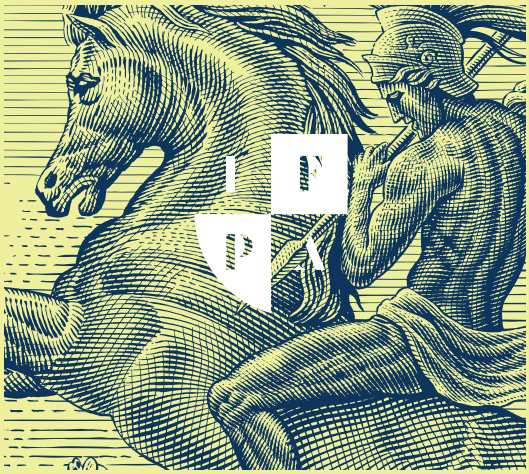
Monthly Tax Update

November 2024

INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA



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

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

Monthly Tax Update

November 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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Settlement payment to commute income protection benefits assessable as ordinary income

What you need to know

The assessability of any amount is always determined by the "character of the receipt in the hands of the recipient" as determined by reference to all the surrounding facts and circumstances.

Facts

The taxpayer entered into a Deed of Settlement to commute her entitlement to income protection benefits paid under an income protection insurance policy which, when originally taken out, was linked with a life insurance policy.

The terms of the Deed were that she would be paid $1m in respect of her claim under the income protection policy and that she agreed to release the insurer from any claims for income protection benefits.

In the course of the negotiations, the taxpayer had, among other things, agreed that the life insurance cover would be cancelled and that none of the settlement amount related to the termination of the life insurance.

The Commissioner included the amount in the taxpayer's assessable income and her objection was disallowed and she applied to the AAT.

Issue

- Whether the $1m lump sum settlement payment was assessable as ordinary income under s6-5 or as indemnity for loss of assessable income under s15-30 of ITAA 1997;
- Alternatively, whether the amount was a non-assessable, undissected capital amount per *McLaurIn v FCT* [1961] HCA 9 or, if not, whether it was a capital gain under s102-5.

AAT decision

In *Sladden v FCT* [2023] AATA 3815, the AAT ruled the lump sum settlement payment was a substitution for income amounts and therefore was assessable as ordinary income under s6-5. In doing so, it rejected the argument that the payment was an undissected lump sum on a capital account. It then found that the CGT issue was, in effect, not relevant in this light.

Taxpayer's argument on appeal

Among other things, the taxpayer argued that the AAT had erred by not confining itself to the deed of settlement and by also having regard to the parties' subjective state of mind ie it was not entitled to consider other surrounding matters

Decision

The Full Federal Court unanimously dismissed the taxpayer's appeal and confirmed the amount was assessable as ordinary income under s6-5.

In doing so, it rejected the taxpayer's claims that the AAT had erred by not confining itself to the deed of release and by having regard to the parties' subjective state of mind.

Moreover, the Court said that it was necessary to determine "the character of a receipt in the hands of the recipient" - and that this required considering the deed of release in light of all the facts and the surrounding circumstances:

> *However, whether a receipt is to be characterised as an undissected lump sum in the hands of the recipient is not determined exclusively by reference to the terms of settlement pursuant to which it has been received, but requires an examination of the entirety of the facts and circumstances surrounding the agreement (para 48)*

As a result, the Court found that "it was open to the Tribunal to find on the facts, and the terms of the deed of release, that the "Settlement Sum" of $1,000,000 was in respect of commutation of Dr Sladden's monthly benefits payable under the income protection cover and no part of the settlement sum was paid or payable in respect of the termination of the life cover plan" (para 72).

Accordingly, in the light of these matters, the Full Court confirmed that the amount was assessable as ordinary income.

Sladden v FCT [2024] FCAFC 122, 19 September 2024

No joy on work-related expenses for road traffic controller

What you need to know

The AAT has upheld the Commissioner's objection decision in relation to $9,800 worth of work-related expense claims made by a road traffic controller for the 2019-20 financial year, including car expenses (using the cents per kilometre method), other work related travel, clothing, self-education and various other odds and sods.

Facts

The main problem facing the self-represented Applicant in this case was that he was unable to produce receipts, bank statements or other evidence proving that any of the expenditure claimed was incurred. Beyond that challenge, the evidence cast doubt on whether some of the disputed expenditure, if it was indeed incurred, had the necessary nexus to gaining or producing the Applicant's assessable income or whether some of it was of a private nature.

