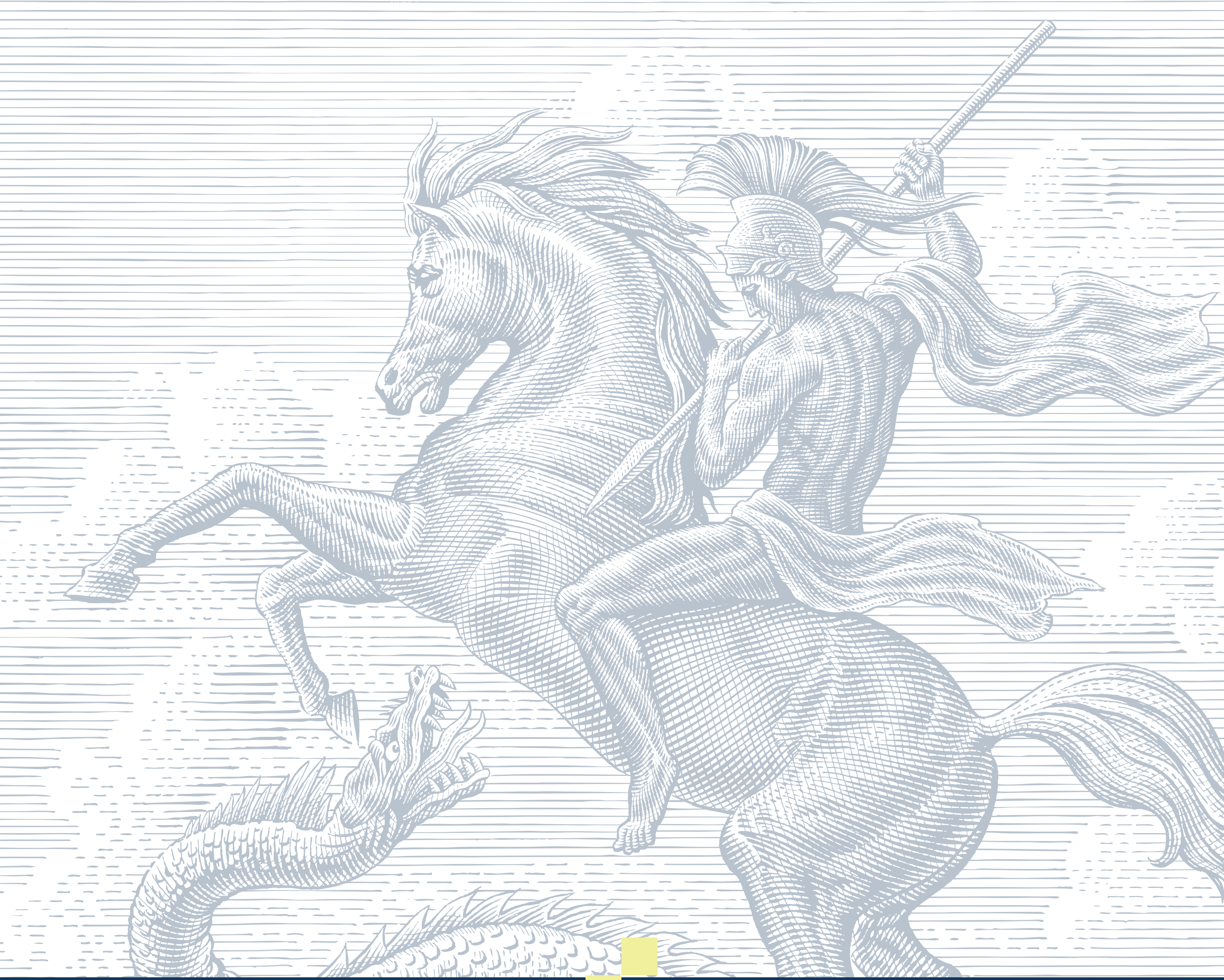
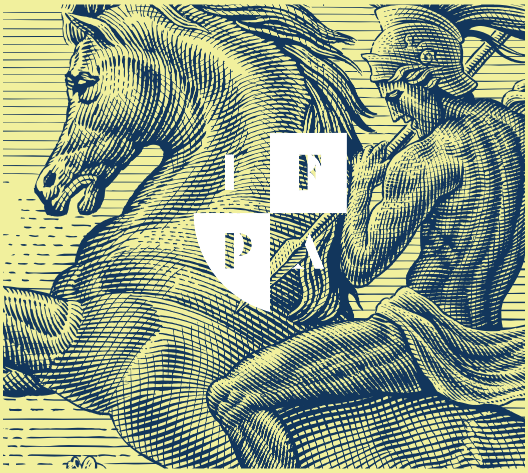


Monthly Tax Update

September 2024

INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA



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Monthly Tax Update

September 2024

These notes are a compilation of key case law, regulator updates and industry insights for you to easily stay abreast of the ever-changing tax landscape.

