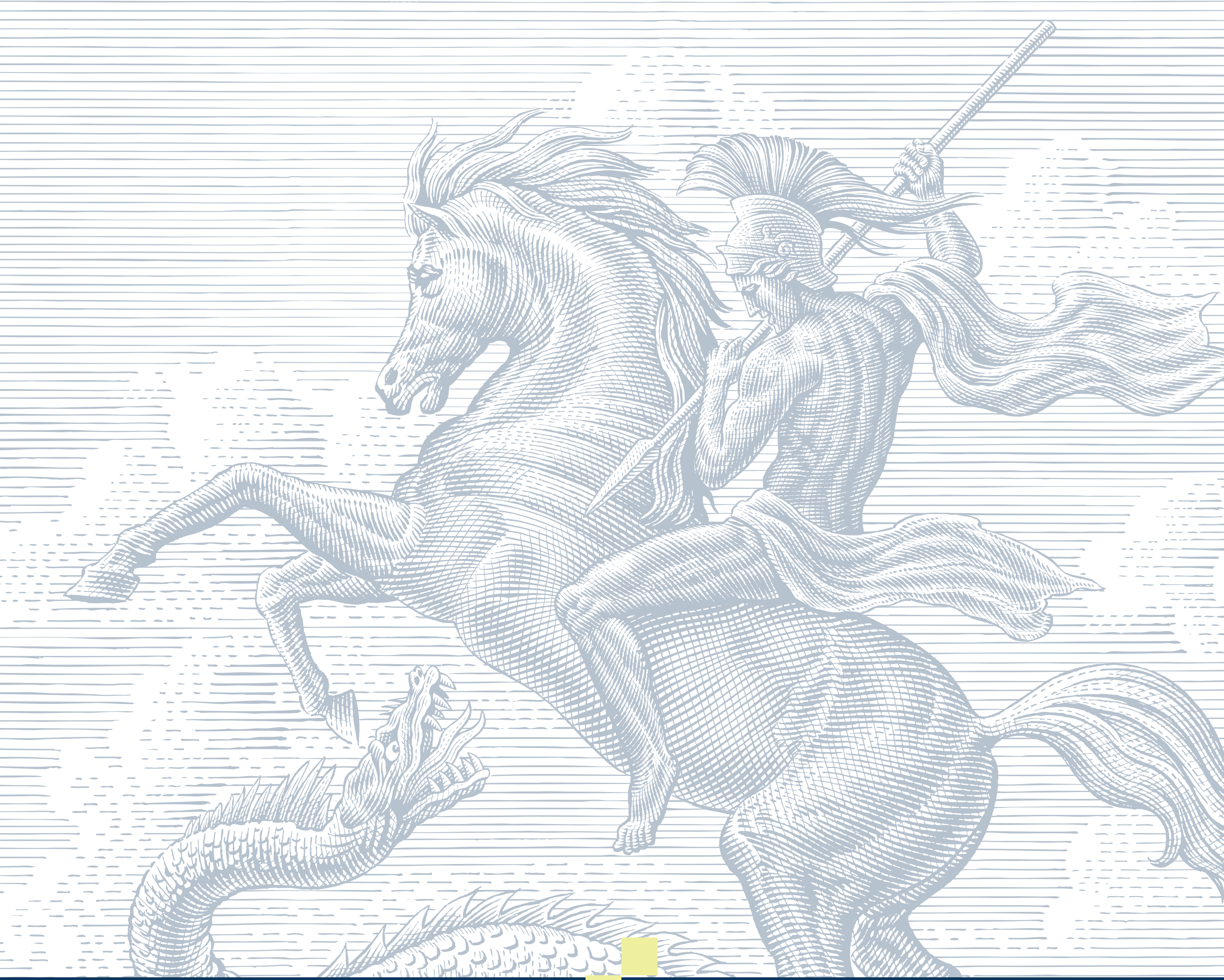


Monthly Tax Update

June 2024

INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA

Monthly Tax Update

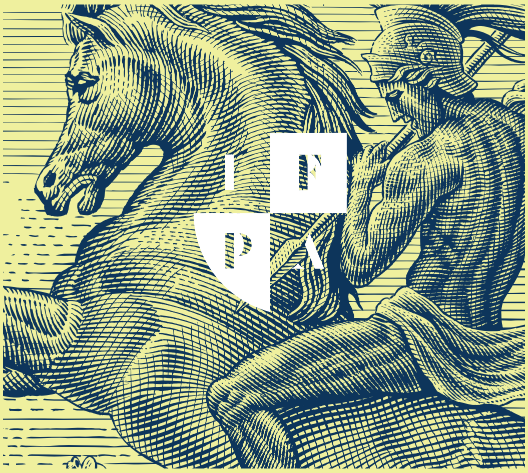
June 2024

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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Contents

No deduction for top up payments made on share sale

What you need to know

The test for whether an expense or loss is of a non-deductible capital nature is forever rooted in the concept of "the character of the advantage sought" and whether the expense or loss relates to "the profit-yielding subject" of its object.

Facts

The taxpayer was in the business of property development through related companies and trusts. The taxpayer generated income from its business in the form of distributions and dividends from its own investment in these entities and from project management and selling fees. It raised finance for these activities by share capital raisings.

In respect of 3 such land development projects, it made "top-up payments" of some $3.2m to investors (payable by instalments) under a share sale agreement whereby the taxpayer purchased the investors' shares following the poor performance of the projects. These top-up payments meant that the investors were not out of pocket from their original investment.

The taxpayer claimed a deduction under s 8-1 of the ITAA 1997 for the payments in the relevant income years, which the Commissioner disallowed.

Taxpayer's arguments

The taxpayer claimed that the payments were deductible under s 8-1 because they were necessarily incurred in carrying on its business for the purpose of gaining or producing assessable income.

In particular, the taxpayer argued that they were not made for the purpose of acquiring the shares, but for the purpose of:

- overcoming the negative impact on investors in respect of the losses they sustained from their investment;
- attracting investors to invest in future property development projects;
- maintaining its fee income from such future projects; and
- maintaining its reputation and goodwill and, therefore, future income streams.

The taxpayer also claimed that the payments did not constitute monies paid in respect of its acquisition of the shares and were instead ex gratia payments made to each of the investors.

The taxpayer also claimed that the payments were incurred on revenue account and were not of a capital nature (by reference to various precedents).