According to the Applicant, his tax records were kept in a box in his brother's garage and were all destroyed in a flood. That doesn't seem so far-fetched these days, and the Applicant even tendered a Centrelink statement confirming he had received a government payment as a flood victim.

It did mean, however, that in giving evidence the Applicant had to rely mainly on his memory, which turned out to be somewhat unreliable. He claimed he had tried to obtain copies of the relevant invoices, but the passage of time, plus the fact that he had probably mostly paid in cash, meant that was unsuccessful.

Applicant's argument

To a certain extent, the Applicant was throwing himself on the Tribunal's mercy, arguing he was a flood victim, he had been highly stressed over the tax dispute and the nature and extent of his claims were not unreasonable or excessive.

Commissioner

The Commissioner argued the objection decision should be upheld as the Applicant had failed to establish:

- that the relevant expenses had actually been incurred; or
- that the deductions claimed were incurred in gaining or producing his assessable income; or
- that the expenditure was not of a capital, private or domestic nature.

Tribunal decision

As to the lack of written evidence, the Tribunal was not satisfied the Applicant had discharged the onus of proving he was entitled to relief of the substantiation provisions in Subdivision 900-H. He had not taken steps to keep his tax records safe (perhaps he should have stashed them in the roof space instead of in his brother's garage). Nor had he made enough of an effort to obtain replacement documents.

The claim for car expenses made up $3,400 out of the total $9,800 claim, but was unfortunately shot down by his employer's unrefuted statement that a company vehicle was always provided to enable the Applicant to travel between the depot and various work locations. He was never required to use his own vehicle for traveling for his work. In evidence, the Applicant also admitted he was never required to transport bulky items to and from work in his own car.

In relation to his claim for a computer and an iPad, the Applicant said he needed to compile and print out work sheets for his employer. However, the Tribunal was not satisfied there was not some significant use of those items by his children for school assignments and there was no evidence to support making any apportionment.

As for the balance of the Applicant's claim, the Tribunal accepted that he would most likely have incurred some allowable deductions in respect of work-related clothing and self-education expenses, but he unfortunately fell short of satisfying the substantiation requirements in the law.

Comment

Larger WRE claims are always susceptible to ATO compliance activity, whether self-prepared or lodged through a tax agent. While the Applicant in this case claimed he had everything he needed to substantiate his claim until the flood event at his brother's house, neither the Commissioner nor the Tribunal cut him much slack over the loss of his tax records.

He probably didn't help himself with his questionable claim for car expenses when he in fact had the use of a company car, but he may still feel aggrieved about missing out on some legitimate deductions for want of written evidence.

Karamanli and Commissioner of Taxation [2024] AATA 3398 (25 September 2024), Senior Member D Benk

Commissioner (mostly) successful in complex s177EA case

What you need to know

In a complex case involving a number of significant matters, the Tribunal had to decide whether it had jurisdiction to review several contested issues that sprang from events that followed the settlement of a prior year tax dispute that was covered by a formal Deed of Settlement (DS) between the Commissioner and the Applicant, BSKF (an individual).

Facts

The earlier dispute, which was not before the AAT, involved the payment of substantial sums by a third party to SOPL, a company controlled by the Applicant. Under the terms of the DS, which was executed on 21 April 2009, SOPL was to pay the Commissioner $3,900,000 in full settlement of the earlier years' tax liability for the whole corporate group controlled by the Applicant, as well as the Applicant himself. An amount of $550,000 was paid up front, while the balance of $3,350,000 (plus GIC) was paid on 28 June 2010.

Combined with a number of other crucial steps the Applicant caused to be taken, the June 2010 tax payment enabled SOPL to pay a franked dividend in the 2010 income year. As well as transferring the two issued shares in SOPL to himself on 19 June 2009, certain intra group subvention payments were made, boosting SOPL's retained earnings so that it was able to pay a franked dividend. The Applicant also entered into a Deed of Assumption on 20 June 2009, under which he assumed liability for certain principal and interest payable to another group entity, HGYT, and which he claimed entitled him to a significant deduction in the 2009 income year. This created a net loss in the 2009 income year which was carried forward into the 2010 income year.

On 30 June 2010 SOPL paid a franked dividend of $6,985,092 to the Applicant, who benefited from the $2,993,610 imputation credits attached to the dividend. As a result of the assumption obligations claimed in the 2009 year and carried forward to the 2010 year, the Applicant became entitled to a refundable tax offset for the same amount, which was credited to the Applicant's account in August 2011.

