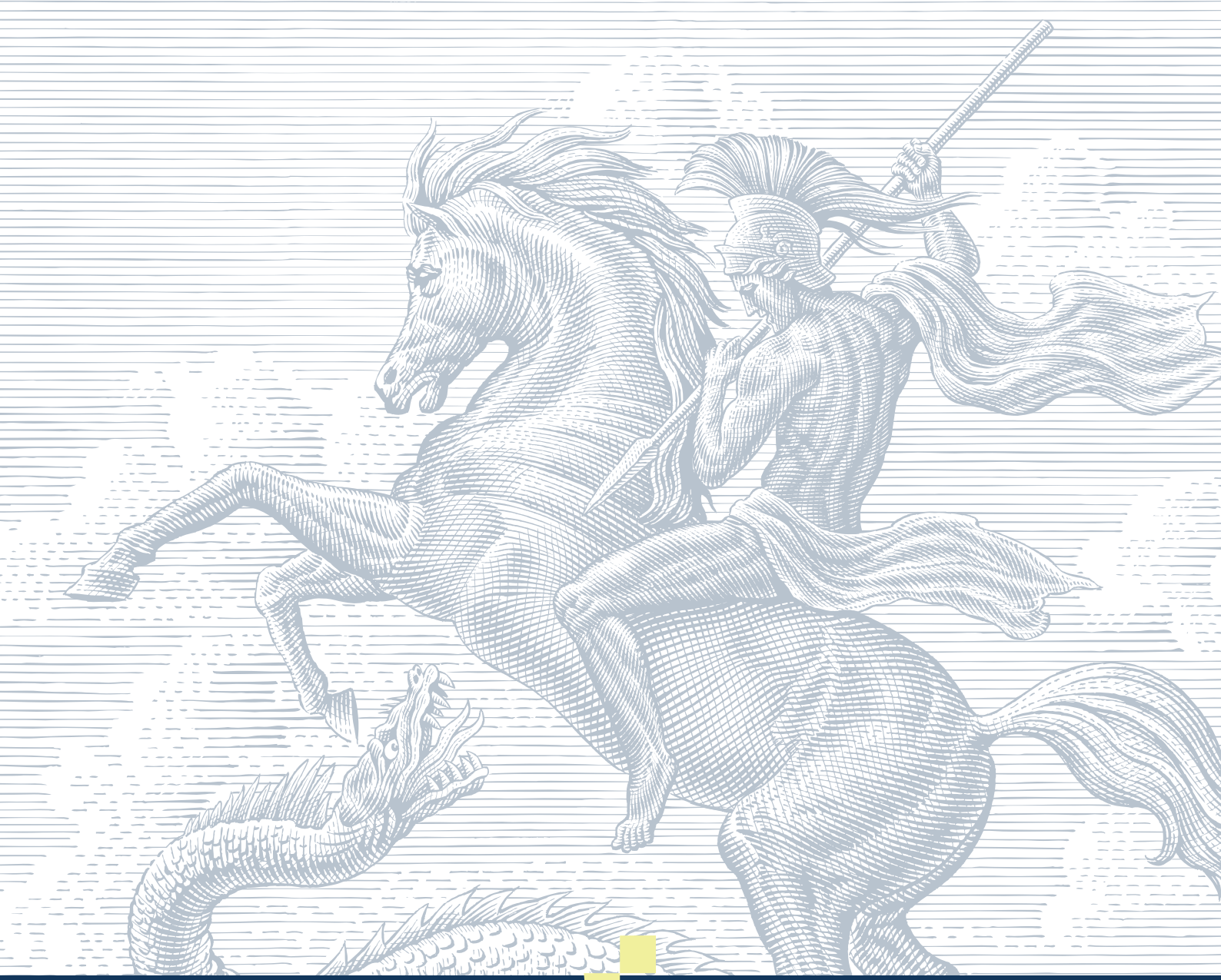
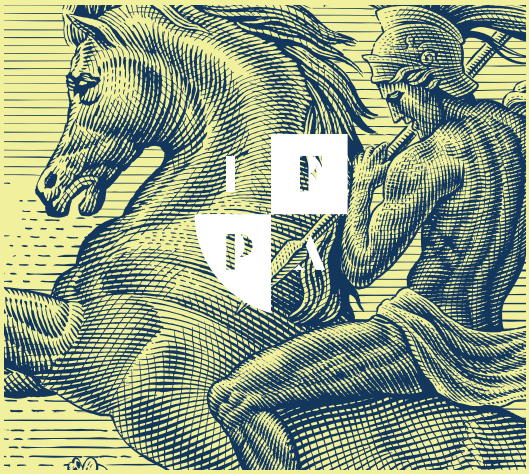


# Monthly Tax Update

## February 2025

INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA



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# Monthly Tax Update

## February 2025

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

# Pt IVA matter: AAT errs in its duty to have regard to material evidence etc

**If an Administrative Tribunal fails to have regard to material evidence and/or fails to weigh the balance of competing submissions and/or to provide adequate reasons for any of its conclusions, then it will fail in its administrative duty – and it will be found to have erred in its decision.**

## Facts

Grant and Collie were associates of the taxpayer in *Hart v FC T* [2018] FCAFC 61 (the *Hart* case), where the Full Federal Court upheld Pt IVA assessments in relation to a very similar set of circumstances. A Special Leave application by Hart to the High Court was denied.

