restructure, the business was ultimately transferred to a new company of which the brothers were the directors. This was achieved by transferring the brother's shares in the corporate trustee to this new company. These shares were transferred under a contract for an agreed amount of $3.5m.

The CGT small business concessions (SBCs) were applied to the capital gain of $3.5m made by the family trust under this arrangement. As a result, the assessable capital gain for that income year was reduced to nil - and the taxpayer beneficiaries were only assessed on their 25% interest in other net income of the trust (being $322,000 each).

Following an audit, the Commissioner issued amended assessments claiming that the family trust was not entitled to the small business concessions as the market value of shares which had been transferred to the company was $10.6m (being the Commissioner's valuation of the business) – and not $3.5m. As a result, each taxpayer's share of net income from the trust was increased to $1.19m.

Issues

The issues for consideration were:

- Whether the market value substitution rule in s 116-30 of the ITAA 1997 applies to permit the Commissioner to substitute his (or any other) market value of the shares in place of the actual capital proceeds as agreed/specified in the share sale agreement.
- Whether the maximum net asset value (MNAV) test in Div 152 was satisfied (which requires that the net value of the CGT assets of the Moloney Trust and connected entities did not exceed $6m) in order to access the CGT SBCs.

Decision

Issue 1: market value substitution rule

The market value substitution rule for capital proceeds in s 116-30 did apply to impose a market value for the shares transferred (whatever that market value may be). This was because there was no real bargaining between the parties to the share sale agreement. They just left it to the accountants and accepted that amount.

In other words, there was none of the normal indicia of bargaining which might be expected of parties dealing with each other at arm's length. The valuation was not challenged or queried on behalf of either the seller or the purchaser (which was not unsurprising because each party to the agreement was substantially controlled and directed by the same persons).

Issue 2: Valuation

The Court preferred the valuation of the taxpayer's expert witnesses, which valued the net value of the business at some $3m (as opposed to the Commissioner's valuation which valued it at some $7m). In arriving at this result, the Court noted the following matters:

- There was no difference between the valuation of the shares and the valuation of the business per se, as the valuation of the shares reflect the valuation of the business ie "the underlying value of the shares was the business".
- For the purposes of the valuation process, the taxpayers were the husband and wife beneficiaries of the trust, together with its connected entities and affiliates – which included the family trust which ran the business.
- The valuation took into account the assets of all the relevant parties - being $803,901 (as agreed by the parties). Likewise, the valuation took into account liabilities of the of all the relevant parties - being $3.66m (as agreed by the parties).
- The parties agreed that the most appropriate method to value the business was the "capitalisation of maintainable earnings" method – which involves determining the arm's length level of future maintainable earnings (maintainable EBITDA) and then applying a capitalisation multiple to the maintainable EBITDA. However, both experts also applied their judgment/experience in valuing the business. "They were not purely formula-driven based on financial statements and available market data".
- The determination of an appropriate capitalisation rate (and to a lesser extent maintainable EBITDA) by the experts was their perception of the industry and environment within which the freight business operated.
- Each of the expert witnesses gave honest and objective evidence and the Court was satisfied that they expressed opinions that they genuinely held and that they were honest and competent.
- The taxpayer's tax agent originally made an error in obtaining a valuation as at 30 June 2014, rather than just before the CGT event of 25 March 2015 (as required).

The Court concluded that the taxpayers established that the net value of the CGT assets of the Trust (including connected entities) did not exceed $6m just before 25 March 2015.

Comment

If opposing expert valuers can have such a disparity in their valuations (some $4m), it does indicate that determining the market value of a business is not a science!

Moloney v FCT [2024] AATA 1483, 7 June 2024

Property developer assessable on proceeds from related contract of sale to which it was not a party

What you need to know

Whether an amount is assessable to a taxpayer as ordinary income will depend on all the circumstances and the context in which the gain is made – including, in this case, a transaction that the taxpayer was not a party to in circumstances where the gain related to its property development activities.

Facts

The taxpayer company was one of a group of companies involved in property development – the controller of which was a Mr Smith. It acquired three adjoining blocks of land for $3.1m. After obtaining initial approval for their development, the taxpayer sold each block to one third party company under 3 different contracts. The contract prices were for $5m in total.

A fourth contract between another company in the group (Zenith) was also entered into with the purchaser to provide DA approval services by way of selling various documents apparently for this purpose. The contract price was for $3.8m, albeit the contract did not assign any value to the documents.