The Commissioner strikes back

Not surprisingly, the Commissioner was not best pleased to find that a big part of the $3,900,000 he was able to extract from SOPL under the DS had found its way back to the Applicant by way of the refundable tax offset, although it took him a while to respond. After a delay of eight years, the Commissioner sought to retrieve his position by cancelling the imputation credit attached to the SOPL dividend paid to the Applicant by making a determination under s 177EA ITAA 1936 – the anti-avoidance provision that cancels the unintended benefit of a franking credit.

As well as making a formal s177EA determination, the Commissioner issued notices under s8AAZN TAA 1953 to recover the tax offset as an administrative overpayment.

Applicant's arguments and Tribunal response

The Applicant's first line of defence was that the payment of the dividend was contemplated under the DS and that the franking credits were protected under the terms of the DS. The threshold question for the Tribunal was whether its role was to police the Commissioner's adherence (or otherwise) with the terms of the DS, or whether it was bound to review the objection decision under the tax laws. Relying on the *Macquarie Bank* decision (FCFCA 2013), the Tribunal held that it was bound to decide the s177EA matter in accordance with the law.

As an aside, given the complex preparatory steps that were taken in order to get the refundable tax offset to the Applicant, it is far from obvious that the payment of a dividend to the applicant was contemplated under the DS. If it was felt the Commissioner has not adhered to the terms of the DS, there were other legal remedies available by way of the Federal Court.

The second argument is that, like the GAAR provision in s177F, the s177EA determination should not have been made without also issuing an accompanying assessment. The Tribunal gave that argument short shrift:

> *"That submission faces, in my view, an insurmountable hurdle in s 177EA(11), which provides:*
>
> > *'If the Commissioner makes a determination under paragraph (5)(b), the determination has effect according to its terms.'" at [117]*

The effect of a s177EA determination is simply that the imputation credit is denied to the recipient of the dividend. Nothing else is required. Under s177F, the Commissioner is empowered to take whatever action is considered necessary to give effect to his determination, which generally includes making an assessment.

Section 177EA decision

The bar for the application of s177EA is not very high – subsection (3)(e) only requires a non-dominant purpose that is not an incidental purpose of enabling a taxpayer to obtain an imputation benefit.

True, subsection (4) provides that the mere transfer of shares is not enough to trigger off ss177EA(3)(e), and the Applicant argued that the transfer of SOPL shares was not enough in itself for s177EA to apply.

In the Tribunal's view, however, the purpose of the scheme is to be determined having regard to all the relevant circumstances.

> *"In my view, because of the contrived circumstances relating to the dividend, this is a case where the relevant circumstances listed in s 17EA(17) being not exhaustive assumes some importance. Many of the listed circumstances do not apply in this case. However, the combination of the various agreements and transactions carried out or caused to be carried out as discussed above, in my view point firmly to the conclusion that the scheme, considered in the context of these agreements and transactions, and the absence of a rational alternative commercial explanation, was entered into for at least a not-incidental purpose of BSKF obtaining the imputation benefit and the refundable tax offset." at [291]*

That disposes of the s177EA issue, but there are a number of other disputed issues that needed to be resolved by the Tribunal.

GIC issue

There was also a dispute around GIC.

The Applicant had assessments raised in relation to the earlier matter. Those assessments remained unpaid and had accrued $13.7 million in GIC through to the 2009 income year. The Applicant claimed the full amount as an allowable deduction in the 2009 income year.

When the earlier matter was settled by way of the DS and SOPL paid $3.9 million in full settlement of all the matters involved in the earlier dispute, the Commissioner reversed the earlier assessments raised against the Applicant and also credited the $13.7 million in GIC to the Applicant's account in 2011.

The Commissioner argued that since the GIC had been allowed as a deduction in the 2009 income year, crediting the amount to the Applicant's account constituted an assessable recoupment under s20-20(3) ITAA 1997 in the 2011 income year.

Sections 20-20(3), 20-25(1) and (2A), and 25-5(1) combine to provide that the $13.7 million GIC credited in the 2011 income year will be an assessable recoupment if the Applicant has deducted or can deduct the GIC amount in the 2009 income year.

The Applicant's counterargument rests on the premise that the effect of s172(1) ITAA 1936 is that both the primary tax and the GIC attributable to the earlier assessments are taken never to have been payable:

> *"On the footing that the amended primary tax assessment issued to give effect to the settlement removed the relevant tax liability and therefore any shortfall on which GIC could be payable, BSKF argues the effect of s 172(1)(a) was to retrospectively extinguish his liability to GIC such that it was neither deductible in 2009 (or earlier years) nor assessable in 2011." at [29]*

Ergo, the counterargument goes, as the GIC was retrospectively never legally deductible in the 2009 income year, the recouped amount cannot be an assessable recoupment in the 2011 year.

