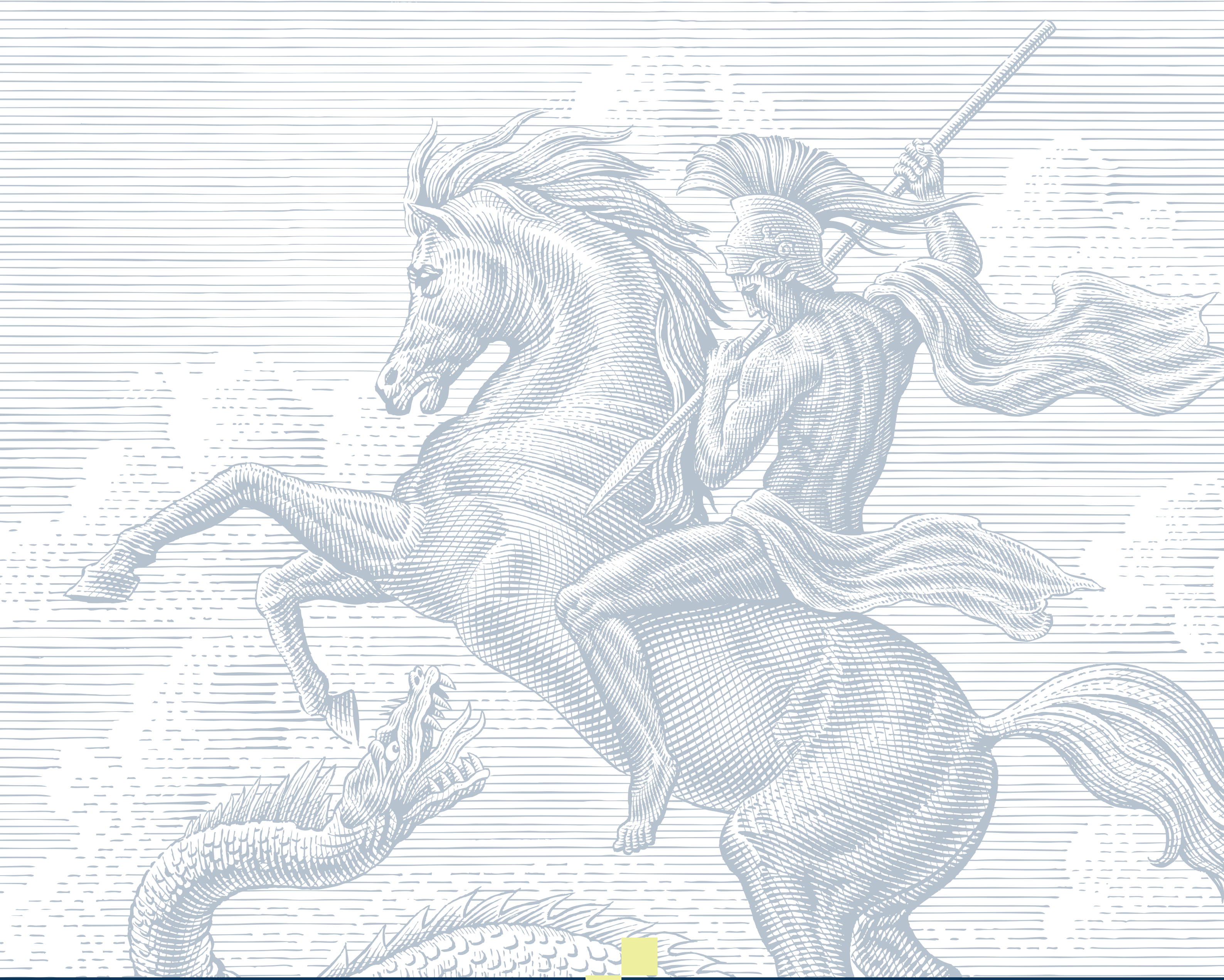
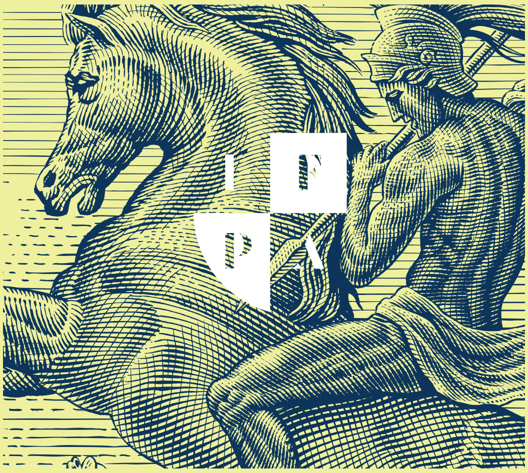


Monthly Tax Update

October 2024

INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA



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Monthly Tax Update

October 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

Charity should be seen but not heard

What you need to know

It seems that any element of "political advocacy" will be fatal to a claim for "public benevolent institution" status for tax purposes – even though it may be considered a legitimate aspect of promoting relief from distress for a sector of the public considered to be in need of relief.

Facts

The applicant is a company limited by guarantee which, under its constitution, seeks to improve the wellbeing and circumstances of gay, lesbian, bisexual, transgender, and intersex people (LGBTIQ+ people) as well as their families and children.

Since 4 January 2016, it has been registered as a charity under the Australian Charities and Not-for-profits Commission Act 2012 (ACNC Act). Specifically, the applicant has been registered as a charity under the subtype "advancing public debate" per s25-5(2)(b) (item 12) of the ACNC Act. (This was because it had originally been involved in advocating for marriage equality.)

On 14 August 2020, it applied to the Commissioner of the Australian Charities and Not-for-profits Commission to be registered with the subtype "Public benevolent institution" (PBI) per s25-5(5) item 14 of the ACNC Act (in order to give it deductible gift recipient status). It did so on the grounds that it worked to "relieve distress" suffered by persons who identified as LGBTQI+.

A delegate of the Commissioner refused that application on 14 December 2020.

On 6 April 2021, the Commissioner disallowed the applicant's objection to the delegate's decision - essentially on the basis that it clearly had a non-benevolent purpose of "advocacy" to bring about law reform and social change.

The Applicant then applied to the AAT for review of the decision.

Issue

Was the applicant a Public benevolent institution (PBI) in terms of its ordinary meaning?

Specifically

- whether LGBTQI+ people in Australia were subject to distress such as to be persons in need of "benevolence" in the relevant sense, and
- whether the appellant was organised or conducted for or promoted the relief of distress experienced by LGBTQI+ people in Australia – and therefore was a PBI.

Arguments

The Commissioner argued, among other things, that the appellant was conducted to achieve changes to laws and government policies that apply to LGBTQI+ people (in the same way in relation to its prior marriage equality role). In other words, the Commissioner said the appellant's political advocacy and lobbying activities disqualified it from being a PBI.

The appellant argued that relief need not be "direct and immediate", and that in undertaking activities to prevent particular adverse outcomes for LGBTQI+ people, amounted to activity that fell within the description of a PBI as "an institution which is organised or conducted for or which promotes the relief of distress".

Decision of AAT

A majority of the AAT held that the applicant was not entitled to be registered as a PBI essentially because there was not a sufficient nexus between its activities and benevolent purposes ie its activities were too remote from the concepts of benevolence.

However, the majority first concluded that some LGBTIQ+ people do experience "minority distress" such that they are capable of being regarded as persons in need of benevolence. But it then concluded that the applicant was not organised or conducted for, and did not promote, the relief of that distress in the required way.

In doing so the AAT found that, even though positive engagement with government was often a necessary feature of charitable work, the evidence established that the applicant focused on advocacy (especially advocacy of law reform and social change) as well as policy development at the relevant time and that the staffing profile of the applicant "was clearly geared towards advocacy and policy development work".