Alternatively, the taxpayer claimed that payments were deductible under s 40-880 (blackhole expenditure). In this regard it said that the exception in s 40-880(5)(f) for expenditure that could be taken into account in working out the amount of a capital gain or loss from a CGT event did not apply as the payments were not paid to acquire the shares.

The taxpayer also said that even if this exception were to apply, then the exclusion from it in s 40-880(6) (for expenditure incurred to preserve the value of goodwill in relation to a legal or equitable right that was solely attributable to the effect that the right had on goodwill) would apply to allow a deduction for the payment under the blackhole expenditure rules.

Commissioner's arguments

The Commissioner submitted that the payments were clearly of a non-deductible capital nature as they were:

- made for the purpose of preserving the over-all profit-earning structure of the taxpayer's business;
- an "extra-ordinary" one-off-payment made for this purpose and were not an "ordinary incident" of its income earning activities; and
- part of the purchase price paid for the shares from investors (being capital assets).

In relation to blackhole expenditure claim, the Commissioner said that even if the payments were considered to be made on capital account, then for CGT purposes the payments formed part of the cost base of the shares it purchased from investors and that therefore s 40-880(5)(f) clearly applied to deny a deduction as blackhole expenditure. The Commissioner also claimed the exclusion to that exception in s 40-880(6) did not apply in the circumstances.

Decision

Section 8-1 deduction

The Federal Court dismissed the taxpayer's appeal and held that the payments were not deductible under s 8-1 but were of a non-deductible capital nature the following reasons:

- On the proper interpretation of the share sale agreements the payments formed part of the consideration paid by the taxpayer for acquiring the shares (a capital asset) from the investors (and even if the payments were characterised as ex gratia payments).
- The character of the advantage sought (which relates to the business structure and the profit-yielding subject and its lasting qualities) led to the conclusion that the payments were on capital account.
- The means adopted to obtain this lasting advantage (ie, by making a once-and-for-all outgoing, albeit payable in instalments) supported the view that the payment was of a capital nature.
- In terms of the manner in which the advantage was used and relied upon, the payments meant that the investors could withdraw from the project and the taxpayer was able to extricate itself from an unsuccessful project which was likely to cost it money in the future.

Section 40-880 deduction

In relation to deduction under the blackhole expenditure rules, the Court ruled that it did not apply because the capital expenditure falls within the exception in s 40-880(5)(f) – that is, they fell within the definition of money required to be paid in respect of acquiring a CGT asset as reflected in s 110-25(2(a) –

which requires looking at the taxpayer's purpose in incurring the relevant expenditure "from a practical and business point of view".

In relation to the exclusion in s 40-880(6) from this exception in s 40-880(5)(f) – which required the expenditure incurred to preserve the value of goodwill in relation to a legal or equitable right that was solely attributable to the effect that the right had on goodwill – the Court ruled that right to shares obtained from the investors was not such a right as did not have the necessary effect on goodwill as required.

Specifically, the Court said that:

> *"..the purchase of the shares...was inextricably bound up with the exit of SPG [the taxpayer] from a loss-making venture, thereby giving SPG the ability to participate in other ventures. This goes beyond the value of the right to SPG being solely attributable to the effect that the right has on goodwill. Subsection 40-880(6) is not engaged."*

IFPA Comment

Presumably, in the interests of reciprocal treatment, the investors included the top-up payment as part of the capital proceeds received on the sale of their shares to the taxpayer for CGT purposes!

Satterley Property Group Pty Ltd v FCT [2024] FCA 421

Applications for deferral of payment of tax and remission of GIC

What you need to know

In challenging whether the Commissioner has exercised a discretion properly – in this case to refuse to defer payment of tax and remit GIC – the matter will turn on whether the Commissioner has taken into account relevant considerations and not taken into account irrelevant ones.

Facts

The taxpayer and various entities he controlled were involved in a multi-million dollar dispute involving the application of Pt IVA, Div 7A and s 100A to an arrangement whereby, broadly, trust distributions were made to a controlled partnership and loans made from the controlled partnership to the taxpayer. The dispute also entailed issuing alternative Pt IVA assessments to the three parties involved in the dispute in respect of the same amount for the same income year.

The substantive matters were resolved by consent between the parties. However, the taxpayer requested a deferral of the time at which the tax was to be paid pursuant to s 255-10 of Sch 1, TAA 1953. The taxpayer also sought remission of related GIC.

The request for deferral was refused by the Commissioner and the taxpayer sought judicial review. In prior litigation, the Federal Court found that Commissioner had not, in fact, taken into account relevant considerations as he was required to do and remitted the matter to him for reconsideration. But, again, the Commissioner refused to defer the due date for payment.

The taxpayer applied to the Federal Court for judicial review of this decision – as well as the related matter of the Commissioner's refusal to remit GIC.

Issues before the Court

Deferral application

The taxpayer argued that the decision not to defer payment was unreasonable in the circumstances and involved an error of law (in relation to the issuing of alternative assessments). The taxpayer also argued that the Commissioner failed to take into account relevant considerations and had also taken into account irrelevant ones.

GIC remission

The taxpayer also argued that the GIC should be remitted to the extent that it related to tax that had been paid by one of the other entities in respect of the same amount under one of the alternative assessments. The taxpayer also relied on the statement of the Full Court in *Hyder v FCT* [2023] FCAFC 29 that the payment of the tax by one of the entities could be expected to be taken into account by the Commissioner in considering remission of GIC.

Decision

The Court found that the Commissioner's decision not to defer of the payment of the tax had been properly arrived at, but that the request for remission of GIC had not been.

Deferral application

The Federal Court found that the deferral decision was not unreasonable or illogical and was in accordance with the relevant legislative scheme.

Furthermore, it found that the taxpayer failed to show that the Commissioner had failed to take into account any relevant considerations, as he was required to do in accordance with s 255-10 of Sch 1, TAA 1953 and ATO policies for the collection of taxation debts set out in various Practice Statements (eg, PS LA 2011/14, PS LA 2011/18 and PS LA 2006/7).