While the AAT handed down separate decisions for each of *Grant* and *Collie*, their respective circumstances and the Tribunal's decisions are very similar.

They are both lawyers who were at one time connected to a Brisbane law firm that was under something of a cloud, having lost a number of significant clients and many partners resigning to move elsewhere. The firm and the applicants were engaged in marketing and implementing a number of tax-based schemes, including schemes involving company losses (this all happened well before the promoter penalty rules came into effect in April 2006).

They both also faced personal financial risks by reason of various legal and regulatory proceedings they were involved in and both applicants felt compelled to take steps to avoid deriving income or accumulating assets in their own names.

The Tribunal accepted their perceived need for asset protection as being a genuine factor in both cases, although as things turned out, that was not enough to overcome the Commissioner's Pt IVA determinations.

The way the tax outcomes were achieved was through the use of a daisy chain of newly established trusts, the making of gifts of capital by way of promissory notes and running part of the profits of the legal practice through loss companies and tax-exempt entities for a small fee.

The applicants' share of the untaxed profits of the legal practice ended up in entities controlled by them, from which funds were applied for their personal use by way of informal loans.

The gist of what occurred is captured by the Tribunal with the following observation:

> *"For present circumstances a blatant artificial and contrived means was designed and executed to ensure that amounts having their origins in the legal practice and consulting services businesses were not taxable in the hands of anybody in the Years in which they otherwise would be. The contrivance and artificiality reach their zenith in paper distributions to tax exempt charitable entities or loss companies with the charity or loss company receiving and enjoying a very small proportion of the distribution purportedly made to it while providing shelter from Australian taxation in respect of the whole distribution. The contrivance associated with these steps in the scheme reveal a dominant purpose of tax avoidance or securing the tax benefit as opposed to asset protection. It is useful to see whether the contended for asset protection objectives (and therefore purposes) could be achieved by other means. Clearly, they could have*

*been achieved without the number of trusts and paper distributions involved in the scheme which produce the tax benefit." [Grant at 196]*

## Decision at first instance

At first instance in *Grant and FCT* [2024] AATA 427 and *Collie and FCT* [2024] AATA 440, the AAT dismissed the taxpayers' application and found that Pt IVA applied to the arrangement.

Broadly, it found that:

» there was a tax benefit to the taxpayers – and they had been unable to demonstrate that a different taxpayer would have been liable for tax on the relevant amounts; and

» the dominant purpose of the scheme was to not to secure asset protection, rather it was tax avoidance – even though there may have also been a commercial purpose.

Specifically, the AAT found the following:

### Tax benefit issue

Because the scheme designed by the applicants involved the use of clean skin trusts with no history of making distributions to anyone, the applicants believed (or hoped) that it would be beyond the Commissioner's power to conceive of a sufficiently reliable or reasonable counterfactual that would support a Part IVA determination.

Unfortunately for the applicants, the AAT found that it is not sufficient for the applicants to attack the Commissioner's counterfactual – they have to come up with their own:

*"In this case, the appellant has focused on trying to establish that the Commissioner's counterfactual was unreasonable, without himself sufficiently identifying and evidencing his own counterfactual. Showing that the Commissioner's counterfactual was unreasonable does not of itself operate as a discharge of the onus of proof imposed upon the taxpayer in relation to s 177C." [Grant, at 84]*

Standing in the shoes of the Commissioner, the Tribunal constructed its own counterfactual by holding that the cash the applicants helped themselves to by way of loans from entities they controlled represented their own assessable income:

*"it can be predicted with sufficient reliability so as to meet the reasonable expectation threshold that a principal in an organisation conducting a business would be the recipient of that taxable income apart from the scheme having been entered into or carried out." [Grant, at 88]*

### Dominant purpose issue

As a fall back, the applicants sought to argue that asset protection was their dominant purpose for entering into the schemes. The Tribunal observed that commercial pursuits and tax benefits are quite capable of coexistence.

However, when considering the eight factors set out in s177D ITAA 1936, the Tribunal had no difficulty in concluding that securing a tax benefit was the dominant purpose in each case and that the goal of asset protection could have been easily achieved without the number of trusts involved or the paper distributions made.

## Appeal

Both taxpayers appealed to the Full Federal Court against their respective decisions, arguing, among other things that:

» the structure of the trust arrangements meant there was no relevant tax benefit pursuant to s177C; and

» the arrangement was structured for asset protection reasons and to ensure they did not derive any taxable income of any of the trusts.

## Full court decision

The Full Court unanimously found that the AAT erred in its administrative function by failing to have regard to the material evidence, and the various and competing submissions (*"..not a word of any of the competing submissions or evidence – on matters self-evidently critical to the outcome – were dealt with by the Tribunal in its reasons."*) The Full Court also said that the AAT failed to provide adequate reasons for any of its conclusions (per s 43(2B) of the AAT Act 1975).