We hope you enjoy this update.

Warm regards,

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TPB Code of Professional Conduct developments

A moving feast

It is difficult to write on this topic as there are daily developments that can quickly overtake whatever the current version of events might be. This update reflects the position as at 29 August 2024.

Your Institute has participated in various consultation meetings with government officials, some confidential, others not. We have also kept in close contact with the nine other professional bodies that have fashioned a united approach in resisting the bureaucratic overreach involve in the rewriting of the Code in excruciating detail when the existing principles based Code is perfectly serviceable.

The concerns of the professional bodies revolve around the lack of adequate consultation on some of the changes to the Code, the specific language of the law, and the lack of guidance.

"Dob in" requirement goes too far

One of our main concerns about the new law is s15(2)(c), which imposes a legal requirement on practitioners to "dob in" their clients to the TPB and/or the ATO where their client refuses to correct a false or misleading statement about their tax affairs. While we accept the need to strongly urge the client to do the right thing and to decline to continue acting for them if they refuse, reporting them without their consent is an overreach that will prove to be counterproductive. Once clients realise their tax agent may be required to act as an informer they will stop being open and frank with their tax advisers, which will only make matters worse. Legal practitioners are not required under their Code of Conduct to report their clients without their consent, and there is no reason to treat tax practitioners differently.

"Any matter" is too wide

Another sensitive issue is the requirement, under s45, for tax practitioners to disclose to existing and prospective clients "any matter" which might significantly influence their decision to engage them or continue to engage them to provide taxation services. We have concerns that the phrase "any matter" is too broadly drafted, and could be taken to extend to personal issues such as the physical or mental health of the tax practitioner, or even their political or religious beliefs.

The TPB has informally indicated that the words have to be read in context and it will take a pragmatic approach to the issue and develop guidance material as soon as they can. While guidance can be helpful up to a point, drafting the law in a more targeted way would be far preferable. What if a practitioner in under investigation by the TPB (perhaps after being "dobbed in" by another practitioner under the breach reporting rules), but no adverse findings have yet been made (and might never be made)? What if you're thinking about selling your practice in the next few years (who isn't?); would that have a significant bearing on your clients' decisions to stick with you?

Clayton's extension of time

The Assistant Treasurer appeared to be cutting tax practitioners some slack by deferring the start date to 1 July 2025 for firms with up to 100 employees. This is to allow for more time for the TPB to publish more guidance material and for the consultation process to continue. But on reading the small print in the minister's Media Release, it turns out **the extension of time applies only where practitioners have been taking "reasonable steps" to implement the Code changes as from 1 August 2024.**

Just over the last few days, the government has withdrawn the requirement for practitioners to be taking "reasonable steps", which is a welcome move. We can't have practitioners being required to comply with new Code of Conduct requirements that might still be changed, and where a lot more guidance material is yet to be developed by the TPB.

Motion to disallow the Legislative Instrument

Following lobbying efforts by the professional bodies, the Coalition has announced it is planning to move a motion of disallowance of the Legislative Instrument in the Senate on 10 September. The success of the disallowance motion is not assured, and will depend on the positions taken by the cross bench senators and the Greens. This introduces even more uncertainty.

Next

The Assistant Treasurer has invited the professional bodies to participate in a round table discussion in the week commencing the 3rd of September 2024 to address our concerns. Your Institute is proposing to participate in this process.

Stay tuned for further developments, especially with regard to the disallowance motion in the Senate.

SGC liability: Jockeys employees of turf club "payer", not of owner and/or trainer

What you need to know

In determining liability for SGC, it is not just a matter of determining if a payment has been made to an "employee" (under any of the definitions in the SG legislation) it is also a matter of determining who is the "payer" entity.

Facts

The taxpayer, the Australian Turf Club Ltd (ATC), is an unlisted public company registered on 1 February 2011. According to its constitution, it was established:

> *"...for the encouragement of horse racing, and other incidental related purposes and to carry on any other activity which is calculated directly or indirectly to enhance or further the interests of registered horse racing..".*

The taxpayer conducted race meetings at racetracks in NSW and was bound by the Australian Rules of Racing and the NSW Local Racing Rules (LRs).

For the 2010 to 2014 financial years, the ATO issued notices of assessment for the Super Guarantee Charge (SGC) on the basis that the jockeys were "employees" of the taxpayer pursuant to s 12 of the *Superannuation Guarantee (Administration) Act 1992* (the SGAA).