The $13.7 million question that is not answered in the 353 paragraphs of the decision is what the Applicant was proposing would happen to the deduction he has already been allowed in the 2009 income year if, as he alleges, s172 deems the amount not to ever have been deductible. Perhaps the year of the deduction was out of time. Otherwise it is difficult to understand the basis for the dispute.

But no matter. The Tribunal favoured the Commissioner's view of the law, which is that there is nothing in the legislative scheme that:

> *"expressly and retrospectively renders not deductible an amount of GIC that had accrued and was properly allowable at the time the deduction was claimed."*

The recouped GIC was therefore held to be an assessable recoupment in the 2011 income year.

Does the AAT have the jurisdiction to review the s8AAZN notices?

Contrary to the Applicant's submissions, the Tribunal ruled that it lacked the necessary jurisdiction to review the Commissioner's decision to issue the s8AAZN notices.

Although s43(1) *AAT Act 1975* permits the Tribunal to exercise all the powers and discretions of the original decision maker, those powers exist only for the purpose of reviewing a decision. The only

decision that is germane to the s8AAZN notices is whether the s177EA determination should not have been made or made differently. However, the decision whether or not to issue the notices was held not to be relevant to the review of the s177EA determination.

Can administrative penalties be increased at the objection stage?

Perhaps surprisingly, they can.

In raising the original assessments the Commissioner applied an administrative penalty for recklessness, but on objection (and perhaps reflecting his displeasure about the refundable tax offset being credited to the Applicant) he increased the penalty rate to 75 per cent, reflecting the intentional disregard of the taxation laws. Always avoid poking the bear.

The Applicant's argument was summarised by the Tribunal as follows:

> *"Thus, so the argument goes, the Commissioner may only allow the objection, wholly or in part, which would involve a reduction in the penalty, or disallow it, which would result in no change to the penalty. The Commissioner, it is submitted, may not increase the penalty from the amount of the assessment against which the objection was lodged, as that is not a decision contemplated by s 14ZY(1)." at [152]*

That seems like a robust enough argument, to which one could add the administrative unfairness of risking an increase in penalties merely by exercising one's right of objection against a primary tax assessment.

Relying on s33(3) of the *Acts Interpretation Act 1901* and a 2011 Federal Court decision in *Aurora Developments*, however, the Tribunal was persuaded that the Commissioner does have the power to increase administrative penalties at objection unless there is a contrary intention (which in the Tribunal's view, there was not).

This seems like a harsh outcome, which might have been a factor in the Tribunal reducing the penalties it held the Commissioner had the power to increase.

Administrative penalties reduced

Both the Applicant, BSKF, and a group company he controlled and whose case was heard together (HGYT), claimed significant deductions for taking on assumption obligations and incurring employee share scheme payments respectively. These were the claims the Commissioner had penalised at a base rate of 75% and which both taxpayers had abandoned before the Tribunal.

The Tribunal regarded these claims as having only a tenuous basis in law, involving as they did circular payments and transactions effected among family controlled entities.

After carefully considering all the evidence, the Tribunal satisfied itself that BSKF and his accountant had certainly been reckless in claiming the relevant deductions, but that men of their experience would not have deliberately disregarded any tax laws. The base rate was therefore reduced from 75% back down to 50%.

The 20% repeat offender uplift

The 20% uplift above the base rate was applied by the Commissioner in income years after the first year of the shortfall. The Tribunal did not decide the uplift should not have been imposed (which is something that happens automatically where there are multiple years involved), but it remitted the full 20% in each case because the shortfalls for each taxpayer stemmed from a single cause:

> *"This is not a case where a taxpayer has embarked upon the same or similar behaviour again after being penalised on an earlier occasion for similar conduct. The shortfall arises out of a single source" at [245]*

Apart from the penalty remission, the Commissioner will be well satisfied with the outcome of this hearing.

BSKF v C of T [2024] AAT 3377 (20 September 2024) Senior Member R Olding

Company not entitled to producer offset: it did not carry out the "making of the film"

What you need to know

It is always important to identify the relevant taxpayer who is liable for taxation or, moreover, is entitled to any tax concession – be it accelerated depreciation, the CGT small business concessions or the producer offset as in this case.

Facts

The applicant was a registered company that was incorporated in May 2019 and whose sole shareholder and director was JP. A few weeks after incorporation, the company applied to Screen Australia for a certificate to obtain a producer offset for a film.