The Full Court also found it was also wrong for the AAT to consider itself bound by the decision in *Hart v FCT* [2018] FCAFC 61 (the *Hart* case) where the Full Court upheld Pt IVA assessments in relation to a very similar set of circumstances – but not entirely the same.

In particular, the Full Court found that the AAT did not properly deal with the tax benefit issue in s177C (*"...the Tribunal never posed, let alone answered, the question posited by s 177C of the ITAA 1936"*). That is, the AAT did not consider whether was there an amount not included in the assessable income of the taxpayer that would have been included, or might reasonably be expected to have been included, in the assessable income of the taxpayer if the scheme had not been entered into or carried out.

In relation to identifying the taxpayer who would have obtained the obtained the tax-benefit, the Full Court held that the AAT was wrong in saying that *"the Hart case decides that it is necessary for a taxpayer "definitively" to show that a different taxpayer would have included the relevant amounts in their assessable income. That is not what the case says and is not what s 177C(1)(a) contemplates"*.

In short, the Full Court found by saying that "there was a wholesale failure of the Tribunal to have regard to material evidence, to weigh in the balance competing submissions, and to provide adequate reasons for any of its conclusions".

The Full Court disposed of the matter by remitting the matter to the Administrative Review Tribunal (ART) for rehearing of whether the taxpayers had assessable amounts in respect of the trust structures in issue for the years in question. However, it emphasised that all other issues were beyond the scope of the remitter, and the findings made by the AAT in respect of such issues will not be re-opened – and that these issues included, but were not limited to, the issue of dominant purpose and the assessment of penalty applied to the corrected shortfalls.

***Grant v FCT (No 2) [2024] FCAFC 173; Collie v FCT (No 2) [2024] FCAFC 172, 19 December 2024***

# ACT property development GST assessments upheld

**An ACT property developer using the margin scheme has been unsuccessful in overturning a number of GST assessments, partly because the ART ruled it had failed to prove that excess GST had not been passed on to the purchasers of completed apartments. The Tribunal also held that refunding the excess GST to the property developer without compensating the buyers would result in it obtaining a windfall gain.**

## Facts

The taxpayer, SFQV, undertook a residential apartment development project in the ACT by acquiring land from the ACT Land Development Authority (LDA). By way of consideration for the transfer of the land, it paid LDA $5.4 million in cash. In addition, it provided non-monetary consideration in the form of development services which the parties agreed had a value of $103 million.

In spite of obtaining a binding ruling from the ATO to the effect that the supply of development services could be taken into account when applying the margin scheme to the supply of completed units to private purchasers, SFQV elected to adopt a conservative approach to applying the margin scheme without taking the $103 million in development costs into account, effectively overpaying GST.

The Commissioner claimed the GST in respect of the taxable supply of development services was attributable to the September 2015 BAS period, which is when the Crown Lease was transferred. The taxpayer argued it was the later registration of the unit plans in the September 2017 BAS period that moved the supply of the development services. The associated GST of $10.3 million was therefore attributable to the later BAS period.

There was also a dispute about whether there was excess GST in any BAS period, whether the overpaid GST had been passed on to apartment buyers and whether refunding the overpaid GST to SFQV would result in a windfall gain.

## Decision

### Attribution period

The Tribunal resolved the attribution question in the Commissioner's favour. The granting of the Crown Lease in July 2015 was of significant economic value and, having regard to the very broad definition of consideration in s9-15 *GST Act 1999*, it considered that the development services were part of the non-monetary consideration for the granting of Crown Leases, which occurred in the September 2015 BAS period.

### Excess GST

Although not strictly necessary to decide, the Tribunal held there was excess GST paid in the September 2017, December 2017 and March 2018 BAS periods, given that the margin scheme was applied on the sale of apartments to private buyers without taking the development costs into account.

This opens up the potential application of s142-10, which deems excess GST on a taxable supply to have always been payable where the amount has been passed on to the recipients but not refunded (unless the Commissioner decides to apply his discretion to refund the amount because doing would not result in a windfall gain to the supplier).

### GST and value of non-monetary consideration

As a side issue, the Tribunal also decided that the GST applicable to the development costs invoiced to SLA (LDA's successor agency) was not to be taken into account in applying the margin scheme to the sale of individual units.

### Passing on issue

On the passing on question, the evidence of SFQV's director was that it was essentially a price taker in relation to the marketing and sale of completed apartments. Competition from other developers meant that the company was limited to charging what the market would bear. Private purchasers of apartments would never countenance the inclusion of an explicit additional charge for GST.

The Tribunal took the view that as an experienced property developer, SFQV was operating profitably, even though it had overpaid GST by applying the margin scheme incorrectly in the later BAS periods. It was therefore implicitly recovering all of its costs from apartment purchasers, including any overpaid GST, thereby passing on the excess GST.

### Windfall gain

The Tribunal observed that generally, refunding excess GST to a taxpayer who has passed on the burden of the GST without reimbursing the recipients will receive a windfall gain. These was no basis for exercising the discretion in s142-15 to issue the refund sought by the taxpayer.

## Déjà vu

If you think you've seen this movie before, you may be right.