The taxpayer unsuccessfully objected to the assessments and then applied for review before the AAT.

Issue

1. Were the jockeys "employees" of the taxpayer in terms of the taxpayer making the type of payments to the jockeys as set out in any of the sub-paras in s 12 of the SGAA?
2. Was the owner and/or the trainers of the horse an employer of the jockeys either in their own right or jointly with the taxpayer?

Arguments

Commissioner's argument

The Commissioner's main argument was that s 12(8) was the relevant provision (and not s 12(3) as argued by the taxpayer, below).

Section 12(8) provides an expanded definition of "employee" which included persons such as artists, musicians, sports persons who are "paid to perform" and therefore the jockey were employees – and that they were employees of the person liable to make the payment for their performance.

The Commissioner also relied on *FCT v Scone Race Club Ltd* [2019] FCAFC 225 where the Full Court held that the Scone Race Club was liable to make the payment of race-day riding fees to jockeys pursuant to NSW Local Racing Rule 72 (LR 72) – which provides that the clubs were to pay a fee to jockeys for riding a horse in a race (and for an amount as determined by Racing NSW).

Taxpayer's argument

The taxpayer argued that the jockeys were not its employees, but those of the racehorse owners and/or trainers pursuant to s 12(3) of the SGAA with whom they "entered into contract wholly or principally for their labour" – and that it was only making payments to the jockeys "on behalf of" the owners/trainers.

The taxpayer also argued that while LR72 imposed an obligation on it and other clubs to pay the owners the riding fees, the amounts were in fact payable by the owners to jockeys under an implied contractual term between the parties.

Decision

The AAT found that the taxpayer was the "payer" liable for the SGC, for the following reasons:

- The taxpayer had not discharged its onus of proving that it was not liable to pay the jockeys pursuant to s 12(8) ie payments for the performance of artists, musicians, sports persons etc.
- Both s 12(8) and the SGAA as a whole precluded any argument that there could be more than one employer/payer liable for SGAA.
- Section 12(3) did not apply to make the jockeys employees of the owners and/or trainers as it was not clear whether there was any contract between them "wholly or principally for their labour".
- The decision in *Scone Race Club* case indicated that the taxpayer was liable to pay riding fees - and the "plain meaning" of LR72 did not support the proposition that the taxpayer was not liable to pay riding fees.

In relation to the significance of s 12(8), the AAT said s 12(8) is a deeming clause, deeming certain persons to be employers and that the object of the section is to ensure that where a person assumes a liability to pay someone in order for that person to (inter alia) play sport, then that person should be the employer of the person for the purposes of the SGAA. Furthermore, it said that s 12(8)(a) should be construed in the context of that purpose.

The AAT also found that it was not possible to form a view as to whether there were implied terms in any contractual arrangements between the parties that made the owners and/or trainers liable for payments as all the relevant parties had not given evidence on the matter.

In the light of these matters, the AAT concluded that the:

> *"ATC has failed to discharge its onus of proving that it was not the employer of jockeys who rode in races held by it ...within the meaning of subsection 12(8)(a) of the Act".*

Australian Turf Club Ltd v FCT [2024] AATA 2728, 30 July 2024.

Record penalty for preparing returns while not a registered agent

What you need to know

It is one thing to breach the TASA code of conduct if you are registered tax-agent; it's another thing not to be registered at all!

Facts

Mr Van Dyke was a Radio Traffic Controller. He admitted to 3,359 contraventions of s 50-5(1) of the *Tax Agent Services Act 2009* (TASA) over a four year period between 2019 and 2023 by preparing and lodging 3,359 income tax returns for taxpayers, for a fee or other reward (of $500 for each return), whilst not a registered tax agent within the meaning of that Act. He earned some $1.65m from this business activity.

Moreover, he was not, and never had been a registered tax agent and had never lodged an application with the Tax Practitioners Board (TPB) for registration as a tax agent.

In September 2002, he was sent a "cease-and-desist letter" by TPB which threatened him with legal action – and yet he persisted in his activities (albeit to a lesser extent).

In addition, in 2023 the ATO issued amended assessments to Mr Van Dyke for the 2019 to 2022 income years for failing to declare any of this income. This gave rise to a tax liability of some $1.3m (including administrative penalties).

Issue

The appropriate amount of civil penalty to be imposed.

Arguments

The taxpayer argued that

- he was only helping people who approached him;
- he accepted the serious nature of his conduct; and
- his conduct occurred at a time when he was gambling heavily (and for which he sought professional help).

The TPB argued that the penalty should be $1,000 to $1,500 for each contravention (amounting to approximately $3.3m to $5m).