However, most of the existing work for the making of the film had been carried out by JP in his own right and in his own name, prior to the company's registration (eg, writing the script, filming, crowdfunding for finance, the release of the official trailer on Youtube etc).

Note: To obtain a producer offset, an applicant is required to carry out, or make arrangements for carrying out, the activities necessary for the "making of the film" (s 376-65 ITAA 1997). The "making of a film" means "the doing of the things necessary for the production of the first copy of the film" and:

> *"includes:*
>
> *(a) pre-production activities in relation to the film;*
>
> *(b) post-production activities in relation to the film; and*
>
> *(c) any other activities undertaken to bring the film up to the state where it could reasonably be regarded as ready to be distributed, broadcast or exhibited to the general public".* (s 376-125).

After originally issuing a provisional certificate, Screen Australia refused to issue a final one.

The taxpayer applied to the AAT for review of the decision.

Issue and argument

Whether the taxpayer (ie, the company) had carried out, or had made the arrangements for the carrying out of, all activities necessary for the making of the film for the purposes of s 376-65(1).

Decision

The AAT affirmed that the taxpayer was not entitled to a final certificate under s 376-65(1). This was because it (the company) had not as a question of fact carried out, or made the arrangements for the

carrying out of, all activities necessary for the "making of the film" (as defined in s 376-1).

Instead, the AAT found that most of these activities were carried out by JP in his own right before the taxpayer was incorporated. In fact, it found it was 85% complete and that it was in a position to be screened at that time (albeit, not yet "commercially").

> *"The work undertaken by JP prior to the applicant's incorporation was more than a mere frolic or running around with a camera. He undertook a significant endeavour to make a film in 2017 and 2018....Although the film was 'raw' by industry standards and needed further significant production and post-production work before it could be screened commercially, it cannot be said that the work completed by JP was anything other than the development, pre-production and production of 'making the Film'." (para 58)*

Accordingly, the AAT found that the taxpayer could not satisfy the condition in s 376-65(1) because it did not carry out, or make the arrangements for the carrying out of, all activities necessary for the making of the Film. And that was "fatal to its application".

Fragmentary Pty Ltd and Screen Australia [2024] AATA 3316, 18 September 2024

Plumber held to be an independent contractor for SG purposes

What you need to know

The AAT has held that a plumbing business which engaged a qualified plumber in an ad hoc way to undertake maintenance and repair jobs on an unsupervised basis was not in an employer/employee relationship and was therefore not obliged to make superannuation contributions.

Facts

The plumber, H, complained to the ATO that he had been wrongly treated as an independent contractor from 2010 to 2020 and should have had compulsory employer superannuation contributions made along the way. After making enquiries the ATO agreed with H and raised an SGC assessment against the plumbing firm on the basis that H was an employee.

The Appellant plumbing firm objected and referred the Commissioner's objection decision to the AAT for review.

The business arrangement was a long standing one, and was based on a verbal agreement reached between the parties some 14 years ago. Following the High Court's decisions in *Personnel Contracting* and *Jamsec* in 2022, the absence of a written agreement meant the Tribunal had to apply the multifactorial approach in deciding on the true nature of the relationship in terms of s12(3) SGAA.

The Tribunal found that different factors pointed in different directions.

Employee relationship

- H was engaged at an hourly rate and submitted time sheets and invoices on a weekly basis;
- the Applicant would pay H's invoice within seven days;
- when attending a job, H would introduce himself as being from the Applicant's plumbing firm;
- the maintenance and repair jobs H took on had mainly a labour component and the cost of materials was not usually significant;
- any materials used by H were generally purchased on the Applicant's account; and
- there were never any discussions about H delegating any of the work, and H never did so in the ten year period under review.

Contractor relationship

- H advertised his services outside his relationship with the plumbing firm and performed jobs for other clients away from the plumbing firm;
- H was not paid sick leave or annual leave;
- H was expected to perform tasks at his own discretion and without supervision;
- there were periods when H was not available when he did not perform any work for the Applicant;
- H used his own tools to carry out the work;
- H advertised his own business on the side of his van that he used to attend jobs arranged by the Applicant – he also had business cards advertising his services;
- H has been trading as a sole trader since 2010 using an ABN and has been registered for GST since 1 July 2000.

Tribunal decision

In spite of H being paid at an hourly rate, the Tribunal did not consider the relationship fell on the employer/employee side of the dividing line. Importantly:

> *"It was understood Mr Hargreaves had to complete each job he was engaged to perform. That is, Mr Hargreaves was engaged to obtain a result." at [146]*

The Tribunal concluded that H was an independent contractor because:

- H was able to refuse any job due to other commitments;
- H was free to choose how to perform the work, what materials or equipment to use, and the hours it took to complete a job;
- H did not have to devote his entire time to the Applicant's business;
- H provided his own vehicle, telephone and essential tools, and took out his own business insurance; and
- there were no contractual provisions concerning leave, termination or prohibiting delegation.