A very similar case involving another ACT property developer, reported as *WYPF v C of T* AATA 3050, was decided by the AAT in August 2021, and which we reported on in our Tax Discussion Group Notes in October of that year. Like the taxpayer in *SFQV, WYPF* also adopted a conservative approach in relation to the non-monetary cost of site preparatory works and did not factor those in when applying the margin scheme to the sale of individual apartments.

And like *SFQV*, evidence given by the director of *WYPF* was that it was a price taker who had to meet the market, having regard to how competitor developers were pricing their apartment stocks. Accordingly, they were unable to pass on the overpaid GST (or any other GST) to the buyers either explicitly or implicitly.

In sharp contrast to the *SFQV* decision, however, the Tribunal in *WYPF* accepted on the basis of this evidence that there had been no passing on. The Tribunal in *WYPF* also noted the perverse outcome that could result in a taxpayer who adopts a conservative position in relation to whether and to what extent a particular supply is taxable being penalised through the application of s142-10. This might encourage some taxpayers to adopt a more aggressive approach in accounting for their GST liabilities.

***SFQV and C of T [2024] ARTA 9 (20 December 2024), Deputy President G Lazanas***

# No extension of time to seek review of objection decision

**In an application for an extension of time to challenge an ATO decision, there are various factors to be considered – including procedural fairness, prospect of success and the public interest etc. But the key one seems to be "the explanation for the delay" in seeking the extension of time.**

## Facts

In 2020, the taxpayer (a private company that caried on a physiotherapy business) claimed an entitlement to a Cash Flow Boost payment ('CFB Payment') under the *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020*. The ATO determined that it was not entitled to the CFB Payment. In April 2021 the taxpayer lodged an objection against the ATO's decision, which was subsequently disallowed in July 2021. At that time the taxpayer did not pursue any further review or appeal rights.

However, in late 2023 the Tax Practitioners Board ('TPB') terminated the tax registration of a tax agent (Mr S), who was also a former director of the taxpayer, in view of its finding that, among other things, he had caused the taxpayer to enter into a scheme to obtain the CFB Payment in contravention of certain integrity provisions within the CFB Act.

In 2024, Mr S commenced separate proceedings seeking review of the deregistration decision as he believed that in order for him to fully argue his case in the TPB proceedings, the disallowed objection decision of the ATO had to be challenged.

Accordingly, Mr S persuaded the taxpayer to seek an extension of time for review of the disallowed objection decision – as a favourable outcome in any challenge to the objection decision would assist Mr S in his challenge in the TPB proceedings.

## Issue

Is the granting of an extension of time to seek review of the disallowed objection pursuant to s19 of the *Administrative Review Tribunal Act 2024* appropriate in the circumstances – having regard to the relevant common law criteria for granting an extension of time?

## Decision

The ART took into account the following factors and found that it was not appropriate to grant an extension of time:

» **Length of and explanation for the delay** – There was no reasonable explanation for the delay as, among other things, the circumstances of the taxpayer, which were known at the time that the statutory review rights existed in relation to the objection decision, had not changed. In addition, the taxpayer was not misled by the ATO about the existence of a CPB scheme being a basis for its original objection decision. Furthermore, that Tribunal noted that the implications for the taxpayer were subsidiary to the interest of Mr S.

» **Prejudice to ATO** – This of itself was not sufficient to refuse the extension of time application – notwithstanding that it may cause unnecessary legal expenditure for an ulterior purpose, being the issues relating to the registration of Mr S. Furthermore, the Tribunal said that the ATO was likely to have retained the relevant records and information to deal with any review of the objection decision.

» **Public interest considerations and fairness** – The Tribunal said that while Mr S may face difficulties in challenging aspects of the TPB's decision to deregister him without being able to challenge the CPB scheme finding against the taxpayer, the CPB scheme finding was described as only *"one of the matters the Board alleged against Mr S"* which gave rise to the TPB's decision. In this regard, it said that there may be alternative options for Mr S in the TPB proceeding to obtain further information to support his case.

» **Strength of taxpayer's case** – On balance, and possibly because of an apparent lack of detailed information and analysis on the part of both the taxpayer and the ATO, the Tribunal concluded that the taxpayer had demonstrated that it had at least "an arguable case" were a review of the Objection Decision to proceed.

## Conclusion

The Tribunal concluded that while the taxpayer has demonstrated it may have an arguable case in relation to the objection decision, it was not satisfied with the explanation provided for the delay in seeking a formal review of that decision. Furthermore, the public interest and fairness contentions outlined by the taxpayer were not convincing.  Accordingly, it found that having regard to all the circumstances it did not believe it would be reasonable to extend the period during which the taxpayer could apply for a review of the objection decision.

***Benson Healthcare Enterprises Pty Ltd and FCT (Practice and Procedure) [2025] ARTA 19, 15 January 2025***

# Matriarch's $33 million transfers from Vanuatu business not taxable in Australia

**An elderly Appellant, Mr Cheung, who received around $33 million over 11 years in 99 separate remittances from his older sister in Vanuatu, has successfully demonstrated to the Federal Court that the sums received were transfers of capital and not assessable income as alleged by the Commissioner.**

## Facts

Most tax disputes are highly fact dependent. This one is no exception, although the focus here was more about what conclusions about the law can reasonably be drawn from the facts.