Decision

The Court decided that a civil penalty of $1.8m was appropriate in all the circumstances. In doing so it made the following observations and comments:

General matters

- The purpose of any civil penalty regime is to ensure compliance with the statutory regime by deterring future contraventions.
- As deterrence is the primary purpose there inevitably will be cases where the penalty that must be imposed will be higher than the penalty that would otherwise be imposed on a particular offender having regard only to the circumstances of that offender.
- The assessment of the appropriate deterrent value will have regard to the following factors: the nature and extent of the contravening conduct; the amount of loss or damage caused; the circumstances in which the conduct took place; the deliberateness of the contravention and the period over which it extended; and whether there has been a willingness to cooperate with the relevant authorities.
- Ordinarily, separate contraventions arising from separate acts should attract separate penalties - but where separate acts give rise to separate contraventions that are interrelated, they are a "course of conduct" for penalty purposes (as in this case)
- There is also a need for there to be a reasonable balance between deterrence and oppressive severity, in any penalty imposed (and care must be taken to avoid double punishment).

Specific matters

- The seriousness of Mr Van Dyke's conduct was self-evident – and his contraventions after the cease-and-desist letter aggravated the wrongdoing.
- His conduct was deliberate, repeated, and sustained conduct, which continued (seemingly unabated initially, but later to a lesser degree), even after being warned of legal action in the cease-and-desist letter.
- The fact that his "unsophisticated" business conduct could so easily be undertaken, and on a large scale, starkly highlights the importance of deterrence in the penalty.
- Mr Van Dyke's remorsefulness was tempered by the fact that in cross-examination, he sought to downplay the seriousness of his conduct.
- There was no medical evidence offered to support his claim that he attempted to address his mental health and gambling addiction.
- The Court was "mindful" that Mr Van Dyke has been required to pay over $2m in unpaid taxes and penalties (relating to income obtained from these contraventions) .

The Court also granted the TPB's application for declaratory relief – which included that he be liable to imprisonment, sequestration of property or other punishment for contempt if he refused or neglect to do the things that he was required to do.

Note also that Mr Van Dyke was declared bankrupt on 16 April 2024 and that the penalty imposed in this case would not be provable in his bankruptcy – which meant that the fine of $1.8m would still be payable after his release from bankruptcy.

Comment

According to the TPB, the penalty of $1.8m imposed was the highest total civil penalty for a Tax Practitioner Board application.

Tax Practitioners Board v Van Dyke [2024] FCA 899, 14 August 2024

AAT "duty bound" to uphold default assessments – despite justice concerns

What you need to know

Even if the manner in which amended or default assessments have been raised by the Commissioner are "flawed" in some way, the onus still strictly remains on the taxpayer to show that the assessments are excessive and what the correct amount of income should be.

Facts

The ATO issued default assessment to the taxpayer for the 2012 to 2017 income years for undeclared business income estimated to be some $3.9m in relation to a business which, although not in the taxpayer's name, was claimed to have been operated on his behalf.

The ATO also issued amended assessments to the taxpayer for the 2008 to 2011 income years for alleged unexplained deposits of some $1.2m, while also disallowing PAYG withholding credits claimed for $112,600.

The assessments also were issued out of time on the basis of fraud or evasion and included 75% shortfall penalties for intentional disregard of the law (plus the statutory uplift of 20% for several of the years in question).

After disallowance of his objections, the taxpayer applied to the AAT for review of the decisions.

The following matters were also relevant:

- Some of the taxpayer's own records, and those of the business claimed to be operated on his behalf, had been seized by police and were returned to him in a damaged state – which "left them unable to be interrogated without considerable expense and even then not fully as some electronic documentation was corrupted".
- In relation to the assessed business income, the ATO did not make any allowance for deductions for operating expenses, and no reason for this was offered by the ATO.
- At the time of the AAT hearing, the taxpayer was incarcerated and chose not to give evidence by video-link.

Taxpayer's arguments

Before the AAT, the taxpayer argued, among other things, that the business was not his nor operated on his behalf, that the bank amount deposits were not income and that the assessments were issued out of time.

Decision

The AAT found that the taxpayer had failed to prove that any of the assessments were excessive.

In particular, it said that it was unable to reach a “state of satisfaction” regarding the applicant’s income for the relevant income years nor that any shortfalls did not arise out of fraud or evasion.

In arriving at its decision, the AAT first noted the following matters that made it harder for him to prove his case and gave rise to a risk of injustice (albeit some were of his own making): he chose not to give evidence in person; the lapse of time since the assessment years; his records had been seized by police and returned in an unsatisfactory state; and that the ATO made no allowance for any deductions related to the assessed business income.