The objection decision was therefore set aside, and the Appellant is not liable for 10 years of SG contributions.

Appeal

The Commissioner has appealed to the Federal Court against the Tribunal's initial decision.

Comment

It goes without saying that engaging someone as an independent contractor without having a written agreement in place is highly risky. A properly constructed written agreement will put a business in a much stronger decision and creates greater certainty.

And there are Fair Work Act issues that come into play as well – it is a lot simpler (and cheaper) for a business to exit someone who is clearly an independent contractor than it is to see off an employee.

The Applicant in this case had been operating in good faith for ten years on the basis that H was an independent contractor who was running his own business and there were no SG obligations. Had the decision gone the other way that could have proved to be a very costly mistake.

The Trustee for the Peter Hatfield Trust v C of T [2024] AATA 3428 (26 September 2024), Senior Member DK Grigg

No error by AAT: Taxpayers fail to prove assessments excessive

What you need to know

It seems that you will need to have good records if you are going to argue that unexplained deposits in your bank account are due to your successful gambling activities – even though there is no requirement to keep gambling records under the tax law.

Facts

The taxpayers were two brothers, whose circumstances did not differ in any material way. [As a result, the AAT only focused one brother's circumstances for the purpose of the proceedings.]

For the years ending 30 June 2011 to 30 June 2016, the brother generally returned income from the concrete pumping business together with some amounts for interest and rent. His returned taxable income across these years ranged from a minimum of $352 to a maximum of $177,955.

Following an audit, the Commissioner identified substantial deposits into his accounts and issued amended assessment which increased his taxable income for each year by several million dollars – which resulted in a tax shortfall of some $7.5m and penalties of $7.5m.

At first instance, the AAT ruled that while the taxpayer had shown that the assessments were to some extent excessive, he did not establish what his assessable income was and left unexplained the many significant deposits made into his accounts. Therefore, his application was dismissed.

Taxpayer's arguments

On appeal to the Federal Court, the brother argued:

- He was a prolific gambler and that the various deposits into his accounts were either gambling winnings or the repayment of loans he had advanced to other gamblers.
- The maximum amount the concrete pumping business could possibly have made was, even with his rental and interest income, significantly lower than his assessed income.

Decision

The Federal Court dismissed both taxpayers' appeals on the basis that they had not shown that the AAT erred in reaching its decision. In doing so, it made the following observations:

Gambling

- The Court could not disturb the AAT's finding that the brother was not a reliable witness and that his evidence lacked credibility in relation to his gambling exploits.

- Even though the brother was not required to keep records of his gambling activities, his record keeping for his gambling profits was unsatisfactory in that it was incomplete and in places contradictory (eg he left his gambling losses out of the picture and, as a result, it was not possible to hazard a guess about what his actual gambling profits were).
- Contrary to the brother's claim, the Commissioner did not prevent him from making his case – as evidenced by the extent of his cross examination. In these circumstances, the AAT was not bound to accept his contrary evidence in his affidavit that he had no other sources of income apart from the concrete pumping business, interest and rent.

Loans

- While the AAT accepted at a level of generality that the brother did provide loans to fellow gamblers in a number of situations and that these were repaid (which the brother proved in relation to one $30,000 amount), it had good grounds to be dissatisfied with the level of detail in the brother's evidence about these transactions.
- The AAT could not accept the brother's argument that the repaid loans showed that his assessable income should be reduced by the repayments. This was because the brother failed to prove what his assessable income was.

Maximum Taxable Income

- The brother failed to demonstrate that the maximum amount of his assessable income was limited to the maximum amount the concrete pumping business earned etc.
- The brother submitted that the AAT failed to give any reasons at all for why it did not accept his case as to his maximum income. But there was no occasion for the AAT to do this in light of its conclusions about his gambling profits.

The Federal Court concluded that it could not detect any error in the AAT's decision and therefore dismissed the appeals of both brothers.

Youssef v FCT [2024] FCA 1154, 4 October 2024

Tax determination TD 2024/7: Deductions for financial advice fees paid by individuals who are not carrying on an investment business

What you need to know

Suffice to say, the deductibility of fees paid for financial advice squarely follows all the established principles for the deductibility of any expense under s 8-1 of the ITAA 1997.