The dispute centred on the nature of the remittances the Appellant received from his sister, Mrs Leong, the owner of a prominent and highly successful Vanuatu-based supermarket chain, ABM.

The Appellant and Mrs Leong are two of seven siblings, born in 1944 and 1942 respectively. Originally from Fujian Province in China, their parents settled in Vanuatu's capital, Port Vila, probably some years before the start of World War 2.

After Mrs Leong married in 1961, she and her husband inherited a small grocery store that over the years grew into the ABM business. Following the breakdown of the marriage and subsequent property settlement in 1978, Mrs Leong became the sole owner of ABM. Her family rallied to support her after the divorce, with the Appellant assuming the role of ABM's general manager.

By the time the Appellant retired due to ill health in 2000, ABM had grown from a single store to the largest supermarket chain in Vanuatu, with six retail outlets, one wholesale operation, four fuel stations, and employing about 600 workers.

The Appellant relocated to Australia as a long-term resident with his wife and children following his retirement, although over the years he would regularly return to Port Vila to visit family. In the course of those visits, he would often offer business advice based on his extensive experience in managing the enterprise. From that time on, he was an Australian resident for tax purposes.

Once he was settled in Australia the family's evidence was that his sister, Mrs Leong, began to send him money sourced from the ABM business to invest in Australian on behalf of the wider Leong/Cheung family. She regarded Australia as a safe destination for her surplus capital and trusted her brother to make the necessary investment decisions. There were 99 such remittances in the 11 years from 2005 to 2015, totalling $32.8 million. Under an informal agreement with his sister, the Appellant was entitled to keep any interest generated by the funds, but the investments made out of the funds were for the benefit of the broader family. The Appellant disclosed the relevant interest amounts in his Australian tax returns.

## ATO audit and arguments

It is probably unsurprising that the Commissioner would try to get his hands on the tax payable on that sort of money. He may have been encouraged by the fact that the remittances were made at regular intervals over a period of many years, thereby satisfying one of the indicia of income, at least superficially.

But as observed by the court, the Commissioner seems to have disregarded or downplayed a lot of relevant factual material about the family relationships that would have been available to him at the objection stage and which, if approached with an open mind, could have allowed him to draw the same conclusion as that reached by the court.

Things must have got heated between the parties during the course of the dispute, as the Appellant was at one stage prevented from visiting his family in Vanuatu by means of a Departure Prohibition Order.

Doing his best to cover all bases, the Commissioner argued that the remittances were ordinary income because they were either:

» proceeds from the ABM business, which was secretly part-owned by the Appellant;

» rental income for the use of the land on which the ABM business was conducted,

» a formal or informal reward for services rendered to the ABM business; or

» a pension paid in respect of past services.

## The evidence

Unfortunately for the Commissioner, the court found that evidence given the by members of the Cheung/Leong family strongly supported what the Appellant had always argued the remittances represented – gifts of capital from Mrs Leong's ABM business.

None of the evidence supported the Commissioner's wishful thinking about the nature of the transferred funds:

> *"The Commissioner's case that the payments were returns in respect of an ownership interest by Rene in the ABM business fails on the facts. So, too, does an alternative submission that they were payments in the nature of a return for services rendered. It was, I apprehended, also submitted that some of the payments were in the nature of rent in respect of sites in which, directly or indirectly, Rene had an interest. On the facts, none were. Neither were the payments in the nature of a pension in respect of past services to the ABM business. They were not income in Rene's hands in any sense." at [85]*

Mrs Leong gave evidence in French through an interpreter and by way of a video link from Vanuatu. The Appellant gave evidence in person, as did Mrs Leong's two sons, Andrew and Michael, both of whom insisted the ABM business was solely owned and controlled by their mother and not by their uncle.

The court found the evidence given by all family members to be truthful, highly persuasive and easily withstood cross-examination. The court was clearly impressed by the strong familial and cultural ties at work within the extended family group and readily accepted their uncontradicted evidence that the remittances were not in the nature of income, but came from profits generated by Mrs Leong's wholly owned ABM business.

Those funds were invested in Australian real property for the benefit of the wider Cheung/Leong family under the guidance of the Appellant, who neither sought nor expected any financial reward, other than interest accrued on funds held on deposit.

> *"They were just her funds disposed of at her will to a brother trusted to invest them wisely and well for the wider Cheung/Leong family as, if and when occasion required, according to his value judgement but without any formal legal obligation." at [70]*

Having concluded that the Appellant had discharged the onus of proving that the amended assessments were excessive, the court allowed the appeals.

## How did the ATO get it so wrong?

While the ATO may prefer to think it was the court which got it wrong, that's not how things work, and at the end of the judgement his Honour Logan J saw fit to make the following gratuitous but pointed comment:

> *"while I do not doubt that the objection decision was made in good faith, to read the reasons in light of what even then, had been placed before the Commissioner by or on behalf of Rene is, with respect, to read an uncritical rehearsal of cases divorced from an understanding of a family reality and a related absence, save for interest, of an income tax liability. The importance in taxation administration of open-mindedness and detachment from assessment in decision-making in respect of objections cannot be over-emphasised." at [89]*

Whether the Commissioner registers this strong rebuke remains to be seen.