However, the AAT concluded that despite these matters:

> *“our duty is clear: we must affirm the decisions under review ….That is so even if the applicant proves ‘**the Commissioner formed a judgement about the taxpayer’s taxable income on a wrong basis**’”*

Ownership of business

In relation to the issue of whether the taxpayer owned the business in respect of which business income had been assessed to him, the AAT noted that an outgoing passenger movement card at the relevant time referred to the taxpayer owning a business and that the taxpayer’s solicitor had provided an affidavit for a bail application which stated he was running a business with his wife. In the light of this evidence, the AAT concluded that the taxpayer had not proven that he did not own a business at the relevant time in respect of which the ATO had assessed income to him.

Various deposits

In the AAT’s view, even making full allowance for the difficulties the taxpayer faced in obtaining documentary evidence, it would be “a significant leap” for the AAT to accept that the taxpayer had positively proved that, for example, specific deposits of nearly $90,000 were not income in the absence of any direct evidence to that effect.

PAYG credits

In relation to the disallowance of PAYG credits, the AAT found that in accordance with relevant legislation and regulations, they did not form part of the assessment process and therefore could not be objected against. The AAT therefore did not have jurisdiction to review the matter.

Out of time

In view of the absence of an explanation by the taxpayer regarding his failure to lodge returns, the AAT was satisfied the absence of fraud or evasion had not been proved and therefore the relevant assessments could be issued out of time.

Other relevant facts

The AAT also noted the following relevant matters about the taxpayer:

- he did not maintain a bank account from 2009;
- he did not lodge tax returns for several of the years under review even though he admitted he derived significant income in those years;
- his claims to have been paid in cash, but did not produce any record of the amounts he says he received; and
- his failure to give evidence before the AAT meant that he was not able to have put to him in cross examination statements apparently made on his behalf or other evidence inconsistent with propositions put to this AAT – in particular, regarding whether he was the true owner of the businesses.

Conclusion

The AAT concluded that the taxpayer did not provide "a sufficiently complete picture" to enable it to be satisfied what the taxpayer's taxable income actually was – and, that, therefore the assessments had not been proven to be excessive.

IFPA comment

Interestingly, the AAT was so worried by the prospect of injustice to the taxpayer (particularly in relation to there being no adjustment for possible businesses deductions) that it contemplated taking the unusual course of remitting the applications to the ATO for reconsideration. However, because of the practicalities of doing so and the prospect of the further delay in hearing the matter, it decided not to do so.

> *"So troubled were we by the risk of injustice to the applicant in this case that we contemplated taking the unusual course of remitting the applications to the Commissioner for reconsideration to enable the Commissioner to reflect upon, in particular, the appropriateness of maintaining (some of) the assessments apparently based on an estimate of business income without allowing in the estimate for expenses.* ***Ultimately, given the Commissioner's response to that prospect, and the unsatisfactory evidentiary position both the Commissioner and the Tribunal are confronted with, we concluded to do so would be futile and only serve to further delay finalisation of the reviews, contrary to the statutory objects of the Tribunal."***

CJYB and FCT [2024] AATA 2640, 29 July 2024

Penalties for imaginary family trust deductions upheld

What you need to know

In what will be news to many people, tax in Australia is entirely voluntary and you can reduce the tax you've been assessed by claiming deductions for non-existing payments made to a non-existing family trust – all without letting your tax agent know.

Facts

The applicant, B, lodged her 2020 and 2021 returns through her tax agent in the normal way. Using the on-line portal, she subsequently lodged amended returns in September 2022 claiming $136,000 as "other deductions" in relation to a trust she had apparently thought about but never bothered to create because of the costs involved. B did not involve her tax agent in lodging the amended returns.

The ATO checks large refunds before they are issued and on this occasion smelled a rat and prevented the resulting refunds from issuing. In November 2022 the ATO advised B it was proposing to audit the amended returns and requested her to provide documents and an explanation of her claims. B responded by asserting that all tax is voluntary, demanded a refund of all the tax she had paid over the last 10 to 20 years, disputed the existence of the ATO and the legality of all taxation laws.

Undeterred, the Commissioner completed the audit and imposed a shortfall penalty of 50% of the tax shortfall, being for recklessness rather than deliberate disregard of a taxation law (75%), without the 20% s284-220(1)(c) TAA 1953 penalty uplift for the second year. The total penalty was $15,000 over the two income years.

B objected to the imposition of any penalties, partly because no harm had been done – the Commissioner intercepted the amended assessments before they were issued. The Commissioner disallowed the objections and the applicant applied to the AAT for a review of the objection decisions.

Tribunal decision

The Applicant wisely decided not to pursue the argument that tax is voluntary and confined her arguments to the penalty issue.