These relevant considerations included:

- that there were assessments which were alternative to others (and the consequences thereof - including that the alternative assessments each imposed a liability which was then due and payable, but which could not all ultimately be correct);
- that the Commissioner did not intend to double recover tax and that his intention was ultimately to collect the relevant amount of tax payable only on those assessments which proved to be correct, following Pt IVC proceedings;
- that the Commissioner had given an undertaking to defer recovery action in relation to the assessments until after the conclusion of the Pt IVC appeal process;
- the fact that GIC continued to accrue on the assessments and that the effect of deferring the time for payment, if such a deferral was made, would be that GIC on the respective assessments would not be payable until (and from) the deferred date; and
- the fact that GIC would only ultimately be payable in respect of the liability that was found to be correct at the conclusion of the Part IVC proceedings.

In relation to the alternative assessment issue, the Court said that the debt recovery scheme:

> *"..does not require the Commissioner to resolve his uncertainty concerning alternative assessments merely because a taxpayer with an alternative assessment has made a request under s 255-10 of Sch 1 to defer the due date for payment. That is not to say that the fact that there are alternative assessments, and that one or other taxpayer has made a payment under such an assessment, are not relevant in considering whether or not to exercise the power in s 255-10 of Sch 1 having regard to the particular circumstances of the taxpayer."*

In relation to the taxpayer's claim that irrelevant considerations had been taken into account, the Court said:

> *"The decision-maker's task necessarily involved taking a view about the merits of the application for deferral. If the ground, or the submissions advanced, were intended to suggest bias, or lack of good faith, or that the decision-maker made the decision at the behest of another person, none of those allegations have been made out."*

GIC remission

The Court found that the Commissioner's failure to determine the GIC remission request without addressing the central argument raised by the taxpayer was a "jurisdictional error" – and this central argument was that the GIC related to tax that had already been paid by one of the other entities in respect of the same amount assessed under an alternative assessment.

Furthermore, it said that this amounted to a breach of procedural fairness and the implied statutory condition that the power to remit be exercised reasonably.

Accordingly, the Court ordered that the request for remission of GIC was to be remitted to the Commissioner for reconsideration by a different decision-maker in accordance with law.

Hyder & Ors v FCT [2024] FCA 464, 7 May 2024.

Concessional meals substantiation rules denied to truck driver

What you need to know

A long distance truck driver was unsuccessful in relying on the s900-50 written evidence exception for domestic travel allowance expenses because he had failed to demonstrate that he had incurred the relevant expenditure and also because the amounts claimed for food and drink were not considered by the Tribunal to be "covered by a travel allowance".

Tax practitioners need to be familiar with the particular Awards under which their truck driver clients receive travel allowances as the terms of an Award can potentially disqualify the drivers from benefiting from the substantiation exception.

Facts

The Applicant Mr. Duncan, a long haul truck driver, spent 282 days on the road during the income year ended 30 June 2021, including 141 nights away from his home. Under the terms of the *Road Transport (Long Distance Operations) Award 2020*, he was paid a travel allowance of $6,349 in respect of some of the days he was away from home overnight as part of his employment as a driver. Oddly, the Award stipulates that the $45.03 daily travel allowance is not payable *"where the employee is provided with suitable accommodation".*

In his 2021 income tax return Mr. Duncan disclosed his $6,349 travel allowance as assessable income and claimed an amount of $28,200 as deductible expenditure on food and drink. This was based on an estimate made by Mr. Duncan and, at $100 per day, came in just under the reasonable amount limits for food and drink expenditure set by the Commissioner for the income year ended 30 June 2021 in TD 2020/5 (up to $105.75 per day, allocated across three meals).

The Commissioner had already accepted, through bank statements provided by Mr. Duncan, that $8,393 had been expended on food and drink while traveling in the course of his employment. The balance of just under $20,000 was thought by the applicant's representative to represent expenditure on ingredients which he would have bought and used to prepare meals in his rig (which was equipped with a fridge and a kitchenette).

To further complicate matters, Mr. Duncan suffers from a post-traumatic stress disorder and was unable to give evidence about what additional expenditure he may have incurred. Nor was his wife called to shed light on this issue.

The issue was whether Mr. Duncan was entitled to rely on the substantiation exemption in s900-50.

The law

All references are to the *Income Tax Assessment Act 1997.*

900-15 Getting written evidence

(1) To deduct a work expense:

(a) it must qualify as a deduction under some provision of this Act outside this Division; and

(b) you need to substantiate it by getting written evidence.

900-30 Meaning of work expense

General

*(1) A **work expense** is a loss or outgoing you incur in producing your salary or wages.*

Travel allowance expenses included

*(2) Travel allowance expenses count as work expenses. A **travel allowance expense** is a loss or outgoing you incur for travel that is covered by a travel allowance. The loss or outgoing must:*

(a) be for accommodation or for food or drink; or

(b) be incidental to the travel.

*(3) A **travel allowance** is an allowance your employer pays or is to pay to you to cover losses or outgoings:*

(a) that you incur for travel away from your ordinary residence that you undertake in the course of your duties as an employee; and

(b) that are losses or outgoings for accommodation or for food and drink, or are incidental to the travel.

900-50 Exception for domestic travel allowance expenses

(1) You can deduct a travel allowance expense for travel within Australia without getting written evidence or keeping travel records if the Commissioner considers reasonable the total of the losses or outgoings you claim for travel covered by the allowance.

Taxpayer’s arguments

The applicant’s representative simply relied on the Commissioner’s reasonable meal caps set in TD 2020/5. He did not acknowledge or recognise the need to demonstrate that expenditure on food and drink up to the amount of the cap had actually been incurred, making for an inevitable outcome for his client.

Decision

In determining whether Mr. Duncan was entitled to the benefit of the substantiation exception, the Tribunal posed four questions that needed to be answered:

1. *Did the applicant receive a travel allowance?*

   Although observing the amount of the allowance was "rather meagre" and might in the Tribunal's view be better described as a hardship allowance or a loading, the Tribunal was prepared to accept it was a bona fide travel allowance. Given the terms of the Award, however, the allowance was seen as being intended to cover only the cost of accommodation (and not food and drink).

2. *Did he spend $100 a day on food and drink?*

   While the Tribunal accepted that Mr. Duncan might well have spent some additional amounts on food and drink beyond the $8,393 already allowed, it concluded that he had not discharged the onus proving how much was involved. The food ingredients mentioned at the hearing were apparently bought at supermarkets close to the applicant's home, but the tribunal was not provided with any basis for apportioning his family's total groceries bill between the food ingredients allegedly used on his travels and the normal family shopping.