## Onus of proof – credibility is everything

The tax landscape is littered with cases where taxpayers have unsuccessfully challenged default assessments involving unexplained bank deposits. Most of these cases fail because the law confers a huge advantage on the Commissioner – it is for the taxpayer to prove that the assessment is excessive by positively showing that the deposits were something other than income. The Commissioner does not actually have to prove anything about the deposits.

For a variety of reasons (poor record keeping; mixing business with private funds; uncorroborated and improbable claims about large gambling wins) these challenges usually end in failure and within the framework of the onus of proof rules, the courts and tribunals seem to generally get to the right outcome in these cases.

This case represents a rare victory for taxpayers on the default assessment front, but the Appellant only succeeded because the court accepted the family's evidence about their personal relationships and the nature of the transferred funds as being highly credible. And in the context of the family's history, the transfer of excess funds from the ABM business in Vanuatu to Australia and putting the investments into the hands of a trusted and highly capable family member living in Australia made a lot of sense.

## Record keeping

Financial dealings between family members are usually conducted on a less formal basis than dealings between parties who are at arm's-length from each other.

But the interactions with the ATO in this case might have been less fraught if, from the outset, there had there been a contemporaneous record of the various transfers of funds, explaining their source and their purpose. Such an approach might have saved the elderly protagonists a good deal of unnecessary stress, and spared the Commissioner some embarrassment.

***Cheung v Commissioner of Taxation [2024] FCA 1370 (29 November 2024), Logan J***

# No stay of decision to ban tax agent for four years

**An application for a stay of any Tax Practitioners Board's (TPB) decision to ban a tax agent from applying for re-registration will only be successful where a range of factors are met – and, in particular, the likelihood of the tax agent's success in challenging the substantive matter of deregistration. Also, the need to protect the TPB's reputation as an effective regulator will be a key consideration**

## Facts

The tax agent had his registration terminated by the Tax Practitioners Board (TPB) for breaches of the Code of Professional Conduct in the *TASA Act 2009* – and he was banned from applying for re-registration for a period of four years.

Apart from his breaches of the Code (which included making false and misleading statements in relation to the extent he had completed his CPE obligations, failing to lodge client returns and failing to comply with various personal tax obligations), he had previously been sanctioned for these and other matters. As a result, he had given an undertaking to ensure both compliance with various ATO payment arrangements and that future lodgments would be kept up to date.

The current termination of his registration and the accompanying four year ban were the result of breaching these undertakings. (However, a temporary stay had been granted in the meantime.)

## Application and arguments

The tax agent applied to the Administrative Review Tribunal (ART) for a stay of the four year ban pending the hearing of his matter against his deregistration.

He claimed that the TPB decision would adversely affect existing clients, himself and the ATO (in terms of the payment of tax from his clients). He also pointed to his personal circumstances, including the effects of COVID-19 and his responsibilities for a special needs child.

## Decision

The ART refused the stay application (and discharged the interim stay order that had previously been granted). In doing so it examined relevant factors taken into account to grant a stay order and found as follows:

» Prospects of success – the ART was not persuaded on the material before it that the applicant has good prospects of success on the application for review. This included that the applicant "has not advanced any argument or evidence capable of contesting the findings made by the respondent".

» Consequences for the applicant of the refusal of a stay – on balance, the ART found that this factor weighed slightly in favour of granting a stay in view of the fact that *"terminating his registration will bring about a multitude of serious consequences for both [myself] personally, for existing clients and the efficient collection of taxation from these same clients, acting for and on behalf of the ATO."* The

ART also noted that the applicant pointed to a range of extenuating circumstances, including the effects of Covid-19 and his carer responsibilities for a special needs child and aging parents.

» Public interest – the ART agreed with the TPB that were it to grant a stay it would undermine the TPB's reputation as an effective regulatory body and may publicly undermine its ability to discharge its statutory duties. It also said that the situation has been exacerbated by the alleged failure of the applicant to act honestly and with integrity under the Code in relation to the CPE.

» Consequences for the TPB – likewise, the ART accepted the TPB's submission that where, as in this case, the factual findings are for the most part not being contested, the need to protect the TPBs reputation as an effective regulator and its ability to function as a regulatory body, dictated that this factor should weigh against the grant of a stay.

Finally, the ATR also found that this was not a case where "the application for review will be rendered nugatory or pointless if the stay is refused".

***Kambourakis v Tax Practitioners Board [2025] ARTA 1, 3 January 2025***

## Comment

The TPB subsequently issued a statement in which it said that it welcomed three recent decisions of the Administrative Review Tribunal (ART) refusing to stay sanctions against disqualified tax agents (of which *Kambourakis* was one case). The TPB said that in each of these cases, the TPB took action to protect the public with bans on seeking re-registration of up to four years. The TPB also emphasised that in considering these ongoing appeals, the ART declined to stay or suspend the sanctions imposed by the TPB, having regard to the seriousness of the misconduct and the need to uphold professional standards. The full test of the statement can be found on the TPB's website, here.