The Tribunal held that the fact her claim was intercepted:

> *"does not alter the fact that she tried in a very blatant way to obtain a deduction to which she was not entitled." [18]*

The Full Federal Court decision in *Dixon Holdsworth Superannuation Fund v Commissioner of Taxation* stands for the proposition that penalties still apply in such cases and the Tribunal followed the Full Court on this issue.

After quoting from MT 2008/1 the Tribunal concludes, somewhat unconvincingly, that the Applicant's conduct was, at best, reckless and she has not shown that the imposition of a 50% penalty was excessive or incorrect.

As for the Commissioner's general powers of remission, the Tribunal found the Applicant had advanced no cogent reasons for further remission. Specifically, the Tribunal pointed out that the "no harm to the revenue" argument is not relevant to further penalty remission. Nor is hardship or incapacity to pay the penalties – there are other avenues for dealing with those issues.

Comment

Arguably, the Applicant got off lightly on penalties. It is highly arguable that one or two taxation laws must have been deliberately disregarded in lodging her amended returns with their fictitious trust deductions. Seen in that light, a 75% penalty would not have seemed unduly harsh. Also, the 20% uplift has been consistently applied in default assessment cases where multiple assessments issue on the same day (going back to the *Ross* case). Things could have turned out worse for the Applicant.

Bootlis v C of T [2024] AATA 2723 (2 August 2024), DP Ian Hanger

Accountant's disqualification as SMSF trustee confirmed by AAT

What you need to know

After the recent success enjoyed by Mr Merchant in having his disqualification as an SMSF trustee overturned, the Commissioner will be relieved that the AAT has upheld a disqualification of another SMSF trustee in a case that's been around the block a few times over the last three years.

Facts

C is an accountant with more than 50 years' experience running his own practice through a company he controlled. During the 2009 to 2014 financial years he was found by the ATO to have committed 26 contraventions of the SIS Act, including:

- acquiring assets from related parties;
- borrowing from his SMSF;
- contravening the in-house asset rules;
- failing the sole purpose test; and
- failing to keep proper accounting records.

The Commissioner deemed C not to be a "fit and proper person" and disqualified him from being an SMSF trustee or being a responsible officer of a corporate trustee of a SMSF. C referred the Commissioner's decision to the AAT for review.

AAT decision (first time around)

C was successful before the AAT, at least initially. The Tribunal held that while the transgressions were serious, it was prepared to exercise its discretion to set aside the disqualification decision in view of various undertakings C had given, including the appointment of an independent accountant, tax agent and auditor. The Tribunal also held that the tax consequences for the fund of the non-compliance findings represented an appropriate penalty for the trustee. Unhappy with this outcome, the Commissioner appealed to the Federal Court.

Federal Court decision

The Federal Court held the Tribunal had failed to address the correct statutory questions, which were the seriousness of the contraventions and whether C was a "fit and proper person". Also, it was wrong of the Tribunal to conflate the tax consequences of non-compliance by the fund and an appropriate penalty for the trustee. Multiple sanctions falling separately on both the fund and the trustee may be an appropriate outcome in a case such as this. The Court set aside the AAT decision and remitted the case back to a differently constituted Tribunal for reconsideration.

AAT decision (second time around)

The second AAT hearing did not go so well for C.

The Tribunal distinguished the recent decision involving Mr Merchant, who had acted on what he reasonably believed was sound external advice around the transfer of Billabong shares from his discretionary trust to his SMSF. In the case of C, there had been multiple serious transgressions spanning a number of income years which were not minor legacy issues as contended.

A lack of contrition on the part of C was also regarded by the Tribunal as indicative of C not being a "fit and proper person".

Coronica v Commissioner of Taxation [2024] AATA 2592 (19 July 2024), G Lazanas SM

Insufficient work experience to warrant tax agent registration

What you need to know

The Tax Practitioners Board's decision to deny a senior accountant's application for registration as a tax agent has been upheld by the AAT, mainly because of reservations the Tribunal held over the competence of the supervising tax agent, who had been de-registered due to significant failures in various areas.

Facts

D worked as a senior accountant for H for more than five years. His tertiary qualifications met the TASA requirements, and he was seeking registration under item 201(d), Schedule 2 TAS Regulations 2022, which required him to have undertaken at least one full-time year of "relevant experience" under the "supervision and control" of a registered tax agent. In this regard, D submitted that he was supervised by H on a daily basis.

In the meantime, H was designated as a "high risk agent" in 2019, after an ATO audit revealed he had:

- systematically claimed deductions for clients which had no nexus to income, resulting in substantial tax shortfalls and penalties;
- made unsubstantiated claims for deductions;
- failed to take reasonable care to establish his clients' state of affairs; and
- contravened or disregarded tax laws in preparing returns for clients.