Moreover, the majority found that the applicant had not established that there was a sufficiency of connection between the applicant's activities and the benevolent ends sought to justify a finding that it was entitled to be registered as a PBI.

(Equality Australia Ltd v Commissioner of ACNC [2023] AATA 2161)

Appeal – and argument

The applicant appealed to the Full Federal Court from this decision – arguing, among other things, that AAT erred in introduced a qualification of its own – namely, the *"sufficiency of connection between the applicant's activities and the benevolent ends".*

Decision of Full Federal Court

The Full Court unanimously held that the AAT had not erred in its decision and that it was open on the facts to conclude that the applicant was not a PBI (on the basis of the ordinary meaning of that term.)

Moreover, the Full Court found that the AAT did not err by misapprehending or misconstruing the expression "public benevolent institution" by the way it introduced a qualification of its own – namely, a *"sufficiency of connection between the applicant's activities and the benevolent ends".*

The Full Court said that in any event it was necessary at law that there be a connection between the ends pursued by an entity and its activities. In other words, the Full Court said that the majority of the AAT was giving effect to the ordinary meaning of "public benevolent institution" in its understanding that "sufficient proximity" was required between the activities of the organisation and relief it was seeking to achieve.

Furthermore, the Full Court found that the applicant did not identify any persuasive reason to conclude that a requirement of a sufficient connection is an impermissible qualification on the ordinary meaning of PBI was an error in law.

The Full Court also said that the majority in the AAT was giving effect to its understanding of the ordinary meaning of "public benevolent institution". It was not treating the ordinary meaning as irrelevant or as supplying only part of the test. Nor was the majority giving the phrase "public benevolent institution" a meaning so clearly at odds with its generally accepted meaning as to transgress the "bounds of reasonableness".

The Full Court concluded that the applicant showed no error of law regarding the AAT's finding that *"when viewed as a whole, [the evidence] confirms it was focused on advocacy in furtherance of its goal of changing laws and social practices that were injurious to LGBTQI+ persons".*

Equality Australia Ltd v Commissioner of the Australian Charities and Not-for-profits Commission [2024] FCAFC 115

SGC: More on "Jockey" case

In *Australian Turf Club Ltd v FCT* [2024] AATA 2728 (see *September Tax Discussion notes*) the AAT found that Australian Turf Club was liable for the super guarantee charge (SGC) in respect of race day payments it made to jockeys. It did so, pursuant to s12(8) of the *Superannuation Guarantee (Administration) Act 1992* – which provides that persons such as artists, musicians, sports persons who are "paid to perform" are deemed to be employees of the person who is liable to make the payment to them for SGC purposes.

In this regard, it should also be noted that in June 2024 the ATO released draft Taxation Ruling *TR 2023/4DC1 Income tax and superannuation guarantee: who is an employee?*

It deals with the operation of section 12(8) of the *Superannuation Guarantee (Administration) Act 1992* at paras 117 to 121, and states as follows (emphasis added):

> <u>Entertainers, artists, musicians, sports persons et cetera – subsection 12(8)</u>
>
> *117. Approaching subsection 12(8) on a textual basis, **the tests contained in paragraphs 12(8) (a) to (c) must be applied on a payment-by-payment basis.** This is because the character of the payments received by the relevant person will be determinative of whether that person will be treated as an employee of the payer under subsection 12(8). **In determining the character of the relevant payment, reference must be made to the substance of the arrangement, and not merely by reference to what the parties have agreed to label the payment.***
>
> *118. Identifying the relevant payment to which the tests in subsection 12(8) must be applied will often be straightforward. Each payment should be examined separately to determine the character of that payment.*
>
> *119. **Subsection 12(8) is not limited in the way that subsection 12(3) is limited to contracts wholly or principally for a person's labour.** However, it is necessary that the particular person is actually paid to provide, perform or present services rather than for some other purpose. For example, a person engaged to write a script is performing services but one who sells existing scripts is not – they are merely selling property.*
>
> *120. **If a person is an employee by virtue of subsection 12(8) applying, then the person liable to make the payment is their employer for the purposes of the SGAA.***
>
> *121. Superannuation Guarantee Ruling SGR 2009/1 Superannuation guarantee: payments made to sportspersons provides further insight into the Commissioner's interpretation and application of the extended definition of employee contained subsection 12(8) as it applies to sportspersons.*

NSW payroll tax: Payments made by Uber to drivers not wages

What you need to know

Uber rideshare does not pay "wages" to drivers for NSW payroll tax purposes. Rather, it acts as a "payment collection agent" for the payments made by the rider for the services of the driver.

Facts

The taxpayer (Uber) operates a rideshare system that connects "riders" with "drivers" by way of relevant software applications (apps). The riders make payment for these driver services to Uber who collects them, takes a "service fee" cut and then remits the balance to drivers. The Apps also contain an incentive program for driver referrals and a rating system.

The NSW Commissioner of State Revenue assessed Uber for payroll tax of $81.5m for the 2015 to 2019 financial years under the "contractor provisions" in Div 7 of the *Payroll Tax Act* (the Act). He did so on the basis that the relevant amounts collected and remitted to the drivers were "wages" ie amounts payable for, or in relation to, the performance of work relating to a "relevant contract" pursuant to s32(1)(b) and s35 (1) of the Act

Uber applied to the NSW Supreme Court to seek review of the Commissioner's decision to disallow its objection to the assessments.

Issues

There were a range of issues for the Court to consider, but they boiled down to three main ones (in order of consideration):

- Firstly, whether the contracts entered into by drivers with Uber were "relevant contracts" for the purposes of s32 of the Act. (Uber argued that the "transportation services" that were provided by drivers were not provided to Uber as required, but to the riders.)
- If so, whether any of the exclusions in s32 of the Act were applicable eg, the 90 day exemption, ancillary services exclusion, and the exclusion for the public. (Uber argued that one or more of these exclusions applied, while the Commissioner argued that none of them applied.)
- Finally, if none of the exclusions applied, whether the payments made to drivers by Uber were "wages" pursuant to s35 of the Act – in terms of the payments having been paid "for or in relation to the performance of work" performed by the drivers for Uber as payer.

Decision

The Supreme Court first found that the contracts between the drivers and Uber were "relevant contracts" under s32 of the Act essentially because the services provided by the driver to Uber (such as giving feedback about riders) were supplied under the contractual arrangement between them.

However, it held that the payments made to the driver by Uber were not "wages" under s35 of the Act as they were not made by Uber to the driver for the performance of work by the driver. Instead, it said Uber was merely acting as a "payment collection agent" for the payments made by the rider:

> *"It is not Uber who pays the driver. The rider does that. Uber is a mere "payment collection agent". True it is that Uber has to account to the driver or partner for what it has received as agent, but by the time it does that, the driver has, in accordance with the legal relationship between the parties, already been paid, and the rider has discharged their obligation to pay the driver for the ride." (para 178)*

The Court also emphasised a key (and unchallenged) clause in the contract between Uber and the driver which provided that:

> *"… Uber will facilitate your payment of the applicable Charges on behalf of the Third Party Provider as such Third Party Provider›s limited payment collection agent. Payment of the Charges in such manner shall be considered the same as payment made directly by you to the Third Party Provider".*

The Court also commented that:

> *"Undoubtedly some form of relationship between Uber's payment and the work which the driver performed, not least of all because, had the driver not driven, there would no money for which Uber would have to account to the driver by paying the driver". But I do not consider that that relationship is one which can fairly be described as being "in relation to" the work, in the context in which that phrase appears in s 35(1) and with the objects of Division 7 squarely in mind". (para 180)*

Uber Australia Pty Ltd v Chief Commissioner of State Revenue (NSW) [2024] NSWSC 1124, 6 September 2024.