3. *Is the amount of $28,200 claimed reasonable?*

   The amount claimed would have been reasonable in the context of the substantiation exception, had it applied. The problem for the applicant was that he had not demonstrated how much more than the $8,393 already allowed he had actually incurred.

4. *Was the disputed expenditure "covered by" the travel allowance?*

   Because the travel allowance was taken by the Tribunal as covering only the cost of accommodation, but not the cost of food and drink, it was held that the expenditure being claimed was not a "travel allowance expense" under s900-30 and hence the substantiation exception in s900-50 did not apply.

In any event, the onus of proving how much had been spent had not been discharged, even if the exception did apply – s900-15 stipulates that a work expense needs to be deductible and under s8-1 that means the relevant expenditure has to be incurred.

IFPA Comment

Our Outlook Magazine Issue 26 (September/October 2023) includes a detailed article on what the substantiation rules are for long distance truck drivers. While the s900-50 substantiation exception is better than nothing, it does not give taxpayers carte blanche to simply claim up to the reasonable amounts cap. Drivers still have to prove they have incurred the expenditure being claimed.

As the Commissioner says in TR 2004/6 (para 39), the requirements under the s900-50 exception are significantly less than drivers having to keep all their greasy receipts for every single meal they pay for on the road. TD 2023/3 suggests a driver should "demonstrate his typical spending pattern on meals" by way of diary entries or bank records and receipts kept for some trips.

With respect, the Tribunal's conclusion about the meals expenditure not being covered by the allowance may be a bit shaky as it stems from the questionable finding that the allowance was intended to cover only accommodation costs but not food and drink. It's very hard to park a B-Double outside a pub or a motel, which is why long distance drivers mostly sleep in their rig. How can the allowance be intended to cover accommodation costs when most drivers would rarely incur any accommodation costs?

The better view of the allowance, and the terms of the Award notwithstanding, may be that it is more than a nominal offset against the only overnight travel costs which drivers do incur, which are for food and drink. Hence the expenditure on food and drink is "covered by" the travel allowance and becomes a "travel allowance expense", which in turn entitles the driver to the limited relief provided by the s900-50 substantiation exception. In the case of Mr. Duncan, however, he would not have benefited from such a finding as he was unable to demonstrate how much was incurred.

To be on the safe side, practitioners should determine under which Award their driver clients are receiving their travel allowance. If it is the Road Transport (Long Distance Operations) Award 2020 (or another Award with a similar condition), they may recommend that those clients retain their greasy receipts and bank statements for every meal for the entire year. That can be a major pain, but the gap between the allowance received and the likely expenditure on food and drink should make it worthwhile.

The case is also a useful reminder that even where the substantiation exception clearly applies, it is not advisable to just ask the client to give a rough estimate of what they may have spent on food and drink. Practitioners would be well advised to revisit TD 2023/3 and establish the driver's typical spending pattern on meals for the year of income.

The ATO can be expected to keep chipping away at large claims for the allowance/expenditure gap made by long distance drivers. Audits often arise from the review of large refunds. Better to stay ahead of things and have the right evidence to hand when the call comes.

Duncan v C of T [2024] AATA 974 (7 May 2024), Dr N A Manetta

Dental technician's self-education costs disallowed

What you need to know

A foreign qualified dentist working in Australia as a dental technician has been unsuccessful in her claim for self-education expenses incurred with the aim of qualifying as a dentist in Australia.

Facts

The Applicant, Ms. Ionita moved from Romania to live in Australia in 2012 and commenced working here as a dental technician in 2013. She was already qualified to practise as a dentist in Romania but not in Australia.

Wishing to qualify to be registered and practise as a dentist here, and while working as a dental technician, she incurred expenditure of $16,643 over four income years in meeting the requirements of the Dental Board of Australia (DBA) by undertaking an initial assessment and then completing both written and practical examinations run by the Australian Dental Council (ADC). She successfully completed those requirements and is now a qualified dentist practising in Australia.

The Commissioner has denied her claim for self-education expenses and disallowed the applicant's subsequent objections. Those objection decisions are subject to a review by the AAT.

Applicant's arguments

Ms. Ionita argued that the skills of a dentist and a dental technician are highly complementary, and her studies towards registration as a dentist made her a better dental technician.

She also submitted a letter from her employer for the 10 years she worked as a dental technician, which spoke very highly of her. Her skills and effectiveness were of a very high standard and she merited salary increases that ran well ahead of the rate of inflation. These things all coincided with the studying she undertook in order to pass the written and practical examinations conducted by ADC.

She argued that her circumstances were akin to those in the Studdert case, where a flight engineer's claim for flying lessons was upheld as the court accepted that the taxpayer's flying lessons improved his proficiency as a flight engineer.

Commissioner's response

- Undertaking dentistry studies was not a condition of Ms. Ionita's employment. In fact, she commenced her employment before setting out on qualifying for registration as a dentist in Australia.
- The roles of a dentist and a dental technician are not, in fact, as closely aligned as alleged by the applicant. One deals with live patients and the other with inanimate objects.

- The applicant has not demonstrated that undertaking the initial assessment and the written and practical examinations maintained or improved her skills as a dental technician.
- No link has been demonstrated between the studies undertaken and the applicant's pay rises.
- The assessment and examinations were undertaken in order to become registered as a dentist in Australia, something the applicant ultimately achieved. As in the *Maddalena* and *Ting* cases, however, the expenditure was incurred at a point too soon to be regarded as having been incurred in gaining or producing her assessable income.

Tribunal decision

Unsurprisingly, the Tribunal threw its lot in with the Commissioner in denying the applicant's claim for self-education expenses.

In spite of submissions to the contrary, there was no evidence that Ms. Ionita's studies in any way improved her skills or knowledge as a dental technician. The Tribunal therefore had no difficulty in distinguishing Studdert's case. The Tribunal also agreed with the Commissioner that the work undertaken by a dentist and a dental technician are very different.

As for her substantial salary increases, they were seen by the Tribunal as stemming more from the experience and confidence she gained over the 10 years she worked for her employer. There was no obvious correlation between the salary increases and the completion by the applicant of her initial assessment and subsequent written and practical examinations.

The Tribunal also agreed with the Commissioner's "point too soon" argument:

> *"As the Applicant was not yet employed as a dentist during the Relevant Income Years but sought to become registered as a dentist to work as a dentist in the future, the expenses were incurred at a point too soon to be regarded as incurred in gaining or producing the Applicant's assessable income (Maddalena)." [58]*

By all means spend money to acquire new skills that lead to better jobs, but don't expect the tax system to subsidise you.