# Eyewatering civil penalties imposed in promoter penalty case

**The Federal Court has imposed some very steep civil penalties in a promoter penalty case involving refundable R&D tax offsets. The chances of most of those penalties ever being paid seem fairly slim, however, since the main protagonists are all more or less broke.**

## Facts

The main player, Mr Bakarich (B), ran an accounting and advisory firm that provided financial services to small business through two companies, TDC and TDA. He did so in association with Ms Nguyen (N), and between them they controlled the two corporate entities.

On the basis of a statement of agreed facts, the two individuals and the companies they controlled admitted to having engaged in conduct that resulted in each of them being the promoter of a tax exploitation scheme designed to secure refundable R&D tax offsets for various clients while knowing those claims were not reasonably arguable under the law, thereby contravening s290-50(1) of the *Tax Administration Act 1953*. The R&D marketing and claims activities took place over the 2015 and 2016 income years.

The accounting practice charged a fee of around 15% of the refundable tax offset obtained by their clients, amounting to $591,000 (of which $439,000 was actually received). Had the schemes escaped detection, the loss of revenue by way of non-allowable RD claims would have been about $7 million.

B and the two companies admitted to twelve separate contraventions, while N was less culpable, admitting to just three. B also admitted the schemes involved tax evasion, as the success of the schemes depended on the Commissioner never finding out that the clients were not entitled at law to the refundable R&D tax offsets claimed.

The two companies were in liquidation at the time these proceedings were taking place, but those liquidations have been put on hold pending the outcome of this case.

## Penalties

Having established the breaches of s 290-50(1) had occurred, it was for the court to decide on the level of civil penalties to impose.

The maximum penalty under s290-50(4) TAA 1953 is the greater of:

» 5,000 penalty units for an individual or 25,000 penalty units for a body corporate; and

» twice the consideration received or receivable (directly or indirectly) by the entity and associates of the entity in respect of the scheme.

The amount of a penalty unit is fixed by the *Crimes Act 1914*, and at the time the breaches occurred stood at $180. Given the relatively modest consideration received, the penalty unit route produces by far the largest maximum penalty - $900,000 for each of twelve breaches for B (a total of $10.8 million) and three breaches for N (a total of $2.7 million). For TDC and TDA the maximum penalties come to $54 million, although these amounts are largely fictitious, given the liquidation proceedings that are pending.

B and the Commissioner jointly recommended an agreed total penalty of $4.5 million. In considering the joint recommendation, the court considered the following factors:

» the relationship between the agreed amount and the statutory maximum penalty;

» the deterrent effect, which the court said was the most important factor;

» the nature and extent of the contraventions and the circumstances of the contravening conduct;

» the consideration received or receivable in respect of the scheme;

» the loss or damages incurred by scheme participants;

» the period over which the conduct extended;

» any steps taken to avoid the contravention;

» any previous findings by the court;

» degree of cooperation with the Commissioner;

» financial circumstances, remorse, contrition and other relevant matters;

» the course of conduct principle – the court held that each of the 12 schemes was a separate and distinct course of conduct; and

» the totality principle – all things consider, $4.5 million was a fair enough outcome.

In relation to the corporate entities TDC and TDA, one gets the impression that the court didn't really care what level of fines were imposed, given they were about to be liquidated. It accepted a joint recommendation by B and the Commissioner that the corporate fines should mirror those imposed on B – ie. $4.5 million each. The court acknowledged the fines would in all likelihood never be paid, but should nevertheless be imposed for their deterrent effect.

Which brings us to N, the Robin to B's Batman. While her maximum statutory penalty was $2.7 million, the Commissioner jointly recommended a reduced penalty of just $100,000. That might look like a great outcome for N, but unlike B, she acknowledged to the court that she had the capacity to pay that amount, which the court will probably hold her to.

## What about B's $4.5 million penalty?

A previously discharged bankrupt, B can't go down the same road to escape the civil penalties imposed in this case – s 82(3) of the *Bankruptcy Act 1966* provides that;

> *"Penalties or fines imposed by a court in respect of an offence against a law, whether a law of the Commonwealth or not, are not provable in bankruptcy."*

This means the $4.5 million debt will follow B around whatever he does professionally in the future (unless he comes to a cents in the dollar payment arrangement).

However, he works as a business coach for a company controlled by his wife, he lives in rented premises and has limited assets. Provided he avoids accumulating assets in his own name (and keeps sweet with his wife), he might well end up paying less in fines than his former colleague, N.

## Policy issues

But perhaps this case wasn't mainly about the fines.

The rationale for bringing in the promoter penalty laws in 2006 was to overcome an asymmetry in the tax system whereby clients were at risk of penalties for entering into dodgy tax schemes while the promoters of those schemes usually got away scot-free.

While it remains to be seen how much of B's fine ends up getting paid, he does have it hanging over him going forward, and he has been embroiled in costly litigation for a number of years. His reputation has also been damaged and may prove difficult to restore.

Overall, the Commissioner should be reasonably satisfied with the way this case has played out.