No stay of decision to terminate agent's registration

What you need to know

You are unlikely to succeed in a stay application just because of claims of personal hardship – and certainly not without good evidence to justify why it should be granted and how the original decision could be overturned in a later hearing.

Facts

The applicant, a former tax agent, applied for a stay of the decision of the Tax Practitioners' Board (TPB) to terminate his registration as a tax agent for five years so that he could continue to practise as a tax agent pending the outcome of his application for a review of the decision by the Administrative Appeals Tribunal. He also applied for confidentiality orders so that his name would not be published in connection with these stay proceedings.

The tax agent's registration had been terminated by the TPB for failing to act honestly and with integrity by, among other things, lodging false BAS statements under his ABN (which resulted in him receiving refunds of over $270,000 to which he was not entitled); and providing false or misleading statements in his email to the TPB. He also failed to satisfy personal taxation obligations in relation to this conduct and had demonstrated a pattern of failure to comply with tax laws over a period of three years.

Arguments

The applicant argued that there were 'special and exceptional circumstances argument' that justified a stay order – including: he had been the victim of a scam by a bookkeeper; he was innocent of any wrongdoing; he had been robbed of his chosen vocation, because of his lapse in judgment. He also said that it was relevant that he had taken responsibility for, and rectified, his mistakes.

The Commissioner opposed the grant of a stay or confidentiality orders, maintaining that the Applicant's conduct was so egregious that the application could not be entertained.

Decision

Stay application

The AAT concluded that there were no grounds for a stay of the TPB 's decision to terminate his registration – in terms of the principle that were relevant to the grant of a stay. These all counted against him as follows:

- **Prospects of success at hearing proper:** Given the lack of evidence to rebut the claims against him, the applicant could not demonstrate any reasonable prospects of success, particularly given his acknowledgement of breaches. In short, the prospects of success were negligible because, the evidence, allegations and findings all pointed in one direction – and the applicant admitted he had no evidence to disturb them.
- **Consequences of the refusal of a stay:** Despite his claim that refusal of a stay will be financially, emotionally and professionally crippling, the claim of prejudice or hardship is "hardly ever a sufficient basis for securing a stay". Also, his claims that a refusal of a stay would cause inconvenience to his clients, was not enough. In any event, there was a lack of evidence to show how the clients would be inconvenienced (and how many).
- **Consequences of granting a stay for public interest:** The AAT first emphasised that given the important role of tax agents in society, the public had an expectation that their tax agent was 'fit and proper' to engage in the provision of such services and the "public interest extended to all Australians who rely on the integrity of the tax system. Accordingly, in light of the evidence, the AAT found that the public interest was likely to be adversely affected by the applicant continuing to act as a tax agent especially where he has admitted that his conduct has fallen short.
- **Other matters:** The AAT also noted that the substantive hearing was ready for listing and that the matter will be decided shortly thereafter. Accordingly, this factor counted against granting a stay as any hardship to the applicant, and any inconvenience to his clients, would be quickly ameliorated if he were successful in that hearing.

Confidentiality application

In refusing the applicant's additional application for confidentiality orders for the stay proceedings, the AAT emphasised the importance of the "presumption of openness and transparency of proceedings" (ie open justice) in the interests of maintaining public confidence in the fairness and integrity of that proceeding - and that departure from it was only justified where observance of the principle would in fact frustrate the administration of justice.

It also found that reputational damage and "possible embarrassment" was not a sufficient basis for a confidentiality order - and that " public embarrassment" is sometimes an unavoidable by-product, and a necessary consequence, of the application of the principle of open justice. The AAT also said that there was no compelling material before AAT to bypass or circumvent the foundation of open justice.

Hanieh and Tax Practitioners Board [2024] AATA 3251, 9 September 2024

AAT affirms that applying the unused concessional contributions cap is not optional

What you need to know

The AAT has affirmed that an unused concessional contributions cap amount carried forward from previous years applies by force of law. It does not require a taxpayer to elect to apply the unused amount to increase their concessional contributions cap, nor does it allow a taxpayer to choose not to apply the carried forward amount or any part of it.

Legislative framework

The taxation regime for superannuation in Australia provides tax concessions to encourage retirement savings. Generally, employers can claim income tax deductions for the contributions made on behalf of their employees, while individuals may also claim deductions for personal contributions to complying funds. These deductible contributions, along with the fund's earnings, are considered assessable income for the superannuation fund, which is then taxed at the concessional rate of 15%.

However, there is a limit on the contributions eligible for favourable tax treatment in an income year. If the individual's concessional contributions exceed their concessional contributions cap, the excess is included in the individual's assessable income and taxed at their marginal tax rate less a 15% tax offset to account for the contributions tax already paid by their superannuation fund.

Individuals who have unused concessional cap amounts from previous years may be able to carry them forward to increase their contribution caps in later years. They are eligible to do so if they have both:

- a total superannuation balance of less than $500,000 at 30 June of the previous financial year; and
- unused concessional contributions cap amounts from up to five previous years.

Division 293 of the ITAA97 also restricts the scope of tax concessions by aiming to reduce the concessional tax treatment of superannuation contributions for high income individuals, as stated in section 293-5.

Under Division 293, the sum of an individual's income (as determined for surcharge purposes) and certain superannuation contributions is compared to a high-income threshold of $250,000. If there is an excess, Division 293 tax is payable on the excess, or on the contributions, whichever is less, but not on excess concessional contributions.

Under section 293-15, a person is liable to pay Division 293 tax if they have "*taxable contributions*" for an income year. Pursuant to section 293-20, an individual is taken to have taxable contributions if the sum of their income for surcharge purposes for an income year and their "*low tax contributions*" for the corresponding financial year exceeds $250,000. The low tax contributions amount for a financial year is calculated as the taxpayer's low tax contributed amounts covered by section 293-30 for the financial year, less the taxpayer's excess concessional contributions for the financial year: section 295-25.

Thus, the amount of a taxpayer's excess concessional contributions affects calculation of the Division 293 tax, if any, that is payable.

Facts

In the case of *WTBW and FCT* [2024] AATA 3268, the taxpayer was assessed for tax under Division 293 for the year ended 30 June 2022, due to concessional contributions made by the taxpayer's employer that were related to prior years but paid in 2022 income year.

The taxpayer objected to this assessment, but the Commissioner rejected his objection. Subsequently, the taxpayer applied to the AAT for a review of the decision.

The Commissioner maintained that the taxpayer had no excess concessional contributions for 2022 because his concessional contributions were fully offset by his unused concessional contributions cap carried forward from previous years. However, the taxpayer said that he had excess concessional contributions for 2022 because the unused concessional contributions cap carried forward from prior years applied only if he elected to use it, which he had not done. If the taxpayer's argument were correct, his low tax contributions, and hence his Division 293 tax liability, would have been nil.

Furthermore, if the taxpayer had been correct regarding his Division 293 argument, a separate issue might have arisen regarding whether he would have a liability for tax as a consequence of his excess concessional contributions being treated as assessable income under Division 291 of the ITAA97 The taxpayer put forward various arguments in that regard, including that the Commissioner's discretion under section 291-465 of the ITAA97 to allocate contributions to a different financial year should have been exercised. However, the only matter before the Tribunal for review was the Commissioner's objection decision relating to the taxpayer's objection against the Division 293 assessment.