Ionita and C of T [2024] AATA 808 (19 April 2024)
SM Dr M Evans-Bonner

Cleaner an employee, not an independent contractor

What you need to know

The existence or non-existence of a "right to delegate" is key to determining whether a person is an independent contractor or not – including whether it is presumed from "the conduct of the parties". Likewise, whether the work undertaken is "personal" to the person, is important.

Facts

The taxpayer originally employed a cleaner as an employee and paid superannuation contributions on her salary. Subsequently, the employee was re-engaged under a contractual arrangement with the intention of making her an independent contractor. Key terms of the contractual arrangement (and other relevant facts) included:

- a 20 hour working week (subject to some flexibility) at a higher hourly rate to compensate for lost personal and annual leave etc.
- a requirement to invoice the employer using an ABN;
- the employer provided cleaning equipment (and reimbursement for any purchases of such she made); and
- she was provided with a desk at the office and an email address.

Importantly, as a factual matter, the cleaner did not have any employees and she never delegated her work (and the contract arrangement did not refer to any right to delegate).

The ATO imposed the superannuation guarantee charge (SGC) on the employer on the basis that the cleaner was an employee for super guarantee purposes pursuant to s 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) ie, a contract wholly or principally for labour.

Issue

Was the cleaner an employee for super guarantee purposes per s 12(3) of the SGAA during the relevant period (ie, a contract wholly or principally for labour).

Decision

The AAT concluded that the contractual arrangement between the parties was "wholly or principally for labour" for the purposes of s 12(3) of the SGAA and that therefore she was not an independent contractor.

The AAT also stressed that "employers cannot contract out of their superannuation obligations, nor can employees waive their entitlements under the SGAA" and that instead the definition in s 12(3) of the SGAA determines the matter (in this case), and not any subjective intention of the parties.

The factors that led to the AAT's conclusion included:

- the cleaner was paid for her personal labour and skills ie, the work was personal to her;
- she was paid on an hourly basis which indicated that she was not engaged to achieve a result, and the work she performed was not connected to any quantifiable result; and
- the conduct of the parties indicated that there was no right to delegate (eg, she had no employees and the employer made other arrangements if she was absent).

Accordingly, the AAT said that in these circumstances it was reasonable to conclude that the performance of the work was personal to her and the contractual arrangement was "wholly or principally for labour" for the purposes of s 12(3) of the SGAA.

Interestingly, the AAT finally noted that the definition in s 12(3) of the SGAA is "broader and easier to meet than the common law definition of an employee".

IFPA Comment

The existence of a clause in a contractual arrangement giving a person the "right to delegate" will, in the absence of a sham, seem to be sufficient to categorise a person as an independent contractor (see ATO Decision Impact Statement re JMC Pty Ltd v FCT [2023] FCAFC 76). However, in this case there was no such clause – and it was assumed that there was no right to delegate (implied or otherwise) from "the conduct of the parties".

S&H Investments Pty Ltd and FCT [2024] AATA 893, 29 April 2024

Make those last minute concessional contributions in plenty of time

What you need to know

A recent AAT decision serves as a useful reminder of the need to allow plenty of time for super funds to receive extra concessional contributions well before 30 June.

Facts

The taxpayer, Mr. Mackie, made the mistake of thinking that the tax and superannuation rules would regard a $30,000 concessional superannuation contribution he initiated through his bank on Sunday 30 June 2019, and which was directed through the QuickSuper clearing house, as having been “made” in the 2018-19 financial year. The taxpayer had intended his contribution to fall in the that year.

In fact, the $30,000 contribution was not actually received by the super fund until 11 July 2019, which placed it squarely in the 2019-20 financial year. Having already contributed $25,000 in that year, and taking into account unused concessional contributions of $10,000 carried forward, the $30,000 created an excess concessional contribution of $20,000 in 2019-20. This amount was taxed at the applicant’s marginal rate, plus a small excess concessional contributions charge.

The applicant did not check his superannuation statements to confirm whether things had turned out the way he intended. Had he done so, he may have reduced his 2019-20 contributions and avoided or limited the excess contributions problem.

Also, the QuickSuper How to Guide expressly states that for payments initiated before 4pm on a business day the funds will be transferred to the super fund the next business day, which means that the $30,000 at issue could not have been transferred to Mr. Mackie’s super fund until Tuesday 2 July 2019 at the earliest.

Mr. Mackie asked the Commissioner to exercise his discretion to allocate the $30,000 concessional contribution to another income year on the basis that special circumstances exist. The Commissioner declined to do so, and his objection decision was referred to the AAT for review.

When is a concessional contribution made?

While it may seem arguable that a concessional contribution is made as soon as the contributor has done everything necessary to effect the payment, the Federal Court has previously ruled that it is not made until the relevant amount is actually received by the fund (*Liwszyc case* 2014). That conclusion also reflects ATO guidance on the subject (TR 2010/1), and the Tribunal is bound to follow the Federal Court’s precedent.

Commissioner's discretion

Under s291-465 ITAA 1997, the Commissioner has a discretion to make a determination to allocate all or part of a concessional contribution to another financial year where he considers that there are special circumstances and making the determination would be consistent with the objects of Divisions 291 and 292.

Case law suggests the discretion is not readily exercised.

Section 291-465(3) provides as follows:

> *(3) In making the determination the Commissioner may have regard to the following:*
>
> *(a) whether a contribution made in the relevant *financial year would more appropriately be allocated towards another financial year instead;*
>
> *(b) whether it was reasonably foreseeable, when a relevant contribution was made, that you would have *excess concessional contributions or *excess nonconcessional contributions for the relevant financial year, and in particular:*
>
> *(i) if the relevant contribution is made in respect of you by another individual—the terms of any agreement or arrangement between you and that individual as to the amount and timing of the contribution; and*
>
> *(ii) the extent to which you had control over the making of the contribution;*
>
> *(c) any other relevant matters.*

The main question for determination was whether special circumstances existed to warrant the Commissioner making a determination to allocate some or all of the $30,000 concessional contribution from the 2019-20 financial year to the 2018-19 financial year.