The Commissioner issued an amended assessment to the taxpayer which increased the proceeds from the sale of the blocks of land by a further $1m from $5m to $6m to account for the gain made under the Zenith contract. The Commissioner argued the additional amount counted as ordinary income derived by the taxpayer within the meaning of s 6-5 of the ITAA 1997 because it was:

> *... taken to have received the amount as soon as it is applied or dealt with in any way on [taxpayer's] behalf or as [the taxpayer] direct[ed] ...*

pursuant to s 6-5(4).

The Commissioner also disallowed deductions claimed for interest of $1.8m and construction costs of some $900,000. Also, 50% shortfall penalties were imposed for recklessness.

Issue

The taxpayer's application before the AAT disputed all four matters – namely:

- the inclusion of the amount as assessable income
- the deduction for interest
- the deduction for construction costs, and
- the imposition of penalties.

Decision

Sale proceeds under the fourth contract

The AAT emphasised that it was necessary to have regard to the wider context of the transactions – and that in this context the sale proceeds under the fourth contract was attributable to the taxpayer and should have been included in its assessable income.

In arriving at this conclusion the AAT said that while:

> *... there was force in the taxpayer's argument that the valuation it obtained for the 3 properties, demonstrated the properties had a market value that approximated the sale price of the properties under the three contracts of sale, [nevertheless] Mr Smith's own evidence suggests there was some sort of commercial linkage in the minds of the parties between the sale contracts and the fourth contract. This raised a real question over what was sought to be achieved by the fourth contract.*

The AAT also noted that the fourth contract in referring to the documentation in relation to the blocks sold, invited the inference that at least part of the purchase price of the contract was referrable to that documentation – in circumstances where that documentation had no intrinsic value itself.

The AAT also accepted the following arguments of the Commissioner:

- The evidence surrounding the fourth contract raises important questions over what was going on between WCVB, other group companies, and the purchasers of the land.
- The taxpayers chose not to call the controllers of the company which purchased the properties to give evidence – and as a result the taxpayer's explanation of the transaction could not be wholly accepted.
- It can readily be inferred that there was at least an implied direction from the taxpayer to the purchaser to pay to Zenith a portion of the proceeds of sale under the fourth contract which related to the sale of the properties.
- There was a commercial relationship between all four contracts, and the subject matter of the fourth contract (the development documents) is inextricably linked to the subject matter of the other three contracts.

As a result of these matters, the AAT found that the taxpayer had not discharged its onus of proving that the assessments were excessive. Accordingly, it said that:

> *... the Commissioner was right to include a portion of the sale proceeds under the fourth contract in the taxpayer's assessable income pursuant to s 6-5(4).*

The deduction for interest

Broadly, the AAT accepted the taxpayer's argument that the interest on an intergroup loan was deductible in respect of the amount assessed on the basis that the repayment of the interest and the loan was contingent upon the properties being sold and there being a surplus of funds for the taxpayer to make the repayment – and that this contingent arose and therefore the liability was realised. Further, the AAT found that there was the relevant nexus between this liability and the derivation of the taxpayer's assessable income ion the circumstances.

The deduction for construction

The AAT found that the taxpayer had not discharged the onus of proving that the expenses were incurred and that it was entitled to a deduction for construction costs for various reasons including that there was no independent verification that the work was completed.

Penalty

The AAT found that the taxpayer had not discharged the onus of showing that the penalty assessment was wrong or what it should have been. Nor had the taxpayer satisfied the AAT that a lower rate of penalty should have been imposed or the penalties should be remitted.

***WCVB v FCT* [2024] AATA 1259, 28 May 2024**

No right of review - no objection decision made (either actual or deemed)

What you need to know

In the 2002 income year, the AAT in *Moreton Resources Ltd and Industry Innovation and Science Australia* [2022] AATA 3804, ruled that the taxpayer was entitled to R&D concessions for various R&D activities it carried out in the 2012 to 2014 income years in relation to a proposed underground coal gasification project in Queensland.