The taxpayer submitted several arguments to support his position:

- First, the taxpayer referenced wording in an ATO explanatory guide that stated, "*you can use caps*," suggesting that the provision is permissive rather than mandatory. However, the AAT concluded this argument did not assist the taxpayer because nothing in the comments of the administrator of these provisions could permissibly be taken into account in determining the intention attributed to Parliament when section 291-20 was enacted.
- Second, the taxpayer pointed out that section 291-1 stated, "*You can carry forward unused concessional contributions cap from the previous 5 financial years*," arguing that the term '*can*' implied permission or discretion. While the AAT acknowledged that, read in isolation, those words were consistent with the taxpayer's submission, it noted that section 291-1 was a 'Guide' separate from the operative provisions and could only be considered for the limited purposes set out in section 950-150 of the ITAA97. The AAT concluded this argument did not assist the taxpayer because the Guide did not clarify the purpose or object of section 291-20 concerning the issue raised by the taxpayer, nor was there anything in the Guide to cast light on whether the provision's meaning was in that respect the ordinary meaning.
- Third, the taxpayer noted that the statutory command to "*apply*" unused concessional contributions cap in the manner set out in section 291-20(4) did not specify to what extent the amount should be applied, indicating that a taxpayer could choose to apply none, some, or all of the unused concessional contributions cap. However, the AAT pointed out that this section did not invite the application of part or none of the unused amount. Rather, it required "*your unused concessional contributions cap*" to be applied, which was defined in section 291-20(6) as a single amount. The only limitation was that the unused amount could not be applied to an extent greater than the extent by

which the taxpayer would otherwise exceed the cap. The AAT also noted that, despite the choice of the active voice in section 292-20(4), the language employed was a common legislative device where a formula was required to be applied to arrive at an amount. More significantly, there remained the statutory command to apply the unapplied unused contributions cap, not a part of that amount, let alone none of it.

Decision

The AAT upheld the ATO's original decision, finding that an ordinary reading of section 291-20(3) did not refer to or suggest any discretion or election on the part of the taxpayer or the Commissioner. It did not provide any mechanism, such as a written election, for the taxpayer to opt to apply only part of their unused concessional contributions cap,

For these reasons, the AAT was unable to accept the taxpayer's submission that he was entitled to elect not to apply his carried forward unused excess contributions cap in calculating excess concessional contributions for the purposes of the assessment of his taxable contributions under Division 293.

Source: WTBW and FCT [2024] AATA 3268 (11 September 2024)

ATO getting serious about PSI and Part IVA

What you need to know

The release of draft PCG 2024/D2 on 24 August 2024 has reignited the debate over whether the PSI rules should be an exclusive code for the tax treatment of personal exertion income and whether a structure under which a personal services entity (PSE) conducts a personal services business (PSB) is safe from the application of Part IVA.

The ATO believes it isn't, and just to make sure tax practitioners are getting the message, it has also published a new web page saying exactly that (QC 17216). In the Commissioner's view, Part IVA is capable of applying to deny the tax benefits arising from income splitting with lower tax associates after underpaying the test individual (TI) for the services they perform for the client or the deferral of tax through the use of a corporate structure.

Some have predicted the draft TD will cause an uproar among small business owners. Perhaps it will, but only if it is enforced by the ATO, which does now seem more likely.

The draft PCG

Having regard to previous ATO guidance on the subject, there is nothing new or different about the draft PCG. It restates the Commissioner's long-held view that where the PSI attribution rules don't apply because a PSE qualifies as a PSB, Part IVA can nevertheless apply where there is income splitting through the PSE structure or the retention of net PSI profits in a corporate entity.

The scope of the draft PCG is limited to cases where a PSE derives the PSI of a TI and the PSI attribution rules do not apply because the PSE qualifies as a PSB. It is not aimed at interposed entities where the entity's income is not the PSI of a TI – ie, income mainly generated from the supply or sale of goods, the supply or use of income producing assets, or from the business structure of the interposed entity.

So, the ATO is not tackling income splitting involving real businesses in the draft PCG. In the case of real businesses providing mainly professional services, however, individual professional practitioners already have to navigate the two gateways in PCG 2021/4 – *Allocation of professional firm profits – ATO compliance approach*, hopefully avoiding the amber and red zones, but that is another topic altogether.

The draft PCG contemplates that in applying Part IVA where having a corporate structure is one of the tender conditions, it might identify a narrow scheme – ie, one that does not include the setting up of the PSE structure but which focuses on the underpayment of a salary to the TI and the subsequent distribution of net PSI profits to lower tax associates.

The draft PCG sets out what the ATO considers are the indicia of lower risk arrangements, including where:

- the PSE distributes all the net PSI to the TI;
- the TI is remunerated at a level that is commensurate with the value of the services they provide;
- the remuneration paid to associates is not excessive;
- timing differences between the derivation of PSI and its distribution to the TI can be explained by reasons beyond the control of the TI and are not tax driven;
- the PSB makes a superannuation contribution on behalf of the TI; and
- there is a temporary retention of profits in a corporate structure in order to acquire an asset for use in the business.

Higher risk arrangements on the other hand, display the following features:

- some or all of the net PSI is distributed to associates with lower tax rates that the TI, thereby reducing overall tax;
- the TI is remunerated at a level below the value of the work they perform;
- the PSE does not distribute net PSI to the TI;
- excessive remuneration is paid to an associate; and
- the retention of net PSI in a corporate vehicle, thereby setting up a deferral.

There are a number of examples in the draft PCG which are intended to illustrate which scenarios are regarded as lower risk and higher risk. Where an arrangement is rated as higher risk, the ATO will not automatically apply Part IVA to deny the tax benefit, but they may well ask some questions.

Regrettably, the draft PCG does not include any examples where another client-facing employee joins the business. All the examples involve a single TI performing all of the principal work. An employee scenario is not uncommon and would require the ATO to clarify the issue of how to separate "pure" PSI from profits partly produced by employees also performing principal work.

Consideration should also be given to targeting the ATO's compliance activities more precisely by providing a *de minimis* carve out for the splitting of relatively small amounts of net PSI. If the amount of net PSI distributed to lower taxed associates is below, say, $50,000, the tax savings are unlikely to warrant going to the trouble of issuing Part IVA determinations. Good tax administration is not about collecting every last dollar.

Long standing ATO position

The draft PCG's claim that the Commissioner has always held the view that Part IVA can apply to deny the tax benefits of income splitting or tax deferral where a PSE falls outside the PSI attribution rules is difficult to refute.

The ATO's views about the potential application of Part IVA in PSB cases can be found in a number of ATO guidance and interpretative products, some going back many years:

- **TR 2001/8**

  This comprehensive ruling on the PSI rules includes the example of JB, a computer systems analyst who is underpaid by his family trust and splits his net PSI profit with his wife by way of a trust distribution – example 14 at paras 272 to 276. The ruling considers that arrangement is one that would be susceptible to the application of Part IVA.

- **TR 2022/3**

  Updates TR 2001/8 to reflect recent case law developments, mainly around the four PSB conditions.

  In this ruling, example 41 reprises the JB computer systems analyst example from TR 2001/8 with slightly different dollar amounts and concludes that, subject to the factors in s 177D(2), the income splitting arrangement will likely attract the application of Part IVA.

It is difficult to argue that the draft PCG would have taken anyone by surprise, but whether the ATO is right in its views about the application of Part IVA to PSB cases remains open to question.

The note to s 86-10 ITAA 1997

Section 86-10 Object of this Division

> *"The object of this Division is to ensure that individuals cannot reduce or defer their income tax (and other liabilities) by alienating their personal services income through companies, partnerships or trusts* ***that are not conducting personal services businesses****." (emphasis added)*

On a plain reading of the object provision, the drafter seems to be saying that Division 86 is intended to prevent PSI income splitting or deferral through interposed entities unless those entities are conducting a PSB. Or to put it another way, income splitting is not prevented by Division 86 where the PSE is conducting a PSB. But it would be straining the meaning of ordinary language to say the provision gives the green light to income splitting by PSBs and somehow turns Division 86 into an exclusive code where Part IVA can have no application.