***C of T v Bakarich (No 2) [2024] FCA 1448 (16 December 2024), Kennett J***

# Rental bond data-matching program

The ATO has issued a "data matching" notice advising that it will acquire rental bond data from state and territory rental bond regulators bi-annually for the 2023-24 through to the 2025-26 financial years. The data items to be acquired include:

» **Individual client details** – landlord and tenant (names, addresses, email addresses, phone numbers, unique identifier for the landlord, bank account for landlord)

» **Managing agent identification details** (business names, addresses, contact names, email addresses, phone numbers, unique identifier of the managing agent).

» **Rental bond transaction details** including:

- rental property address
- period of lease
- commencement of lease
- expiration of lease
- amount of rental bond held
- number of weeks the rental bond is for
- amount of rent payable for each period
- period of rental payments (weekly, fortnightly, monthly)
- type of dwelling
- number of bedrooms
- unique identifier of the rental property
- bond number
- bond lodgment date
- bond status
- bond refunded date
- amount of bond refunded
- amount of bond refunded to tenant and, or landlord
- unclaimed bond.

See also the ATO website for the ATO's "Rental bond data-matching program protocol", here.

# Status of Tax Matters @ 26 November 2024

*(This table is not intended to be comprehensive)*

| Status of Tax Matters @ 26 November 2024 | |
|---|---|
| **Legislation** | **Status** |
| ***Superannuation (Objective) Bill 2023***<br>This bill enshrines the objective of superannuation in legislation and requires that any future changes to superannuation laws are consistent with the legislated objectives.<br>The main objectives are the preservation of savings and the delivery of income to fund retirement. | Passed by both houses.<br>Royal Assent given.<br>Act No 129 of 2024 |
| ***Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024***<br>The Bill introduces the following tax measures which have been previously announced:<br>» the extension of $20,000 Instant Asset Write-off to 30 June 2025<br>» the Build-to-Rent measures<br>» a Medicare Levy exemption for lump sum payments;<br>» country-by-country reporting by certain large MNEs, and<br>» changes to the listing of Deductible Gift Recipients. | Act No 138 of 2024<br>The IAWO extension in Schedule 7 has been removed from the Bill. The government plans to include the extension in other legislation early in 2025. |
| ***Administrative Review Tribunal (Miscellaneous Matters) Bill 2024***<br>Amends 52 Commonwealth Acts to support the establishment of the Administrative Review Tribunal (ART) | Introduced into the Senate 11 September 2024.<br>Referred to Senate Legal and Constitutional Affairs Committee 12 September 2024.<br>Committee report tabled on 31 October 2024. |

| Status of Tax Matters @ 26 November 2024 | |
|---|---|
| ***Treasury Laws Amendment (Build to Rent) Bill 2024***<br>Gives effect to the 2023-24 Budget announcement to boost large scale investment in long-term rental accommodation, subject to certain eligibility requirements.<br>» Raises the capital works deduction for eligible new BTR developments from 2.5% to 4% per year.<br>» 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. | Act No 112 of 2024 |
| ***Treasury Laws Amendment (2024 Tax and Other Measures No 1) Bill 2024***<br>» 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.<br>» 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).<br>» Allows for standing declarations to enable tax agents to make multiple STO lodgments.<br>» 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). | Act No 135 of 2024 |
| **Scheduled Parliamentary sitting days** | |
| Subject to election announcements, both houses are scheduled to sit from 4th to 6th February and again from 10th to 13th February 2025. | |
| **Appeals** | |
| There are no appeals to report this month. | |

INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA WEBINAR


# Designer trusts: split, cloned, umbrella and corporate trusts

**Now, perhaps more than any other year recently, the appropriateness of various trust structures is in sharp focus.**

With the only certainty seemingly change, the concept of 'designer trusts' is arguably on trend for many specialist advisers.

In particular, throughout the life cycle of a trust, there are a range of situations that may mean a fundamental re-engineering of the trust structure is required.

Using stories and case study examples, this webinar will explore a range of issues in relation to all key forms of designer trusts, including:

» Leading cases
» Trust law rules
» Tax risks
» Stamp duty exposures
» Commercial ramifications

**Who should attend?**

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**More details and booking: ifpa.com.au/events or call 03 8851**

## Details

**Date:** 11 March 2025
**Time:** 12:30 pm - 1:30 pm AEDT
**Cost:** $132.00 excl. GST
**Points:** 1 CPD point

## Presenter

**Matthew Burgess**
Director, View Legal

Matthew Burgess co-founded dynamic specialist firm View Legal in 2014, following experience as a lawyer and partner of one of Australia's most formidable independent law firms for over 17 years.

Matthew's passion is enabling creative customer centric solutions, specialising in holistic tax, estate and succession planning.

He has been recognised for many years in the 'Best Lawyers' list for trusts and estates, and Wealth Management / Succession Planning and either personally or as part of View in 'Doyles' in relation to taxation and for wills, estates and succession planning.

In part inspired by working in the SME market space, Matthew has been the catalyst for a number of innovative legal platforms, including establishing what was widely regarded as Australia's first distributed law firm.