Facts

However, there remained an outstanding matter for the 2013 income year relating to its R&D offset claim to which the taxpayer had lodged an objection on 26 September 2016. The sequences of dealings between the parties that then occurred were as follows:

- on 17 November 2022, the applicant lodged a s 14ZYA(2) notice concerning its objection (which required the ATO to make an objection decision and that if no decision was made within 60 days, the ATO was taken by s 14YA(3) to have made a decision disallowing the objection);
- on 12 December 2022, by agreement between the parties, the objection and the s 14ZYA(2) notice were to be held in abeyance while other matters concerning the taxpayer's entitlement to the R&D Concession were attended to;
- in October 2023, discussions concerning the outstanding matters with which the taxpayer continued to be dissatisfied resumed;
- on 27 December 2023, the taxpayer wrote to the respondent in which the applicant contended that a deemed objection decision has been made by operation of s 14ZYA(3) because the resumed discussions reactivated the earlier s 14ZYA(2) notice or constituted a new s 14ZYA(2) notice,
- on 8 January 2024, the Commissioner wrote to the taxpayer in terms that the taxpayer also claimed constituted an objection decision; and
- about 8 January 2024, the applicant lodged documents with the AAT that purported to seek review of an objection decision – being either the deemed decision under s 14YA(3) or an actual objection decision made on 8 January 2024

Issue before AAT

The issue before the AAT was whether an objection decision been made by Commissioner (either actual or deemed) for which the taxpayer could seek a review before the AAT.

Taxpayer's arguments

The taxpayer argued that an objection decision had been made for the following reasons:

- The Commissioner's 8 January 2024 email was an objection decision.
- In the circumstances, s 14ZY had been activated to permit the AAT to begin a review because the Commissioner had not made a formal objection decision and sufficient time had passed for that delay to be unreasonable.
- More than 60 days had elapsed since the taxpayers original s 14ZYA(2) notice, so that a deemed disallowance of the taxpayer's objection occurred on 26 September 2016.
- The 27 December 2023 email from the taxpayer to the Commissioner constituted a new s 14ZYA(2) notice and more than 60 days had elapsed such that there has been a deemed disallowance of the applicant's September 2016 objection.

Decision

The AAT ruled that the Commissioner had not made an objection decision and that therefore it did not have jurisdiction to hear the application for review.

The AAT firstly found the Commissioner's email of the 8 January could not on its terms be construed as any form of definitive decision or any other form of decision in relation to the matter in dispute about the taxpayer's entitlements to the R&D offset.

It also found that the fact that the s 14YA notice was held in abeyance for a period longer than 60 days meant that the notice had, in effect, lapsed. Moreover, it had not been reactivated in any way. In other words, the Tribunal ruled that from that time it was held in abeyance, it had lost any effect. In arriving at this conclusion, the AAT stated that the relevant provisions s 14YA provisions did not allow for "a suspension of the latent s 14ZYA(3) effect" and then for its later reactivation. (It could not "come out of hibernation".)

In this regard, the AAT also noted that there was judicial precedent that made it clear that *"at the taxpayer's election, the statutory effect of a s 14ZYA(2) notice can be stopped before it crystallises. [And that it] doesn't matter whether the form of expression which affects the entitlement to the s 14ZYA(3) deemed objection decision is expressed in terms of waiver, withdrawal, abeyance, suspension or like synonym".*

In relation to the 27 December 2023 email from the taxpayer to the Commissioner, the AAT said that it could not be treated as a new s 14YA(2) notice as its content did not refer to the section at all nor to an objection decision (notwithstanding there is no prescribed form for such a s 14YA notice.) Furthermore, *"the tenor of the 27 December 2023 email, while asserting an entitlement, is more a continuation of dialogue concerning an ongoing review, and a request for information to make a planned future meeting more meaningful".*

The AAT, for completeness sake, also noted that it could only review decisions made in the *"exercise of powers conferred by an enactment"* – and that in this case the Commissioner had not exercised any powers to disallow an objection.

Moreton Resources Ltd and FCT [2024] AATA 1157, 16 April 2024)

Shortfall penalty reduction

Not intentional disregard but recklessness

What you need to know

It seems that honest and genuine reliance on a tax adviser can be relevant to the matter of the reduction or remission of administrative penalties – notwithstanding that a taxpayer is responsible for returns they sign.

Facts

The taxpayers, a land developer (Sam), his family members and related entities (including "Frontlink") were unsuccessful in *Mitri and FCT* [2023] AATA 3762 in claiming that the gain made sale of two properties ("Beveridge" and "Cranebourne") were made on a capital account and that they were entitled to the CGT concessions. The taxpayers were also unsuccessful in arguing that Frontlink made the gain in its capacity as a trustee for another entity. The issue of any remission or reduction in 75% base rate shortfall penalties of several million dollars imposed for intentional disregard of the law were held over.