To reinforce this point the note immediately following s 86-10 states:

> *"The general anti-avoidance provisions of Part IVA of the Income Tax Assessment Act 1936 may still apply to cases of alienation of personal services income that fall outside this Division".*

Just because Division 86 does not overcome income splitting of PSI where there is a PSB doesn't necessarily mean the general anti-avoidance rules could not apply instead. Indeed, some would say that Part IVA was aimed at tax benefits that are not caught by other specific provisions in the law.

The note may have been added to provide certainty and to foreclose on the exclusive code argument by making it clear that Part IVA may apply in PSB cases, subject to satisfying the various conditions. Anything else is wishful thinking.

The use of an entity is often a condition imposed by the client

It is not unusual for a someone striking out on their own as a consultant to be met with demands to operate through a corporate entity. In fact, most would-be independent contractors would not get their business off the ground without implementing such an arrangement.

Most large corporate clients ask for this in order to sidestep employment issues and control head counts, while the TI may be attracted to the use of an interposed entity for asset protection reasons.

Having regard to the client's insistence on engaging with a corporate entity, and depending on the facts and circumstances, it may be arguable that this crucial precondition for getting work means that there was no sole or dominant purpose of obtaining a tax benefit from income splitting by the TI.

There is a line of older AAT cases in which Tribunals have upheld Part IVA determinations where this argument was put – *Case W58* (1989), *Case X90* (1990), *Case Y13* (1991), and *Case Y28* (1991). These cases all involved the alienation of personal exertion income and were dealt with well before Part 2-42 was even thought about by John Ralph in his *Review of Business Taxation*. The Commissioner's position today is that where a PSE falls outside the PSI attribution rules (because it qualifies as a PSB) the old alienation cases of *Gulland, Watson* and *Pincus* continue to apply, opening the gate to Part IVA.

And as observed earlier, the Commissioner seems to believe he can circumvent this argument by defining the scheme narrowly.

Minerva Full Court decision and the "surrounding context"

The Commissioner's ideas about defining a narrow scheme may come unstuck in light of the recent Full Federal Court decision in *Minerva*. In that case, the Commissioner was defending a narrow scheme that did not include many of the restructuring steps undertaken by the taxpayer ahead of a proposed IPO.

While the Commissioner attempted to confine the scheme quite narrowly to the decision made by the trustee to distribute income in a tax advantageous way, the Full Court held that the wider context of the scheme had to be considered in weighing up the eight factors in s 177D(2):

> *"It is a conclusion to be drawn by reference to the eight factors applied to **the totality of the scheme considered in its wider context.**"* at [61], (emphasis added); and
>
> *"Obtaining the tax benefit is not enough. Desiring the tax benefit is not enough. The obtaining of the tax benefit must have been the main object or aim of what is said to be **the scheme when viewed objectively in its surrounding context.**"* at [65], (emphasis added).

Minerva was part of a large financial group involved in loan securitisation and the case was attended by a high degree of commercial complexity. Given the Full Court's decision, however, it seems reasonably arguable that where a TI has been strongly encouraged by a prospective client to front up with a corporate structure under which to perform their services, then any income splitting that might take place through the structure is incidental to the more important aim of satisfying the client's demand to operate through an interposed entity.

Without accommodating the client's conditions there would be no PSI to split with lower tax associates and this dynamic is highly relevant in the wider context even of a narrow scheme.

If the ATO is determined to press on with this issue, the professional bodies should insist on first running a test case or two. A recent Full Federal Court decision carries rather more weight than a line of AAT decisions going back more than 30 years and it wouldn't be the first time the ATO's long held view about a major tax issue has been proven wrong, at least for now (see *Bendel case* on Division 7A and unpaid present entitlements, an AAT decision that is under appeal).

Outcome misses the policy mark

One of the major justifications for introducing the PSI rules was said to be the perceived threat to the revenue (which was probably overestimated) and the need for a set of prescriptive rules that prevent the widespread splitting of personal exertion income without the ATO having to apply Part IVA on an industrial scale.

As it turns out, this outcome is only achieved where the PSE does not qualify as a PSB and the net PSI is all attributed to the TI under Division 86. Where the PSE satisfies one of the four exceptions and there is no automatic attribution to the TI, taxpayers should in our view be able to income split in the same way as any other entity that is carrying of a business - eg. where the business involves the sale of goods or a manufacturing process.

An alternative administrative approach might be to apply risk assessment factors (1) and (2) in Table 1, para 76 of PCG 2021/4 to the net PSI of the PSB – ie. the proportion of net PSI that is returned in the hands of the TI and the overall effective tax rate that applies to the net PSI received in the hands of the TI and associated entities. Such an approach would provide a consistent safe harbour between the two very similar types of taxpayers while providing an adequate level of protection from a revenue perspective (and PCG 2021/4 is already there).

At a broader level, however, what this issue really needs is not further threats of compliance activity by the ATO, but a complete rethink about the way the PSI regime has been designed.

What's really going on here?

Given the labour intensive and time consuming task of applying Part IVA on a case by case basis (after first identifying all the high risk cases), it is unlikely the Commissioner is seriously proposing to embark on the exercise of applying Part IVA in tens of thousands of PSI cases (assuming there are that many).

Instead, he is expecting tax agents to do all the work for him by identifying high risk clients and persuading them to swim between the flags by distributing all of the net PSI of the PSB to the TI and not accumulating net PSI in a corporate structure - and copping the inevitable flak from their clients.

The draft PCG doesn't really add much of any substance to TR 2022/3, which was issued just two years earlier. What is different is that the draft PCG focuses exclusively on the Part IVA/PSB issue instead of being included almost as an afterthought in a much more comprehensive ruling that covers the PSI rules from start to finish. Combined with the new web page, it is perhaps intended as a signal that this time the Commissioner really means it when he warns that Part IVA can apply where a PSB engages in income splitting or tax deferrals.

Client risks

When finalised, the draft PCG is intended to apply both before and after its issue date. This raises concerns about prior years and could end up costing some clients a bomb if they have their tax benefit cancelled over a number of years and also have penalties imposed.

The Commissioner been quietly beating the drum about this issue for over 20 years now, but without really following up on the compliance front as far as we can tell. Otherwise, where are the disputed cases? It may therefore be fairer to only apply the finalised PCG on a prospective basis.

The trade-off for the Commissioner letting sleeping dogs lie might have to be encouraging the client into a lower risk environment going forward. That is how the s 100A issue was ultimately handled. Before committing to such a trade-off, however, the Part IVA position needs to be clarified by way of a test case.

Professional indemnity

Where clients with PSBs have engaged in income splitting, practitioners need to be mindful of their PI position, as most policies do not cover Part IVA scenarios.

Certainly since the issue of TR 2022/3, and possibly earlier, clients should have been informed that a PSB splitting net PSI profits with lower tax associates places them at the high risk end of the spectrum. There are no excuses for neglecting to do so going forward.

Submissions on the draft PCG are due on 11 October 2024.

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ATO guidance on section 99B

What you need to know

Draft guidance material released by the ATO in late July 2024 (TD 2024/D2 and PCG 2024/D1) clarifies the ATO's views on the operation of s99B ITAA 1936 and provides some welcome quasi safe harbours for some common scenarios.

Background to s99B

The sometimes overlooked s99B has its origins in the 1969 High Court decision in the Union Fidelity case, which held that the trustees of the estate of the late author, Nevil Shute, who were Australian residents and who received foreign sourced royalty income to which no beneficiary was presently entitled, were not liable to Australian tax under Division 6 ITAA 1936. More broadly, the Court held that Division 6 does not apply to foreign sourced income.