General

- The Determination sets out when an individual may be entitled to a deduction under ss 8-1 or 25-5 of the ITAA 1997 for fees paid for financial advice.
- It does not apply to individuals carrying on an investment business - nor where fees for financial advice are paid from a superannuation fund.
- From 1 January 2022, entities that provide tax (financial) advice services for a fee or must either be a 'qualified tax relevant provider' registered with ASIC or be a tax agent registered with the TPB and meet the relevant eligibility requirements.
- Date of effect: the Determination applies both before and after its date of issue – and replaces TD 95/60 as a result of regulatory reforms to the financial services industry (but does not represent a change in ATO's view on the deductibility of financial advice fees).

When deduction for fees for financial advice is allowed under s 8-1

- Where the fees are incurred on a regular or recurrent basis for an existing or ongoing income-producing investment (including fees for advice from an existing adviser on whether the mix of assets held is still appropriate).
- Where the fees are for advice in relation to insurance products which would provide assessable amounts (eg income replacement insurance), but not for other types of insurance products (eg life, total and permanent disability or trauma insurance).

When a deduction for fees for financial advice is NOT allowed under s 8-1

- Where the fees are for advice on a proposed or new investment - because they are an expense associated with putting the income-earning investment in place (but the expenditure may be an incidental cost of acquisition of an asset for CGT purposes);

- Where an individual's existing adviser provides advice on how they can invest additional funds to grow their investment portfolio;
- Where initial advice is provided on pre-existing investments at commencement of an advisory engagement where: an individual seeks advice from a new financial adviser at the commencement of an advisory engagement; and, that advice involves consideration of the individual's circumstances by that financial adviser for the first time;
- Where an individual's existing adviser provides advice on how they can invest additional funds to grow their investment portfolio (as they are of a capital nature); and
- Where the advice incurred about an individual's household budgeting are private or domestic expenditure and will not be deductible under s 8-1.

Deduction for s25-5 tax-related expenses

- Fees for financial advice incurred may be deductible under s 25-5 to the extent that the advice relates to managing their 'tax affairs' – but must you be able to identify that that was what the payment was for (eg, advice in relation to salary sacrifice arrangements);
- There is no deduction for capital expenditure under s 25-5(1) - but expenditure incurred in managing tax affairs is not considered to be capital expenditure merely because the advice relates to matters of a capital nature.
- If financial advice fees are deductible under both ss 8-1 and 25-5, the fees can only be deducted once under the most appropriate provision.
- If the financial advice received relates to managing tax affairs and to other matters, then the fees will need to be apportioned on a fair and reasonable basis.

Evidentiary requirements

- If the expenses incurred for financial advice are deductible, the individual must have sufficient evidence of that expenditure in order to claim the expense as a deduction.
- An itemised invoice (including a fee disclosure statement or an advice fee consent form) from a financial adviser which details the following will be sufficient: the name of the financial adviser; the amount of the expense; an explanation of the advice provided; the date that the expense was incurred; and the date that the invoice was produced.

TASA Code of Professional Conduct developments

Following the signing off by the Assistant Treasurer of the amended determination on 8 October 2024, the TASA Code of Professional Conduct juggernaut rolls on.

The TPB has now released a number of draft information sheets for further public consultation.

These documents are intended to assist tax practitioners to understand their new (or not so new) obligations under the expanded Code:

- upholding and promoting the ethical standards of the tax profession (TPB(I) D56/2024)
- false or misleading statements (TPB(I) D57/2024)
- managing conflicts of interest when undertaking activities for government and maintaining confidentiality in dealings with government (TPB(I) D58/2024)
- the obligation to keep proper client records of tax agent services provided (TPB(I) D59/2024)
- supervision, competency and quality management under the *Tax Agent Services Act 2009* (TPB(I) D60/2024)
- keeping your clients informed (TPB(I) D61/2024)

The Board's aim is to finalise this guidance material by December 2024, in time for the 1 January 2025 commencement date for practices with 100 or more employees.

A certain amount of TPB guidance may well be welcomed as the amended determination and the accompanying explanatory statement are quite complex and now include a lot of "reasonable to believe" references, as well as the concept of "substantial harm". While these concepts also feature in some other codes of conduct, some clarification in a tax context may be useful.

Whether practitioners will welcome the need to get their heads around 160 pages of new material just to understand what additional red tape they need to negotiate in order to be code compliant is another matter.

We would question the need to have reams of pages explaining how to avoid making a false or misleading statement and the consequences of practitioner or a client making such a statement. Or on the need to maintain confidentiality after signing a non-disclosure deed.