In this matter, the taxpayers now sought remission or reduction in penalties imposed on the basis that the tax shortfall did not result from "intentional disregard" of the law and should be remitted in full, or imposed at base rate of 25%.

Decision

The AAT found that the penalties imposed were excessive given that there was no evidence that the gains had been intentionally and dishonestly treated as being on capital account.

Accordingly, the AAT found that it was appropriate to reduce the penalties from 75% for "intentional disregard" to 50% for "recklessness" – plus a further 50% reduction in respect of the Beveridge property. This resulted in a reduction of shortfall penalties from $7m to $2m).

The Beveridge property

Relevant matters for reduction:

- The surrounding circumstances did not support the inference that Frontlink must have known the sale was on revenue account but instead deliberately treated the gain as a capital gain. (These factual circumstances included that the property was held for a number of years and was sold undeveloped to the related superannuation fund.)
- It could not be said that the taxpayers' accountants:

> *"... must have known the sale was on revenue account, but intentionally and dishonestly treated the gain as on capital account. The revenue versus capital distinction is notoriously difficult and fact specific".*

- *"Frontlink was entitled to assume its accountants were capable of addressing the relevant tax issues".*
- It could not be conclusively said or inferred that that the accountants dishonestly treated the property as sold by Frontlink in its capacity as trustee as there was conflicting evidence on this matter.

Accordingly, the AAT said that the base penalty amount of 75% for "intentional disregard of the law" was excessive and should be reduced to 50% for "recklessness".

However, the AAT then found that having regard to all the circumstances (including the returning of 50% of the gain in another entity's return , and the availability of carried forward losses) a penalty of some $200,000 was unduly harsh and that the base penalty amount should be further reduced by 50% to a penalty of 25% of the shortfall.

The Cranebourne property

Relevant matters for reduction:

- There was insufficient evidence to infer that Frontlink knew the gains were on revenue account, but deliberately claimed the CGT concessions, instead.
- There was specific evidence that the accountants reached their own independent professional conclusion without being deliberately dishonest regarding the appropriate treatment of the gain – and the taxpayers followed this advice.
- It was most likely the case that Sam (as the controller of the land development operation) entrusted the tax consequences of the transactions to his accountants and did not impose his will on the accountants for a favourable tax outcome.
- But in relation to barrister's advice obtained on the applicability of the CGT small business concessions, it must have been clear in the circumstances that the treatment of the gains as attracting these concessions would be contestable.

Accordingly, the AAT found that the shortfalls were not due to intentional disregard of the law, and that it was appropriate to impose 50% shortfall penalties for "recklessness".

However, the AAT was not persuaded that any further remission was appropriate as without significant contemporaneous evidence of the basis on which the decision to treat the extraordinary gain as on capital account was reached it could not be satisfied any further remission would be consistent with the policy of encouraging voluntary compliance.

Shortfall interest charge (SIC)

The AAT was not persuaded that it was fair and reasonable to allow any further remission of SIC than the Commissioner had already allowed.

Mitri v FCT [2024] AATA 1268, 28 May 2024

No "serious hardship" relief granted – not "just and proper"

What you need to know

To obtain serious hardship relief a taxpayer must show that they would suffer 'serious hardship' if they were required to pay the tax ***and*** that is just and proper to provide the relief as requested. The former may be easier to establish; the latter harder – as the cause of the serious hardship can be something that it is not just and proper to provide the relief for!

Facts

The taxpayer was a 55-year-old man who was a sole trader in the construction industry. He sought hardship relief for a debt of $300,000.

At the time of his application, he was unemployed and in receipt of Centrelink benefits on account of health issues and had not worked for many years. He lived in shared accommodation and had no other income apart from welfare benefits. He had no assets and his expenses were such that he had only $15 per week in surplus.

Other facts included that he had bought and sold land as part of his work, including a block of land he purchased for cash when he knew that he had tax obligations - and that he didn't put funds away to meet his taxation and GST liabilities as he wanted to develop the property for profit. The taxpayer also did not provide bank statements of his pattern of spending. He also spent money on an overseas trip for his health issue.

Issues

To successfully establish a claim for hardship relief a taxpayer must show:

1. They would suffer 'serious hardship' if they were required to pay the tax; and
2. It is just and proper to provide the discretionary relief requested.

Also, the onus lies on the taxpayer to establish they meets the conditions for release.