Another ten years passed before s99B was inserted into Division 6 in 1979. Interestingly, the new law would not have prevented the Union Fidelity outcome as it is focused on amounts paid to beneficiaries (not trustees), which was probably seen as representing the more serious threat to the revenue posed by the High Court decision.

While the Explanatory Memorandum accompanying the Bill introducing s99B explains that the provision is expected to mainly apply where accumulated foreign income of a non-resident trust estate is distributed to a resident beneficiary, there is nothing in the text of the provision that explicitly prevents it from applying to distributions made by resident trusts.

The law

Instead, the draftsperson has adopted an "it's in unless it's out" approach to addressing the issue. Paraphrasing, sub-section (1) includes as assessable income of a resident beneficiary any amount, being the property of a trust estate, paid to or applied for the benefit of the beneficiary during a year of income.

Nothing about non-resident trust estates, nor even about present entitlements. Its broad wording extends to non-arm's length transactions such as concessional loans and the use of property such as housing or motor vehicles on non-commercial terms.

Sub-section (2) then provides for reductions or exceptions to sub-section (1), including:

a. *amounts paid out of corpus, except to the extent to which the payments are attributable to amounts derived by the trust estate that, had they been derived by "a taxpayer being a resident" would have been assessed to that taxpayer; and*

b. *any amount which, had it been derived by "a taxpayer being a resident" would not have been included in that taxpayer's assessable income.*

There is also an important exclusion for amounts assessed to the beneficiary under s97 or to the trustee under ss 98,99 or 99A, which avoids double counting by excluding most distributions made by resident trusts.

Other exclusions are for non-assessable non-exempt income of a beneficiary under the conduit foreign income rules and amounts included as assessable income under the transferor trust rules.

Once the exceptions and exclusions have been carved out, we are (hopefully) left with only with amounts paid out of trust income derived by a non-resident trust.

Where s99B applies, the relevant amount will be included in the assessable income of the beneficiary, along with the imposition of an interest charge reflecting the time during which the amount accrued to the trust.

The hypothetical resident taxpayer

Having previously provided guidance in TD 2017/24, the draft TD considers the meaning of the term “a taxpayer being a resident”, also described as the “hypothetical resident taxpayer”. Specifically, the draft TD confirms the Commissioner’s earlier view that the characteristics of the hypothetical resident taxpayer are limited to it being a resident, and nothing else. Both the circumstances that gave rise to the relevant amount in the hands of the trustee and the source of the amount being paid to or applied for the beneficiary are also seen as relevant when considering the application of the exceptions in paras (2)(a) and (b).

Examples in draft TD

The draft TD includes a number of examples which demonstrate the application of its view about the way the provision applies to the hypothetical resident taxpayer.

One of the more important examples is that a CGT gain arising from the disposal of a pre-CGT asset by the trustee will not be included as a s99B(1) amount assessable to the beneficiary, reflecting the source of the amount paid.

On the other hand, where the foreign trust makes a CGT gain from the disposal of a post-CGT asset and the amount is paid to or applied for a resident beneficiary, the 50% discount does not apply since the only pertinent characteristic of the hypothetical resident taxpayer is that they are an Australian resident. It cannot be assumed that it is an entity which is eligible for the CGT discount.

All in all, the draft TD doesn’t set off any particular alarm bells, although it surely would not have hurt to confirm that the scope of the application of s99B is limited to the foreign sourced income accumulated by a non-resident trust and paid out in some form to a resident beneficiary. Having said that, it is reassuring to note that all the examples in both the draft TD and the draft PCG involve amounts paid by or property provided by non-resident trusts.

The draft Practical Compliance Guideline

Given increased globalisation and high levels of migration, the ATO has identified a need for guidance to help support taxpayers in complying with s99B. In particular, the draft PCG sets out the ATO’s views about how and where compliance resources will be allocated, having regard to the perceived level of risk, with a particular focus on distributions from deceased estates (with some welcome quasi safe harbours) and the use of trust property. There is also guidance on the practical aspects of record keeping, particularly in relation to proving that a distribution was made out of corpus of the trust.

The draft PCG sets out seven common scenarios under which s99B might apply in relation to amounts paid or property provided to resident beneficiaries out of non-resident trust estates. In each case, the relevant amount is *prima facie* caught under s99B, and the potential application of one of the exceptions would need to be considered:

1. *A non-resident migrates to Australia.*
2. *A resident beneficiary receives a distribution from a non-resident trust.*
3. *A resident beneficiary receives a gift from a non-resident trust controlled by a relative.*
4. *A resident beneficiary receives a loan from the trustee of a non-resident trust.*
5. *A resident beneficiary is allowed the use of property owned by a non-resident trust.*
6. *A resident beneficiary receives an amount from a non-resident deceased estate.*
7. *A resident beneficiary receives a loan from a non-resident trust which is later forgiven.*

The draft PCG then addresses the record keeping requirements where resident taxpayers seek to rely on one of the exceptions, as well as the compliance approach the ATO proposes to take in scenarios that are considered to be low risk.

Record keeping

While acknowledging the practical challenges of obtaining information and documentation from non-resident trustees or their advisers, the draft PCG makes it clear that the onus is on the resident beneficiary to prove they are entitled to rely on either the corpus or the non-taxable exception.

The bare minimum level of documentation required to establish that the corpus exception applies includes:

- a signed and executed trust deed or will of the deceased;
- signed trustee minutes, resolutions or distribution statements confirming that an amount was paid or applied for the benefit of a beneficiary from the trust's corpus; and
- copies of the trust's financial accounts for the relevant years, prepared in accordance with the accounting principles of the relevant country.

But it doesn't necessarily end there.

Whether additional documentation and information may be required will be determined by the ATO on a case by case basis, but could include:

- records detailing the property used to settle the trust, such as payment records or documents demonstrating the transfer of property;
- for a deceased estate, a document setting out the assets owned by the deceased at their date of death, or a valuation of those assets;
- documents showing property being contributed to the trust;
- other records or working papers prepared by the trustee or their professional advisers, for example, accounting working papers;
- bank statements or payment records;
- copies of all trustee minutes, resolutions or distribution statements confirming the payment of capital amounts;

- accounting records, for example, general ledgers;
- correspondence from the executors or their legal advisers setting out the terms of the will;
- advice from professional advisers, including foreign advisers, to support the evidence provided;
- foreign legal advice;
- tax distribution statements;
- foreign country tax returns of the beneficiary where the beneficiary is required to lodge in the foreign jurisdiction; and
- foreign resident withholding tax statements from the foreign jurisdiction.

All the information and documentation needs to be provided in English, or accompanied with an English translation.

The draft PCG leaves taxpayers and their advisers a little in the dark as to precisely what documentation is required, but clearly the more evidence that can be assembled the better.

The draft PCG then includes three examples showing different outcomes for resident beneficiaries seeking to rely on the corpus exception. In one of the examples, the resident beneficiary has provided sufficient evidence that the corpus exception should apply, but in the two other examples the resident beneficiary falls short as they were unable to produce the required documentation.

A client's failure to meet the ATO's exacting standard of proof to satisfy the corpus exception is not necessarily the end of the world. A PCG is no more than the ATO's view about risk and the way it may apply its compliance resources. There is nothing in the law that specifies what documentation is needed, although it is useful to know what the ATO expects.

If the client has been diligent and persistent in their attempts to collect the required documentation from a foreign jurisdiction but has not met with much success (eg, the trust deed may have gone missing), it may be worth engaging the Commissioner and work out whether there is an alternative combination of documents that will satisfy him. If that fails, there is always the Tribunal which may prove to be more accommodating.