In due course H was de-registered as a tax agent, a decision that was not challenged by him.

Given his other shortcomings, the TPB must have had reservations about relying on H to vouch for his supervision of D's work. The TPB made enquiries from both D and H and concluded that the required level of supervision had not been established and D's application for registration must fail. D applied to the AAT for a review of the TPB's decision.

AAT consideration

While D's evidence was that H was constantly by his side as he performed his work, supervising and mentoring him (which must have been annoying at times), H's evidence was that D was highly competent and actually needed very little direct supervision. According to H, D would flag things with him when D thought that was necessary rather than H actually supervising the work in the sense of the dictionary definition of the word. Given the inconsistency in their evidence and the concerns the Tribunal had over H's reliability (given his de-registration) it did not consider the requisite level of supervision had been demonstrated.

In particular, the Tribunal saw the supervision requirement in the following broad terms:

> *"Each workplace is different and I accept that the substance, form and manner of such information collection would vary depending on the size of the practice and the working arrangements and that 'one size does not fit all' but consider such information must be documented contemporaneously and be in a form that is accessible at call to allow for a proper assessment of the extent of supervision and control that an individual has been subject to at any given point in time." [14]*

In affirming the decision of the TPB, the Tribunal found that the applicant had not been subject to the "supervision and control" required under the law and did not meet the work experience requirement.

Comment

Given the TPB's current drive to redraft the Code of Professional Conduct in excruciating detail, it would not be surprising if they come up with yet more guidance material specifying how registered tax agents should create and maintain evidence of supervision for employees seeking their own registration.

How many practitioners would satisfy the Tribunal's expectations as set out in the above quote?

Dou v Tax Practitioners Board [2024] AATA 2580 (19 July 2024), Benk SM

DIS: Fidge case – army colonel ETP redundancy

What you need to know

A bona-fide redundancy occurs if a position is made redundant as opposed to the person in that position. But this will depend on the precise facts.

The ATO has released a Decision Impact Statement on *Fidge and FCT* [2023] AATA 4245. In that case, the AAT ruled that a special benefit payment made to a colonel in the Army on his transfer to the Reserves after he was advised that a full-time position would not be available in his current role was a genuine redundancy payment under s 83-175 of the ITAA 1997.

Facts

The taxpayer was a full-time member of the Regular Army. In his capacity as a member of the Regular Army, the Applicant was bound to "render continuous full-time service". He was promoted to the rank of colonel in 2010 and in March 2016 he was posted as Defence Attaché-Ankara, International Policy.

On 31 July 2018, the Chief of the Army wrote to the Applicant to advise that he was being considered for Command Initiated Transfer to the Reserves (CITR), should another full-time position not be found.

On 5 June 2019, the Chief of Army wrote to the Applicant advising[that continued workforce planning deliberations have confirmed there will not be a full-time position available for him in his current fulltime role and that as a result he was being transferred to the Reserves – for which he would be entitled to a "special benefit" payment to s 58B of the *Defence Act 1903.*

Issue

The issue before the Tribunal was whether the taxpayer was dismissed because his position was made genuinely redundant and that therefore the special benefit payment was a genuine redundancy payment under s 83-175 of the ITAA 1997 - and would attract concessional income tax treatment.

Decision of Tribunal

The Tribunal first found that s 83-175(1) was applicable as the ETP provisions treated the holder of an office as an employee.

It then found that his position was as a 'colonel in the Regular Army'. In doing so, it stated that in military service, it is somewhat unrealistic to search for a specified set of specific duties and responsibilities and that this position differed from ordinary civilian employment, where it is commonplace for an employee to have a designated role in which the duties and responsibilities are set out in a duty statement, or as commonly understood by the parties.

The Tribunal then concluded that it was this position, as a colonel in the Regular Army, from which the taxpayer was dismissed under the CITR – as the position was excess to the requirements of the Regular Army.

In doing so, the Tribunal found no evidence that another officer had taken over the Applicant's position as a colonel of the Regular Army and concluded the position formerly held by him was excess to the Army's requirements.

ATO view of decision

The ATO said that it would accept that the decision was open to the Tribunal on the agreed set of facts. But it also emphasised that the case was conducted on an agreed set of facts between the parties, rather than through the production of evidence to establish the precise position or roles undertaken by the taxpayer

The ATO also said it did not agree that it was unrealistic to search for or identify a specified set of specific duties and responsibilities in Army occupations (as opposed to saying that a position in the Army differed from ordinary civilian employment, where it is commonplace for an employee to have a designated role in which the duties and responsibilities are clearly set out).

Rather, the ATO said that it considered that the roles and functions of an Army Officer related to a position can be identified through the production of evidence.