What took place in relation to the alleged PwC leaks would have happened no matter how detailed the law or the guidance material was at the time, and it is naïve to think otherwise. The existing Code already covers the requirement to act with honesty and integrity and it does not need a lot of elaboration.

The elephant remaining in the room is the "dob in" requirement that can be triggered where a client refuses to correct a materially false or misleading statement that is likely to cause substantial harm if it is not corrected.

It was clear from a meeting with the Assistant Treasurer a few months ago that some form of such a requirement was non-negotiable, but that the government was very keen to engage constructively about whatever concerns we had with the determination. The professional associations could have broken off the consultation process at this point, but that would have undoubtedly left us with a much harsher "dob in" measure than the one we now have.

The joint bodies instead decided to engage with the government, noting our objection in principle to having any "dob in" rule at all. It undermines the relationship of trust that needs to exist between tax practitioners and their clients. Nevertheless, the decision to engage has led to some very positive outcomes in a number of areas, including disclosures to clients and the "dob in" rule itself, which now has a much higher bar than was the case initially.

And do practitioners really want to continue to maintain a relationship with a client who refuses to correct a statement that is false or misleading in a material way and which causes substantial harm to others if it remains uncorrected?

Would that pass the pub test?

INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA WEBINARS

The End of the Contractor / Employee Question

In a recent Decision Impact Statement on the JMC case, the Commissioner has provided clarity on how to address contractor versus employee questions. Join us to explore how these rulings can help end the long-standing debate.

This webinar is crucial for professionals seeking to navigate the complexities of contractor versus employee classifications and ensure compliance with the latest ATO guidelines.

About this session

- Decision Impact Statement – *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76: Understanding the key takeaways and implications of this ruling.
- Decision Impact Statement – *Jamsek v ZG Operations Australia Pty Ltd (No 3)* [2023] FCAFC 48: Insights into how this decision influences contractor and employee classifications.
- *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.

Presented by
Ken Mansell

November 29
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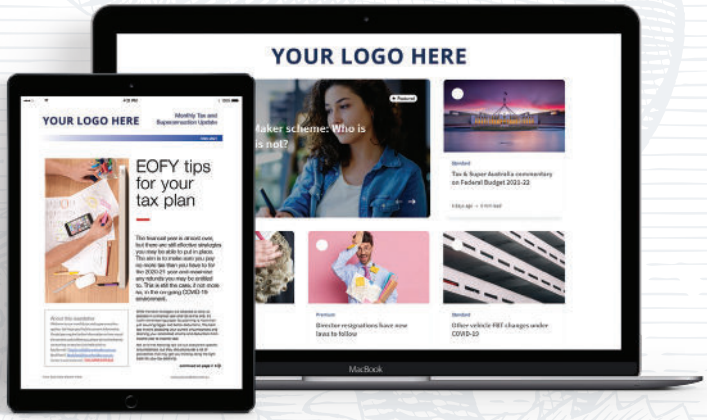

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Status of Tax Matters @ 6 November 2024

(This table is not intended to be comprehensive)

Status of Tax Matters @ 26 October 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. Committee report tabled on 31 October 2024.

Status of Tax Matters @ 26 October 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
Treasury Laws Amendment (2024 Tax and Other Measures No 1) Bill 2024 • Increases foreign residents CGT withholding rate from 12.5% to 15% and removes $750,000 threshold before withholding applies to transactions involving Australian real property interests. • Allows small to medium businesses (annual turnover below $50 million) to apply for an amendment up to four years from the Notice of Assessment (instead of the usual two-year limit). • Allows for standing declarations to enable tax agents to make multiple STO lodgments. • Allows Commissioner to withhold tax refunds for up to 90 days where the taxpayer has not provided their financial institution account details (to avoid the use of cheques).	Passed by the House of Representatives on 12 September 2024. Senate Economics Committee report tabled on 24 October 2024.
Scheduled Parliamentary sitting days	
Both Houses pack up for the summer following the 28 November final sitting day. Parliament is scheduled to resume next February, unless the PM opts for an early poll.	
Appeals	
SingTel	The High Court has refused to grant SingTel special leave to appeal against the Full Federal Court decision that upheld a large transfer pricing adjustment involving $894 million in related party interest payments.
Peter Hatfield Trust	The Commissioner has appealed to the Federal Court against an AAT decision that a plumber engaged by the business was not an employee for SG purposes.
Youssef	In probably the last roll of the dice, the taxpayers have appealed to the Full Federal Court against the decision of a single Federal Court justice to uphold an AAT decision that they had not discharged the onus of proving significant bank deposits represented gambling winnings.