Deceased estates

While the administration of a deceased estate takes time in whatever jurisdiction the death occurs, the ATO will not go chasing payments made to resident beneficiaries by the deceased estate after the date of death provided:

- the trust property, including cash or proceeds from the sale of trust assets is distributed to the resident beneficiary within 24 months of the date of death; and
- the total value of trust property received by the resident beneficiary, whether in multiple payments or in one lump sum, does not exceed A$2 million at the time the amount is paid or applied to the resident beneficiary.

The draft PCG then provides seven examples of how these two conditions play out under various scenarios, which is probably overkill – two years and A$2 million seems straightforward enough.

In order for payments from a deceased estate to be regarded as low risk by the ATO, the resident beneficiary needs to be able to produce the following documentation:

- a document confirming the date of the deceased's death;

- the will of the deceased, letter of wishes or correspondence from executors or their legal advisors stating the terms of the will;
- documentation confirming that the assets were owned or held by the deceased at the time of death; and
- documentation setting out the distribution to the resident beneficiary and the assets of the deceased used to fund the distribution.

A PCG ruling that something is low risk and won't be allocated ATO audit resources is not quite the same as a safe harbour, but it is as close to one as taxpayers will get. The two-year/A$2 million threshold will be a useful quasi safe harbour for many Australians who receive a modest bequest following the death of a relative overseas. Those who don't qualify will need to do their best to work out how much of any distribution was sourced from gains that accrued to the deceased estate after the date of death.

The provision of trust property

Subsection 99B(1) can apply where a non-resident trustee allows a resident beneficiary to use or borrow trust property, including monetary loans.

The draft PCG assigns a low risk rating to an arrangement where:

- the borrowing, hire or use of the trust property is subject to an agreement, whether written or verbal;
- the agreement is made on commercial terms; and
- the resident beneficiary makes a physical payment to the trustee equal to the interest, hire or use per the commercial terms.

The ATO will accept that an arrangement is made on commercial terms where, at the time of entering into the arrangement:

- the rate applied for the interest, use or hire is consistent with market rates in the same or similar circumstances; and
- the terms of the agreement are consistent with terms available in the market in the same or similar circumstances.

In relation to loans from a non-resident trust, the ATO will accept that an agreement is on commercial terms where:

- the rate applied for the interest is consistent with the benchmark rate as prescribed for Division 7A purposes in subsection 109N(2); and
- the terms of the agreement are consistent with terms prescribed for Division 7A purposes in subsection 109N(3).

Like the low risk treatment for payments from non-resident deceased estates, the price of admission is in the form of having certain documentation available, namely:

- written agreements;
- written or electronic correspondence between the beneficiary and the trustee, including emails and electronic messaging;
- memorandums; and
- trustee minutes.

In cases where there is only a verbal agreement, some evidence is still required, in the form of:

- bank statements or payment transfer documents confirming the amounts paid to the trustee;
- contemporaneous relevant market data and information; and
- calculations of repayments identifying the terms applied to the arrangement.

A low risk outcome, while welcome, may be difficult to achieve in some cases involving family relationships where the use of trust property (such as a house, for example) is provided for only nominal consideration or for no consideration at all.

The draft PCG then runs through eight scenarios to illustrate how the commercial terms of an arrangement can be demonstrated (or not). Some scenarios meet the criteria while others do not.

Conclusion

For those who meet the various thresholds and can produce the required documentation, the draft PCG provides a useful quasi safe harbour in relation to monetary payments made or the use of the property for non-resident trusts. For those who do not, welcome to s99B.

ATO: Results from property management data matching

The ATO has advised that its property management data matching protocol has recently been extended. It said the information gathered (including rental data from banks, landlord insurers, rental bond authorities and sharing economy providers) gives it insight to common investment property mistakes. In this regard, it said recent results from property data matching found the following common errors:

- instead of reporting gross rental income and claiming expenses, net rent (after expenses) is reported and the same expenses are claimed a second time
- properties are being omitted from returns
- where they are owned by multiple stakeholders, only one owner reports the property – when both are required to report
- not reporting the rental income received when purchasing an already tenanted property that the new owner intends on moving in to
- capital works or depreciating assets being claimed as repairs and maintenance.

The ATO said if your clients have forgotten to tell you about any rent received or made mistakes with claiming expenses, lodge an amendment as soon as possible.

Note also the ATO advised in August 2024 that it will conduct a data matching program to acquire property management data from property management software companies for 2018-19 through to 2025-26. The data items will include:

- property owner identification details;
- property details (eg property address, date property was first available for rent etc); and
- property transaction details.

The objectives of this data matching program are to identify individuals and businesses who may be failing to meet their registration or lodgment obligations and to help the ATO to: correctly report assessable income from a rental property in their individual income tax return; correctly report associated rental deductions in their individual income tax return; and comply with CGT obligations for rental properties.

ATO issues DIS on Merchant case regarding SMSF trustee disqualification

What you need to know

The ATO has released a Decision Impact Statement (DIS) on the AAT decision in *Merchant v Commissioner of Taxation* [2024] FCA 498 (14 May 2024) (*Merchant* case).

This statement outlines the ATO's perspective on the decision in this case, which overturned the Commissioner's decision to disqualify the applicant under section 126A(2) of the SIS Act from serving as a trustee or responsible officer of a corporate trustee of superannuation entities despite finding the applicant had breached superannuation laws.

Facts

In the *Merchant* case, the ATO had originally disqualified the applicant from acting as a trustee or responsible officer of corporate trustees of superannuation entities under s126A(2) of the SIS Act, after claiming that the applicant, as the sole director of the corporate trustee for his SMSF, had breached the SIS Act by allowing his SMSF to acquire a substantial number of high-cost listed shares at market value from a controlled family discretionary trust. This transaction resulted in the trust realising a significant capital loss and led to breaches of both the Part IVA general anti-avoidance provisions and the dividend stripping provisions.

The AAT determined that three provisions of the SIS Act were contravened.

1. Subsection 34(1) as the SMSF failed to implement its investment strategy. The AAT noted that the applicant lacked a genuine purpose for investing on behalf of the fund and that there was no evidence that the necessary matters outlined in the fund's investment strategy were properly considered by the applicant.
2. Subsection 62(1) as the SMSF was not maintained for the sole purpose of providing retirement benefits. The AAT noted that the predominant purpose of the transaction (ie, crystallising a capital loss in the trust) and the significant purpose of retaining economic ownership of the relevant shares were not considered core purposes under s62(1).
3. Subsection 65(1) as the SMSF provided financial assistance to the applicant through the trust. The AAT noted that s65(1)(b) prohibits financial assistance via an intermediary, including through a discretionary trust.

On appeal, the AAT overturned the disqualification after finding the SMSF trustee had made the transaction based on advice from the SMSF's auditor, and there was no indication he thought the transaction would breach the law.

The ATO also disqualified the individual under s126A(3) of the SIS Act for not being a fit and proper person to be a director of an SMSF corporate trustee. However, this latter disqualification was overturned.

While the AAT acknowledged the contraventions had occurred, it noted the ATO's revised position and agreed the SMSF trustee was a fit and proper person, and the risk of future non-compliance was low, so the disqualification was unnecessary.

ATO view of AAT decision

The ATO acknowledges that the Tribunal's decision regarding serious breaches of ss34(1), 62(1) and 65(1) of the SIS Act aligns with its own position.

The ATO also recognises that the Tribunal's comprehensive assessment of all specific facts in this case, which led to the conclusion that the risk of future non-compliance by the applicant was unlikely, aligns with the Commissioner's approach outlined in Law Administration Practice Statement PS LA 2006/17 regarding the disqualification of individuals from serving as trustees of SMSFs.

The ATO reiterates in the DIS that, when considering disqualification under s126A(2), the Commissioner should evaluate:

- the actions of the individual;
- all relevant facts of the case; and
- the potential for future compliance risks.