Arguments

The ATO argued that evidence of the taxpayer's financial situation was opaque - and despite repeated requests for documentation, none had been provided. It also argued that the taxpayer was in this situation because of his own actions ie his failure to prioritise the sale proceeds of land to meet his taxation. The ATO also emphasised the taxpayer's poor compliance history.

Decision

Would the Applicant suffer 'serious hardship' if he were required to pay?

The AAT found that the first limb of the test had been met – namely, that the taxpayer would suffer serious hardship if he were required to meet his tax liabilities. This was generally because the evidence suggested his income was quite limited and that he had no assets.

In arriving at this conclusion, the AAT observed the following matters:

- **"Hardship"** is assessed at the time of application, while the meaning of "serious hardship" depends on the circumstances and in this regard consideration must be given to whether the taxpayer, if required to pay the tax liabilities would experience financial difficulties which are serious, but not at the level of causing destitution.
- **"Policy guidelines"** are not binding law, but they are relevant for consistency in decision-making. Accordingly, *PSLA 2011/17 (Debt relief, waiver and non-pursuit)* is relevant. It sets out the income/outgoings test, the assets/liabilities test - which are designed to determine if the consequence of paying the tax liabilities would be to deny the taxpayer of necessities according to normal community standards.
- **Re the "income/outgoings" test:** the limited information suggested the taxpayer's sole source of income was welfare benefits and that he had no other sources of income. Also, the taxpayer had no real surplus funds to meet his tax liability without impacting upon his ability to provide accommodation, food, clothing, medical supplies etc. As a result, the income/outgoings test weighed in his favour.
- **Re the "assets/liabilities" test:** the only assets declared were a car valued at $15,000 and savings of approximately $2,000. However, it was unclear whether his current situation represents the true financial picture. As a result, the AAT could not make any definitive findings as to whether this ground was satisfied.

Should the discretion to release the taxpayer from his tax liabilities be exercised?

In regard to the second limb of the test, the AAT found that there was no basis upon which it would be appropriate to exercise the discretion to release the taxpayer from his liabilities for the following reasons:

- *PSLA 2011/17* sets out other relevant factors which may be considered - and of relevance is compliance history and whether delayed lodgements results in the accumulation of a large debt that cannot be paid. In this case, the taxpayer in lodging his returns late, continued to deal with his finances with a "total disregard for his taxation liabilities, despite acknowledging his obligation".
- He purchased a property for cash with the intention of flipping it. However, there was no good reason for not prioritising his tax obligation prior to this purchase. During this period, he also travelled overseas on several occasions, and purchased a BMW.
- The taxpayer was vague in his evidence on the purchase and sale price of properties (and did not reach out to his conveyancer who could have provided the information).
- There was no expert evidence to support his claim that his health compromised his physical and cognitive functioning. Nor was there expert evidence on the need to travel overseas for non-mainstream treatment (at a cost of $30,000). And this was spending in circumstances when he had tax liabilities should have been also accommodated or prioritised.

- The taxpayer favoured the payment of debts owed to other creditors (eg lenders) ahead of meeting his tax liabilities.
- In terms of whether release from his debts would alleviate his financial hardship, the AAT noted that there was a claimed $15 surplus per week between his declared income and his expenditure, which would continue irrespective of whether he was released from his tax liabilities.

Comment

The AAT neatly summarised its decision as follows:

> *... the Applicant is the author of his own financial misfortune. He engaged in imprudent expenditure with no regard to his taxation obligations. Whilst his motivations appear to have been well intentioned, that is, he had to 'spend money to make money', he engaged in a pattern of spending which failed to prioritise his accumulated tax liabilities. His failure to promptly file his returns and contact the [Commissioner] to engage in some form of payment arrangement are all factors that have contributed to this liability... the medical evidence does not suggest that the Applicant was incapable of making decisions or managing money ...The absence of bank statements and a detailed picture of his spending did not assist the [taxpayer]. I also cannot ignore that the Applicant was given ample opportunity to provide these documents ...*

Doery and FCT [2024] AATA 1493, 7 June 2024

Taxpayers succeed over mystery deposits - for now

What you need to know

In a default assessment case with a twist, the Federal Court has overturned an AAT decision to treat as assessable income certain unexplained bank deposits received by a family-owned property trust.

Facts

The appellants are a married couple of Chinese origin who ran two restaurants and take-away outlets at various locations in Victoria through two discretionary trusts. They also controlled a property trust which conducted property investment activities in Victoria.