Taxpayer's arguments

Mr. Mackie argued that he had at all times acted honestly and in good faith and that making catch-up contributions now that his business performance had improved was not inconsistent with the objects of the superannuation rules. Moreover, he was not making superannuation contributions with the aim of avoiding tax, but to provide for his retirement, as intended as a matter of policy.

He made an honest but understandable mistake in thinking that the critical date fell on the day he arranged the bank transfer, and he was unaware that contributions were not regarded as having been made until received by the fund. He should not be penalised for this.

Tribunal decision

The Tribunal made the observation that there was nothing exceptional or unusual about people acting genuinely and honestly in relation to their business and tax affairs. Nor is there anything unusual about someone in good faith holding a mistaken belief about how the law operates (in this case, that the date of the bank transfer initiated by the applicant was the critical date for the purpose of determining when a contribution was made).

Mr. Mackie had complete control over the timing and amount of his concessional contributions, and he chose to make them on 30 June which fell on a weekend.

He failed to check his superannuation statements, which would have told him the $30,000 was being treated by the fund as being attributable to the 2019-20 financial year, and he did not take into account the information around timing included in the QuickSuper How to Guide.

The excess contributions problem was entirely foreseeable and the outcome, while arbitrary, was precisely what Parliament intended.

IFPA Comment

This year 30 June again falls on a Sunday, so that someone using QuickSuper would need to initiate their payment before 4pm on Thursday 27 June for it to hit their super fund on Friday 28 June (according to the How to Guide).

That's if everything goes well, but what about the 11-day delay (eight working days) encountered by the $30,000 contribution initiated by Mr. Mackie on 30 June 2019? The Tribunal hinted that such an inordinate delay might have constituted special circumstances warranting the Commissioner making a determination:

> *"The position may have been much different if, for example, Mr Mackie had undertaken the transaction two or three business days before the end of the financial year relying upon the advice in the How to Guide, only to find that it took 11 days to find its way to the Fund. That is a circumstance far removed from what happened here." [36]*

This is not the first case where a taxpayer had ended up with excess contributions by leaving things to the last minute, and it probably won't be the last. Murphy's Law is alive and well, and taxpayers contemplating making voluntary concessional or non-concessional contributions need to allow plenty of time in case something goes wrong. And they should check their superannuation statements to confirm things have gone according to plan.

Mackie v C of T [2024] AATA 619 (3 April 2024)
Mr Rob Reitano, Member

DIS re JMC case: meaning of employee for SG purposes

What you need to know

The ATO takes the view that the existence of a contractual right within a contract that allows a worker to delegate, subcontract or assign their work will not result in the worker being a common law employee under s 12(2) of the SGAA or falling within the extended definition of 'employee' under s 12(3). However, this is subject to the contractual right not being a sham, or it having been varied by the parties, or it being unenforceable.

Facts

This Decision Impact Statement outlines the ATO's response to the Full Court in *JMC Pty Ltd v FCT* [2023] FCAFC 76, which concerned whether a contract lecturer of a higher education provider was engaged as an employee or an independent contractor pursuant to the common law meaning of the term 'employee' under s 12(1) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) or alternatively, was an employee under the extended meaning of the word contained in s 12(3) of the SGAA.

JMC Pty Ltd (JMC) was the provider of higher education programs. It engaged Mr H to provide teaching services by way of delivering lectures and marking student exams etc in courses for a degree. The terms and conditions of the contract/s included that:

- JMC would pay Mr H an hourly rate for delivering lectures and marking.
- Mr H would submit invoices to JMC which specified the particulars of the teaching services provided (accompanied by time sheets and signed weekly lesson plans).
- Mr H was required to provide his Australian Business Number.
- Any intellectual property brought into existence by Mr H while providing the teaching services vested in JMC.
- Mr H would carry out the teaching services personally.
- Mr H could subcontract or assign the teaching services he was engaged to provide to another but only with JMC's written consent.

JMC paid Mr H for the work he performed without withholding and remitting superannuation contributions, upon the basis that he was an independent contractor.

The Commissioner issued to JMC notices of assessment for super guarantee charges premised on Mr H being an employee, either within s 12(1) (common law meaning of employee in accordance with general law principles), or s 12(3) (deems an employee a person who works under a contract that is wholly or principally for the labour of the person) of the SGAA. JMC objected to the notices of assessment but the Commissioner disallowed the objection. JMC appealed that decision to the Federal Court.

Court decisions

The Court at first instance in *JMC Pty Ltd v FCT* [2022] FCA 750 found that Mr H was an employee of JMC under both subsection 12(1) (that is, within the common law meaning of the word) and the extended definition as contained in subsection 12(3).

The Full Federal Court in *JMC Pty Ltd v FCT* [2022] FCA 750 allowed the appeal – finding Mr H was an independent contractor and not an employee of JMC under either ss 12(1) or 12(3).

Section 12(1)

It held that it is the contractual terms of the arrangement (and not the performance of them) which were relevant to a determination of the nature of the relationship between the parties. In this regard, Full Court found, among other things, the following:

- The existence of a right which allows a worker to delegate, subcontract or assign their work to another, qualified or otherwise, is generally to be viewed as inherently inconsistent with an employee relationship.
- Where a worker has an entirely unfettered right to delegate, subcontract or assign their work to others, the existence of this right will be 'almost conclusive' against the worker being an employee.
- It is the existence of the right to delegate, subcontract, or assign the work that is important, not whether it is likely to be or has been in fact exercised. And in the absence of an argument about sham, it is necessary to consider the contractual terms.
- The evidence did not support a finding that JMC had a sufficient contractual right to control the work of Mr H, to indicate their relationship was one of employment.
- The mode of Mr H's remuneration inclined towards an independent contractor relationship - and the manner in which Mr H charged for his services was not consistent with an employment relationship.

The Full Federal Court decided that, taken as a whole, the contracts did not provide the sort of controls over how, when or where Mr H was required to deliver the lectures such as to amount to indicia that he was an employee rather than an independent contractor.

Section 12(3)

The Full Court held that the right to subcontract or assign the work provided in the contracts indicated that the contracts were not wholly or principally for the labour of Mr H, as he could perform the contracts personally; but equally he could have subcontracted or assigned his work under the contracts to another.

Note: The High Court dismissed the Commissioner's special leave application as it did not identify any reason to doubt the correctness of the decision of the Full Federal Court.