Accordingly, the ATO stressed that its view was that the decision was heavily dependent on the particular agreed facts in the case, and therefore has limited application beyond its own factual circumstances.

The ATO also said that the decision does not disturb the fundamental principles set out in the decisions in *Weeks* and *Dibb***,** or the ATO view in TR 2009/2 and that it will continue to apply s 83-175(1) consistent with these authorities.

ATO's view of Tribunal's reliance on authorities

The taxpayer relied upon the judgment of the Full Federal Court in *Dibb v FCT* [2004] FCAFC 126 *(Dibb)*, which concerned former s 27F of the ITAA 1936. Specifically, the taxpayer sought to rely on comments in *Dibb*, that former s 27F of ITAA 1936 applied if the employee's job was no longer to be performed by any employee or there was no available job for which the employee was suited so that the employee was surplus to the employer's needs.

On the other hand, the ATO said that s 27F speaks of the *bona fide redundancy of the taxpayer* – and that therefore it believes that it is more accurate to say that an employee becomes redundant when his or her job (described by reference to the duties attached to it) is no longer to be performed by any employee of the employer.

Likewise, the ATO said that even if the employee's job, defined by reference to its duties, has disappeared, he or she may be able to perform some other available job to the satisfaction of the employer – and that in that case, no question of redundancy arises. The ATO also said that it is only if the employer considers that there is no available job for which the employee is suited, and that he/she must therefore be dismissed, that the question of redundancy arises.

Accordingly, the ATO claimed that for the purposes of s 27F, an employee will be considered to be dismissed by reason of his or her bona fide redundancy if in good faith, the employer: has re-allocated duties; considers that the employee is not suitable to perform any available job existing after the re-allocation; and for that reason, dismisses the employee.

The ATO also noted that:

- the taxpayer's alternative submission (which was not relied upon by the AAT) that relied on *Taxation Ruling TR 2009/2 (Genuine redundancy payments, for the proposition that the treatment of genuine redundancy payments under the ITAA 1997 to be identical to the treatment of bona fide redundancy payments under the ITAA 1936*); and
- the Commissioner relied on the Full Federal Court decision in *Weeks v FCT* [2013] FCAFC 2 where the Court said that s 83-175(1) applies only to cases where dismissal from employment is because the employee's position is genuinely redundant.

In relation to these matters, the ATO said that while the Tribunal had not relied on TR 2009/2 in making its decision, the Tribunal nevertheless said that TR 2009/2 applies to former s 27F, and not s 83-175(1). The ATO also noted that the operation of s 83-175(1) is different to former s 27F, highlighting the explicit reference to the employee's position being redundant in s 83-175(1) – and that this was in accordance with the decision in Weeks.

The AAT also noted the Tribunal did not rely on the *Dibbs* case as in that case the employer no longer wished to have his job performed by anybody. As such, the Tribunal considered the Full Court's reasoning in *Dibb* was not binding authority for any broader principle.

Finally and importantly, the ATO wondered whether the Tribunal was conflating the taxpayer's redundancy with the redundancy of his position.

Comment

Does this overturn or confirm the simple rule of thumb that it is a bona-fide redundancy if the position is made redundant as opposed to the person?

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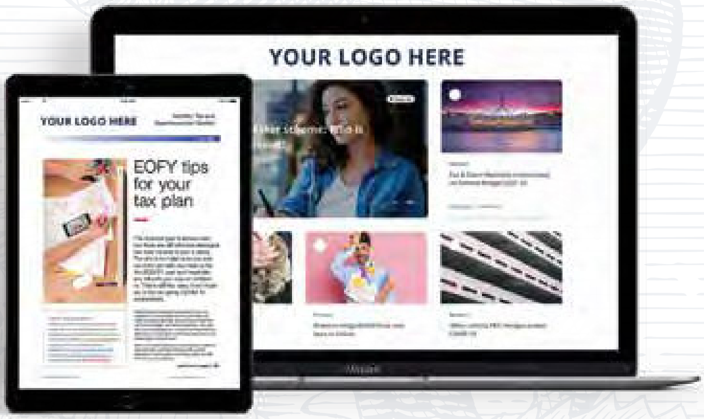

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Status of Tax Matters @ 20 August 2024

(This table is not intended to be comprehensive)

Status of Tax Matters @ 20 August 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.
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 9 September to 12 September 2024. The Senate sits alone from 16 September to 19 September 2024.	

Status of Tax Matters @ 20 August 2024	
Appeals	
Kilgour v FCT [2024] FCA 687	The taxpayer had appealed to the Full Federal Court against a decision that the CGT market valuation rules were not enlivened the parties involved in the sale of shares were dealing with each other on an arm's length basis.