On conducting an audit, the ATO uncovered the existence of seven substantial deposits into the bank account of the property trust comprising cash and bank cheques in the 2017 and 2018 financial years totaling $735,000. Not satisfied with the couple's explanation that these deposits represented a mix of equity contributions and loans made by their Chinese resident parents, the Commissioner treated the $735,000 as assessable income of the property trust under s6-5 ITAA 1997. As presently entitled beneficiaries, the couple was then assessed on the amount of the deposits in their personal returns for the two income years.

Importantly, the amended assessments were raised under s166 ITAA 1936 rather than the usual s167 default assessments that are more commonly issued in such cases. The amended assessments related to the deposits only.

AAT case

In a decision he may now regret, the Commissioner agreed to confine the dispute before the AAT to the deposits made into the bank accounts of the property trust. In terms of discharging their onus of proof the Tribunal said this meant:

> *Therefore (the Applicants) have to prove that the Deposits made into the Property Trustee Company's bank accounts in the 2017 and 2018 income years are not income within the meaning of s 6-5 of the ITAA 1997. [AAT 10]*

In the event, the Tribunal was not receptive to the couple's inconsistent and uncorroborated evidence about when and how the cash was allegedly provided to them by their parents:

> *Their evidence, in the absence of any independent contemporaneous documentation or records, was not credible in all the circumstances. [AAT 84]*

Notwithstanding the problems the Tribunal had with the evidence, it was nevertheless common ground that the deposits were not ordinary income of the property trust. Hence the Applicants could be forgiven for thinking they had discharged the onus of proving the negative expressed by the Tribunal – whatever the deposits received by the property trust represented, they were not assessable income of the property trust.

However, in spite of the way the Tribunal had earlier expressed the onus of proof issue, it ruled that the Appellants' failure to satisfactorily explain the source of the deposits was fatal to their position:

> *In circumstances where the Tribunal rejected the evidence of the Applicants, as explained above, it is difficult to see how they can discharge their burden of proving the assessments are excessive. [AAT 85]*

The Tribunal held that the fact that the amended assessments were raised under s166 rather than s167, nor that the issue before the Tribunal had been confined to whether the deposits represented assessable income made no difference to the outcome.

Federal Court appeal

The Applicants were unhappy with this outcome and appealed to the Federal Court, where Logan J didn't see things in quite the same way, holding that the making of the amended assessments under s166 rather than s167 and then confining the issue to whether the deposits represented the assessable income of the property trust made all the difference to the outcome:

> *In this case, given the way in which the issue was confined, it was not sufficient for the Tribunal merely to act upon a rejection of the evidence of Mr Chen and Ms Li. The Tribunal remained obliged, particularly in light of the deliberate submission made to it, as to what ought to be concluded even if their evidence were rejected, to determine whether, on the material before it, the Deposits constituted income under ordinary concepts. This, it failed to do. [FCA 59]*

In effect, the Court was holding the Tribunal to its own yardstick for measuring whether the taxpayers had discharged the onus of proving the amended assessments were excessive – ie. that the deposits were not part of the assessable income of the property trust. Accordingly, the appeals were allowed (rather than remitted to the AAT for further consideration).

So what was the source of the mystery deposits?

The source of the deposits remains unexplained, although one obvious suspect would be undisclosed income from the restaurant and fast food businesses conducted by the couple:

> *The Commissioner asserted that the businesses operated using cash which was not disputed. [AAT 27]*

However, it would have taken quite some time to put that sort of money under the counter and it seems strange to accumulate that much cash at home for many years when the property trust could probably have invested the funds to earn a return. The Commissioner did allude to this possibility during the audit, but did not make much of it before either the AAT or the Court.

> *... in the revised audit finalisation letter for the Property Trust, (the Commissioner) suggested that the two trading trusts may have been the source of the funds but then did not refute the Applicants' assertion that it was impossible for the Deposits to have been generated by the businesses carried on the trading trusts, having regard to industry benchmarking for restaurant businesses. [AAT 89]*

While the Court may have been curious about where the deposits came from, it was more focused on the fact that the amount assessed was not ordinary or any other sort of income in the hands of the property trust.

Could the Commissioner have done things differently?

With the benefit of hindsight, and without wanting to encourage him in any way, the Commissioner might have achieved a better outcome by preparing an asset betterment statement showing an increase in assets reflecting the deposits made into the property trust controlled by the couple, but without recognising any tax-free funds having been received from the couple's parents.