ATO view of the decision

> *The existence of a contractual right within a contract that allows a worker to delegate, subcontract or assign their work to another, whether subject to the consent of an engaging entity or not, will result in the contract not being either wholly or principally for the labour of the worker. Where this occurs, the worker will not fall within the extended definition of 'employee' under s 12(3). This position is subject to the contractual right not being challenged as being a sham, having been varied by the parties or unenforceable.*

There may be circumstances where the contractual terms of the arrangement do not make it clear whether the worker does have a contractual right to delegate, subcontract or assign their work to another. In these circumstances, the ATO will form its position as to the application of s 12(3) based on the available evidence of the contractual arrangement.

Implications for impacted advice or guidance

The ATO said TR 2023/4 references the findings of the Full Federal Court in respect of subsection 12(1) – and that the following rulings will be reviewed and updated as necessary in accordance with the Full Federal Court decision:

- TR 2013/1: *the identification of 'employer' for the purposes of the short-term visit exception under the Income from Employment Article, or its equivalent, of Australia's tax treaties*
- SGR 2005/1 *Superannuation guarantee: who is an employee?*
- SGR 2009/1 *Superannuation guarantee: payments made to sportspersons*
- SGR 2005/2 *Superannuation guarantee: work arranged by intermediaries*

TPB dob ins – threading the needle

What you need to know

On 30 April 2024 the Tax Practitioners Board released a draft Information Paper (IP) on reporting significant breaches in the TASA Code of Conduct, calling for submissions by 28 May. The new rules impose onerous and uncertain obligations on tax practitioners (TPs). The IP raises significant issues for IFPA's membership and we have made a submission raising a number of serious concerns. A copy of the submission can be found on the IFPA website.

Background

The new measures are a reaction (some would say an over-reaction) to the now very public PwC episode, where a former PwC partner breached a confidentiality undertaking by sharing confidential information about pending tax policy changes around Australia's international tax settings with others in his firm. Existing and potential PwC clients were apparently approached with tax planning ideas based on that confidential information.

The new rules operate as from 1 July 2024 and require TPs to self-report where they themselves have committed a significant breach of the Code. Awkward, but probably doable, although it may beg the question of awareness. Presumably, most TPs would modify their behaviour if they became aware that their actions were potentially in breach of the Code of Conduct. More controversially, however, the rules also impose a requirement for TPs to report on significant breaches they reasonably believe may have been committed by other registered TPs.

The IP is intended to give TPs greater clarity around what constitutes a significant breach and what will be required of them under the new rules. We believe that the IP leaves too many critical issues unresolved.

Legal issues

Most tax practitioners are not legally qualified. Yet the IP expects them to work out when another TP has committed an indictable offence or whether their conduct has involved dishonesty. Even where the reporting TP has access to all the relevant facts, this obligation requires a good understanding of State and Commonwealth criminal laws. It will often be beyond the scope of their skills and experience to form a clear view about whether another TP's conduct satisfies that description.

Likewise, the IP notes (correctly) that the reporting requirements do not trump legal professional privilege. This is another specialised legal area that requires training and experience, including as to whether someone has waived privilege by reason of their conduct (which would generally require much more information about the other TP's conduct than the reporting TP would normally be privy to).

The IP acknowledges (at para 52) that TPs will generally lack the necessary legal expertise, but goes on (at para 53) to say that it is up to the TP to decide whether to obtain (and presumably pay for) the necessary legal advice. That is a significant impost to place on TPs. It effectively outsources what should be the role of the regulator, including bearing the associated legal costs. There should be scope for the TPB to fund legal advice where considered necessary.

Facts and evidence

While the IP acknowledges (at para 105) that the reporting TP may not be privy to the same facts and information as they would be in a self-reporting scenario, in determining whether the reporting TP had reasonable grounds for believing that another TP had committed a significant breach of the Code, the TPB would have regard to (among other things) "whether, and to what extent, the tax practitioner made reasonable enquiries or sought advice to ascertain whether a breach of the Code occurred."

It is important that the reporting TP not be forced into the unwanted position of investigator. They lack the necessary skills and experience, and that is surely a task for the TPB if, based on the information the reporting TP has without engaging in further amateur sleuthing, the conduct of the other TP does warrant reporting.

Any "reasonable enquiries" on the part of the reporting TP should be confined to publicly available information. The draft IP should clarify this point.

To report or not to report?

(with apologies to Hamlet)

While in some cases it may be obvious that another TP has breached the Code through dishonest and/or unlawful conduct, it is expected that many other cases will be more borderline, and the IP is not as helpful as it could be in clarifying how to deal with uncertainty. This is the main problem with the legislation and the IP.

Paras 153-156 address the consequences of a TP failing to report suspected breaches when required. Among other things, such failure may call into question the TP's standing as a fit and proper person, and hence their continued registration. While the IP talks vaguely about initially adopting an educative approach, it is not clear how long that will last and the statement (at para 156) that these matters will be dealt with on a case-by-case basis, taking into account all the facts and circumstances, hardly adds certainty.

The IP does not give TPs much to rely on, and one might suppose such uncertainty could give rise to an "if in doubt report it" approach on the part of many TPs. However, there are guardrails on the other end of the spectrum as well. At para 112 the IP warns that TPs making Code breach reports that are frivolous or vexatious (again, entirely based on facts and circumstances) could have their status as a fit and proper person reviewed, thereby putting their own registration at risk – all while trying to navigate high levels of uncertainty in good faith.

As things stand, TPs are damned if they do and damned if they don't report other practitioners. They somehow have to thread the needle and land in a kind of Goldilocks zone where their belief that a significant breach has been committed is at least strong enough to require reporting to the TPB but not so weak as to be regarded as frivolous or vexatious. Get it wrong and the TP risks their standing as a fit and proper person, thereby putting their registration and their business at risk.

Para 90, under the heading of "When will a breach be 'otherwise significant'?" states that where a TP is undecided "whether a breach is 'otherwise significant' but they have reasonable grounds for suspecting it may be, they should also report it." We are concerned this language could encourage an "if in doubt report it" approach by some risk averse TPs and lead to reporting in circumstances that are not in fact warranted on the information the reporting TP has without embarking on further enquiries (which is the TPB's role).

More and better examples needed

With two exceptions, the six case studies included in the IP are rather vanilla, which is to say the people involved seem to be clearly in or out. There is a place for obvious examples to help set the boundaries for a new measure, but it is the more marginal and nuanced case studies that add the most value. There should be more of these.