The ATO also notes that the nature, number, and seriousness of contraventions are matters of fact and degree, making it impossible to apply strict rules to disqualification decisions.

According to the ATO, an individual may be deemed a future compliance risk if it is reasonable to draw that conclusion from their compliance history. This assessment includes evaluating their management of both their superannuation fund and personal tax affairs, as well as any other entity where they held a position of responsibility.

The ATO recognises that each case must be evaluated based on its unique circumstances, understanding that trustees can make mistakes in managing a fund's affairs. However, it is essential for trustees to demonstrate a willingness to comply with their obligations.

In this matter, the Commissioner maintained that the nature, number, and seriousness of the applicant's contraventions were sufficient grounds for disqualification under s126A(2). Furthermore, given the serious breaches of the SIS Act, the Commissioner found it reasonable to conclude that the applicant posed a future compliance risk, as disqualification aims to protect the investing public from the risk that people with a history of non-compliance re-offending.

However, the ATO acknowledges that, based on the Tribunal's comprehensive assessment of all relevant facts concerning the applicant, the conclusion that the applicant was unlikely to pose a future compliance risk and the decision to set aside the disqualification were reasonable given the information available to the Tribunal.

As each case must be evaluated based on its specific circumstances, the ATO believes that this decision has limited broader applicability beyond the unique context of this case. Furthermore, the ATO says that the decision in this case does not displace the long-standing principle that the primary responsibility for operating an SMSF rests with the individual trustees or the directors of the corporate trustee[nor restricts other consequences of contravening a civil penalty provision.

The ATO also notes the decision in *Coronica and Commissioner of Taxation* [2024] AATA 2592 (*Coronica* case) which was handed down by the Tribunal on 19 July 2024. In that decision, the Tribunal applied the same factors considered in this case to Mr Coronica's circumstances and arrived at a different outcome, affirming the Commissioner's original trustee disqualification decision. For further information about the *Coronica* case, refer to *IFPA Superannuation Notes*, August 2024, pages 47-49.

Conclusion

The *Merchant* case has underscored that SMSF trustees have avenues to challenge ATO disqualification decisions. Factors such as the trustee's intent, reliance on professional advice, and the risk of future misconduct can influence the ultimate decision. However, SMSF trustees must remain vigilant in meeting their compliance obligations, as data shows the ATO continues to actively monitor and enforce superannuation laws and regulations.

It is also important to recognise that transactions that appear "ordinary" may still attract ATO scrutiny, especially if there are additional underlying facts. In this case, while the fund was acquiring listed securities from a related party at market value, this acquisition resulted in the initial trustee disqualification and contravened several provisions of the SIS Act.

Source: Decision impact statement, Merchant and Commissioner of Taxation [2024] AATA 1102, 4 Sept 2024

Developments in TASA Code of Conduct Changes

Since our last update there have been a number of positive developments in relation to changes being made to the TASA Code of Professional Conduct. Change is still coming, and while it still looks as though the many are being made to pay for a brain fade committed by the few, things will hopefully be more manageable that the way they were looking in early July.

While the disallowance motion moved by the Coalition did not quite get up in the Senate on 10 September, (31 votes each way), the prospect of a second disallowance motion being moved in October seems to have galvanised both Treasury and the Assistant Treasurer's office to be as accommodating as possible in relation to issues raised by the joint professional bodies.

Section 15 has been pared back to make the obligation of tax practitioners to notify the Commissioner or the TPB about false or misleading statements made by their clients consistent with the rules that already apply under the ethical standards set by the Australian Ethical & Professional Standards Board (APESB). That involves a much higher threshold then the way the provision was originally drafted. There is also an exclusion where reporting the client would put the tax professional or their family or their staff at personal risk. So, there is still a dob in requirement, but it should only apply in quite limited circumstances.

Section 45, which is about disclosing any matter that might impact on someone's decision to engage a tax practitioner to perform taxation services is now completely unrecognisable from the original version, and is very specific about the things that need to be disclosed. Ongoing investigations that have not made any adverse findings are not disclosable, and neither are the tax practitioners' personal affairs.

A public consultation process is now underway, while direct communications with Treasury and the minister's office and the joint professional bodies continues.

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- *S&H Investments Pty Ltd v the Commissioner* [2024] AATA 893: Examination of the AAT's decision affirming the Commissioner's assessment of the superannuation guarantee charge for employee/contractors.

About the presenter

Ken Mansell currently works in a part-time capacity for both the Australian and Solomon Island government on tax policy and provides tax and super education for a series of organisations. He has previously worked on the secretariat of the Henry Review and in the office of the Assistant Treasurer as a tax advisor. Ken has also worked in the tax division for both KPMG and Deloitte, as a tax trainer and tax specialist for the Institute of Chartered Accountants in Australia and as the head of taxation for the Seven Network Limited group and Raytheon Australia. Further, he has worked as a legal researcher in both commercial and academic role.

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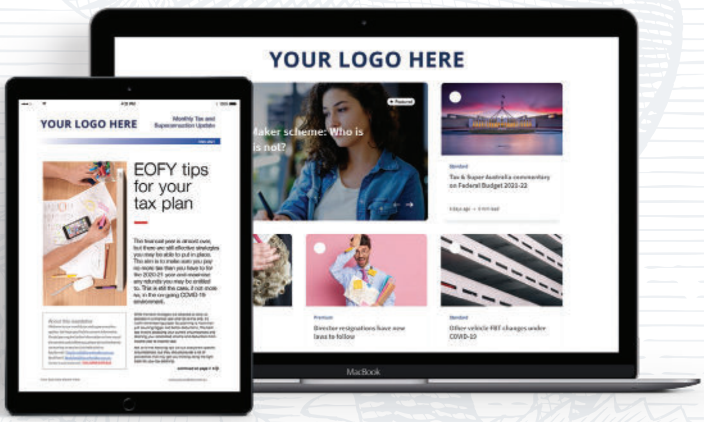

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Status of Tax Matters @ 26 September 2024

(This table is not intended to be comprehensive)

Status of Tax Matters @ 26 September 2024	
Legislation	**Status**
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.	Still before the Senate
Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024 The Bill introduces the following tax measures which have been previously announced: • the extension of $20,000 Instant Asset Write-off to 30 June 2025 • the Build-to-Rent measures • a Medicare Levy exemption for lump sum payments; • country-by-country reporting by certain large MNEs, and • changes to the listing of Deductible Gift Recipients.	The Build-to-Rent measures have been split off into a separate Bill, *Treasury Laws Amendment (Build to Rent) Bill 2024.* The new Bill reproduces the contents of Schedule 1 of the original Bill. The Responsible Buy Now Pay Later Bill is currently before the Senate.
Administrative Review Tribunal (Miscellaneous Matters) Bill 2024 Amends 52 Commonwealth Acts to support the establishment of the Administrative Review Tribunal (ART)	Introduced into the Senate 11 September 2024. Referred to Senate Legal and Constitutional Affairs Committee 12 September 2024; report due on 31 October 2024.

Status of Tax Matters @ 26 September 2024	
Treasury Laws Amendment (Build to Rent) Bill 2024 Gives effect to the 2023-24 Budget announcement to boost large scale investment in long-term rental accommodation, subject to certain eligibility requirements. • Raises the capital works deduction for eligible new BTR developments from 2.5% to 4% per year. • Reduces the final WHT rate on eligible fund payments and capital gains from MIT investments for eligible BTR developments from 30% to 15%, applicable from 1 July 2024.	Before the Senate
Scheduled Parliamentary sitting days	
Both Houses sit from 18 November to 21 November 2024, and again the following week from 25 November to 28 November 2024.	
Appeals	
No appeals news to report this month.	