The Commissioner could then have raised standard s167 default assessments for the discrepancy directly to the taxpayers, leaving them with the onus of proving what their actual taxable incomes were for the years in question (from a long line of cases starting with *Trautwein, Gashi* and many others).

The Commissioner would also likely refrain from confining the appeal to a single issue, but if, in the spirit of good administration he agreed to just focus on the $735,000 allegedly contributed tax-free by the couple's parents, that would be a much better argument for him to have, given what the Tribunal thought of their evidence about that.

The question of what the deposits represented in the hands of the property trust would never arise and the Commissioner would have had little trouble in having his objection decisions confirmed.

Appeal

The Commissioner has appealed against the Court's decision to the Full Federal Court. It is not known what the grounds of the appeal are, but the Commissioner is likely to be concerned about the way in which the Court has seemingly inverted the onus of proof. Possibly, but given the way the audit was conducted and the case was argued, the Commissioner could be said to be the author of his own misfortune.

Another ground of appeal might be around the way the Court, after having faulted the Tribunal for not properly considering the agreed position regarding what the deposits were not, did the job for the Tribunal by allowing the appeal. In a merits review, perhaps a better resolution would have been to remit the case to the AAT for further consideration.

One unfortunate outcome of this case is that it is likely to make the Commissioner even more reluctant than he is already to confine the scope of appeals to specific issues. He is on much safer grounds to rely on s167 to compel taxpayers to prove exactly what their taxable income is. In case after case, this is proving exceedingly difficult to achieve.

Liang v Commissioner of Taxation [2024] FCA 535 (14 May 2024), Logan J

DIS: Minerva case

Part IVA does not apply to trustee discretion

What you need to know

Despite the Full Court's finding that Pt IVA did not apply to the exercise of a trustees discretion to distribute income to a foreign resident unit holder in preference to a resident unit holder (with the result that less tax was payable in Australia), the Commissioner takes the view that the decision is confined to its facts and that, therefore:

> *... it does not disturb the Commissioner's long-held view that schemes which include a trustee's exercise of discretion to distribute income can attract the operation of Pt IVA.*

This Decision impact statement outlines the ATO's response to the decision in *Minerva Financial Group Pty Ltd v FCT* [2024] FCAFC 28 in which the Full Federal Court held that Pt IVA did not apply to a trustee's failure to exercise its discretion, as trustee of a unit trust, to make distributions to the *resident* holder of special units in the unit trust, and instead distributed the amount to a *foreign resident* ordinary unit holder. The Full Court reached its conclusion on the basis of finding that the "dominant purpose test" had not been met.

Facts

The taxpayer was a member of a group of companies and trusts that carried on business as a non-bank lender. It was also the head company of that group for consolidation purposes.

Following a restructure of the business in 2008 for the purposes of an Initial Public Offering (IPO), a new holding trust was settled (MHT) to which the income from the business was distributed. MHT, in turn, made distributions to its unit holders. Most of these distributions were made to its ordinary unit holder (MFGT) and not to its special unit holder (LF), being a resident operating company. The units in MGHT were held by two non-resident unit holders.

The taxation consequence of the distributions going to MFGT's non-resident unitholders, rather than to LF, was that the distributions were subject to a withholding tax of 10% rather than the corporate tax rate of 30%.

Note: The default position under the terms of the MHT constitution was for distributable income to be distributed to the ordinary unitholders.

The Commissioner made Pt IVA determinations to include in the taxpayer's assessable income an amount equal to the income distributed to MFGT, being income that would have been included in its assessable income if the income had been distributed to LF (a subsidiary member of the tax consolidated group of which the taxpayer was the head company).

First instance

In *Minerva Financial Group Pty Ltd v FCT* [2022] FCA 1092, the judge at first instance found that Pt IVA applied to the distribution on the basis that there was a dominant purpose of obtaining a tax benefit in terms of the way in which the distributions were made by MHT to the ordinary unit holder (MFGT) in preference to the special unit holder (LF).

Specifically, the judge said his was because the trustee of MHT did not proffer a commercial reason why it only distributed nominal amounts of income to the special unitholders, both the manner in which the schemes were carried out and the timing of the schemes were indicative of the dominant purpose of obtaining a tax benefit.