Ivan and Colin in examples 2 and 4 are stealing from their clients or embezzling the trust accounts they control. What more needs to be said about them and what uncertainty do those examples address? And it seems naïve to think that a person actually stealing money would be put off by a TASA self-reporting requirement (in Ivan's case).

David in example 1 has inadequate supervisory arrangements in place and his staff are lacking in skills and experience. Hence he should clearly self-report. Samantha's transgression is clearly minor and a once off.

The gossip example and the vexatious unsupported claim example are probably helpful, although we would like example 5 (about overheard gossip) to make it clear that Brittany does not have any obligation to make further enquiries about the mutual acquaintance who is the subject of the gossip.

While retaining the more obvious examples will not do any harm, it might be helpful to also include a further example of a TP taking over a client from another TP and finding serious errors and discrepancies in the work performed in prior years – eg. Division 7A issues not addressed or FBT liabilities not dealt with. We believe such events will give rise to most of the potential reporting of suspected breaches by other practitioners.

TPG support

Rather than casting TPs adrift in an ocean of uncertainty, the TPG should provide resources for some kind of helpline service to give guidance around areas of genuine uncertainty regarding these uncertain and onerous reporting requirements. Such a service should also provide legal support and be made available for at least the first three years of operation of the new reporting regime.

Retrospective law?

Finally, the new reporting requirements apply from 1 July 2024. The IP does not make it clear whether the application date applies to the time the offending actions being reported took place or to the time the reporting TP comes to hold the reasonable belief that there has been a significant breach of the Code (possibly going back many years).

Brave new world or 1984?

That depends on your taste in mid-20th century literature, but the government's adroit moves in not letting a good crisis go to waste will significantly change the landscape for tax practitioners as from 1 July.

The politics around the event that has given rise to these measures make it difficult to get the legislation watered down to any extent and practitioners may need to learn to live with these unwelcome new uncertainties.

INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA – WEBINARS

Navigating the Tax Tide: A 3-part ATO insight series

1: Guiding principles: The essentials of ATO interaction

5 July 2024 12:30 – 1:30pm (AEST)

This session will enhance your understanding of the ATO's current priorities and your interactions with them. We will dive into the essentials of tax governance, the management of tax affairs and offer insights into ATO engagement strategies. Learn the nuances of managing rental properties, understand the foundational elements of tax governance, and gain a clearer picture of how the ATO communicates with taxpayers.

2: Fortifying your tax defences: Strategies for certainty and compliance

12 July 2024 12:30 – 1:30pm (AEST)

This session will focus on empowering taxpayers with the knowledge to robustly defend their tax positions: you will discover effective strategies for interacting with the ATO, preparing documentation in anticipation of audits, and utilising ATO rulings to your advantage. This session will provide practical advice on ensuring your tax affairs are in impeccable order and how to achieve certainty in your dealings with the ATO.

3: Navigating penalties and past precedents: Lessons from the legal front

19 July 2024 12:30 – 1:30pm (AEST)

This webinar addresses the critical aspects of managing and mitigating penalties in interactions with the ATO. Learn from past decisions and understand the different impacts of tribunal rulings versus court decisions. Strategies for dealing with challenging ATO officers, the implications of default assessments, and the consequences of non-compliance will be addressed.

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Presenter:
Joshua Goldsmith

Joshua Goldsmith is a senior lawyer specialising in taxation and commercial advisory. Joshua's experience is broad and diverse including advising family groups, small cap listed and private companies, and high net wealth individuals. Joshua was a finalist in Lawyers Weekly 30 Under 30 awards (for Taxation) in 2021 and a winner of the Australian Lawyer Rising Star award in 2022, acknowledging that he is a rising star in the tax and legal profession. He is a regular presenter and facilitator at tax related seminars and discussion groups, and has appeared on a number of tax related podcasts.

Status of Tax Matters @ 28 May 2024

(This table is not intended to be comprehensive)

Status of Tax Matters @ 28 May 2024	
Legislation	**Status**
Treasury Laws Amendment (Making Multinationals Pay Their Fair Share – Integrity and Transparency) Bill 2023 • Requires Australian public companies to disclose information about their subsidiaries in their annual financial reports for financial years commencing from 1 July 2023. • Tightens the thin capitalisation rules for MNEs to limit debt deductions to 30% of EBITDA in most circumstances, also commencing from 1 July 2023.	Act No 23 2024
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 government's announced Instant Asset Write-off changes that were announced in the May 2023 Budget (a $20,000 cap for entities with an annual turnover of $10 million) have not yet been passed by the Senate. The Senate amended the legislation to make it more generous (a $30,000 cap with a $50 million annual turnover). The House has not accepted the Senate's amendments and the Senate is insistent they should be accepted. The stalemate around the amount and eligibility continues for now, although it is expected the government's preferred position will eventually prevail. In the meantime, there is no legislative support for IAWO claims or claims for the small business energy concession taxpayers lodging their 2023-24 returns may wish to make.

Status of Tax Matters @ 28 May 2024	
Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 • PwC response — Promoter penalty law reform • PwC response — Extending tax whistleblower protections • PwC response — Tax Practitioners Board reform • PwC response — Information sharing • Petroleum resource rent tax deductions cap Note: The Information Sharing Bill gives the ATO and TPB the ability to disclose protected information with prescribed professional disciplinary bodies (to be defined) where the ATO or TPB reasonably suspects acts or omissions may constitute a breach of the prescribed disciplinary body's code of conduct or professional standards (EM p4).	Passed by both houses on 16 May 2024.
Administrative Review Tribunal Bill 2023 *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023* *Administrative Review Tribunal (Consequential and Transitional Provisions No. 2) Bill 2024* • Replaces the AAT with an Administrative Review Tribunal and an Administrative Review Council.	Before the Senate
Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2024 Treasury Laws Amendment (Foreign Investment) Bill 2024 • triples the foreign investment fees for the purchase of established homes; • doubles vacancy fees for all foreign owned dwellings purchased since 9 May 2017; • enhances the ATO's compliance regime to ensure foreign investors comply with the rules, including selling their residence when required.	Act No 17 of 2024

Status of Tax Matters @ 28 May 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
Scheduled Parliamentary sitting days	
The House of Representatives only sits from 3rd to 6th June 2014. Both houses sit from 24th to 27th June.	
Appeals	
There are no new appeals to report.	