Full Court appeal

The Full Federal Court held that Part IVA did not apply to the schemes identified by the Commissioner as:

> *... the finding of objective purpose required by section 177D could not be reached. A person's subjective understanding of a commercial reason or motive does not answer the question posited by Part IVA.*

Specifically, it said that as the default position under the terms of the MHT constitution was for distributable income to be distributed to the ordinary unitholders, then there was nothing extraordinary about distributions flowing in accordance with those terms. Furthermore, it found that the objective facts were that special unitholders had no entitlement to the income of MHT absent the exercise of the discretion available under the trust constitution. It said that this conclusion was also supported by the commercial context of the restructure.

The Full Court also found that the same commercial outcome for the parties would not have been achieved had distributions been made instead to LF. This was because the ultimate distribution of income to the foreign unit holders had real economic and financial consequences to them that would not have flowed had the income been distributed to LF.

ATO view of decision

The Full Court found that Part IVA did not apply on the basis of the particular facts in this case of a non-bank lender with an 'IPO ready' business structure. Accordingly, the ATO says that it does not consider this decision as having any impact on the Commissioner's current advice and guidance.

In particular, the ATO said ***it does not disturb the Commissioner's long-held view that schemes which include a trustee's exercise of discretion to distribute income can attract the operation of Pt IVA.*** Further, whether Part IVA will apply to such a scheme will not be answered by the trustee's evidence of their purpose. It will depend on a consideration of the 8 factors collectively applied to the objective facts, to ascertain whether a party to the scheme had the requisite objective purpose that the taxpayer would obtain a tax benefit.

Minerva Financial Group Pty Ltd v FCT **[2024] FCAFC 28, 8 March 2024**

INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA – WEBINARS

When the ATO audits an SMSF auditor

What to expect and how to prepare

If all goes well in an ATO audit of an SMSF auditor, the ATO may close their file. However, if the ATO is not satisfied, the ATO might refer the SMSF auditor to ASIC. ASIC then has the power to impose outcomes such as public disqualification, suspension or imposing conditions on the auditor's registration. Accordingly, there is tremendous importance in satisfying the ATO's inquiries properly in a timely manner.

Bryce has picked up various practical 'tips' and 'traps' while working for SMSF auditors being audited by the ATO over the years. These practical tips and traps are invaluable for ALL professionals working with SMSFs.

With this knowledge, an SMSF auditor will be far better placed to promptly deal with an ATO review or audit.

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- Key issues and ATO interpretation of the law
- Most common areas where auditors come 'unstuck'
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Presenter: Bryce Figot

Bryce is recognised as one of Australia's leading SMSF lawyers. He has worked predominantly in the fields of tax and superannuation over the past 17 years and holds a Master of Laws from the University of Melbourne.

Bryce is a regular presenter for the major professional bodies on tax and SMSF topics and has published extensively in these areas. Bryce is frequently quoted and published in the AFR, the Herald Sun, CCH and LexisNexis publications, and elsewhere. Bryce wrote the *Complete Guide to SMSFs: Planning for Loss of Capacity and Death*, published by CCH Wolters Kluwer. Bryce is on the editorial panel of LexisNexis' Australian Superannuation Law Bulletin. He is a Senior Fellow at the University of Melbourne's Law School, where he is the subject coordinator of Taxation of Superannuation.

Bryce is a Specialist SMSF Advisor™ as well as being a Chartered Tax Adviser.

Status of Tax Matters @ 28 June 2024

(This table is not intended to be comprehensive)

<table>
<tr><th colspan="2">Status of Tax Matters @ 28 June 2024</th></tr>
<tr><th>Legislation</th><th>Status</th></tr>
<tr><td>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</td><td>The Senate did not insist on its proposed amendment to make the Instant Asset Write-off more generous.

The Bill was passed by both Houses on 25 June 2024 and awaits Royal Assent.</td></tr>
<tr><td>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).</td><td>Royal Assent given on 31 May 2024

Act No. 37 of 2024</td></tr>
<tr><td>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.</td><td>Royal Assent given on 3 June 2024

Act No. 40 of 2024</td></tr>
</table>

Status of Tax Matters @ 28 June 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.	Before the House of Representatives
Scheduled Parliamentary sitting days	
Both Houses sit from 1st July to 4th July 2024 before heading into the long winter recess before returning mid-August.	
Appeals	
Liang v Commissioner of Taxation [2024] FCA 535 (14 May 2024)	As mentioned in the case report above, the Commissioner has appealed to the Full Federal Court against the decision by Logan J that certain deposits into the bank account of a property trust controlled by two individuals were not assessable income of the trust.