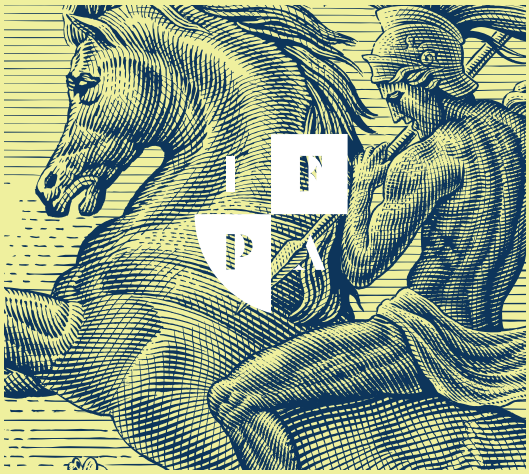
Monthly Tax Update

April 2025

INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA



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Monthly Tax Update

April 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

CASES

Special leave application and revised DIS on *Bendel*

(Fighting the Commissioner – heads he wins, tails you lose)

As was expected, the Commissioner has applied for special leave to appeal to the High Court against the recent unanimous Full Federal Court decision in *Commissioner of Taxation v Bendel* [2025] FCAFC 15. In that case, the Full Court held that an outstanding UPE is not a "loan" or "financial accommodation" for Division 7A purposes since there is no requirement to repay anything.

The Commissioner has also issued a revised Decision Impact Statement (DIS), where he gives himself permission to disregard the current state of the law, which is now represented by the Full Court's decision. In doing so, he also issues some thinly veiled threats against those who would seek to rely on the decision by not following his administrative requirement to either call for payment or convert UPEs into complying Division 7A loan agreements.

Whether such conduct is above board is another issue.

What threats?

Specifically, the revised DIS raises the specter of applying s100A ITAA 1936 where a UPE remains unpaid.

The revised DIS points out that a corporate beneficiary financing the trust by way of a complying Division 7A loan agreement is regarded in PCG 2022/2 as being an ordinary commercial dealing. Where the UPE is not put on a commercial footing, however, the arrangement falls outside of the PCG's green zone and the ATO may take a closer look:

> *"we may engage with you to better understand your arrangement, including the risk of section 100A applying"*

Were s100A to apply, the outcome (the trustee being taxed at the top marginal rate) could be even worse than the application of Division 7A, depending on the marginal rates of presently entitled beneficiaries.

Before s100A can apply, the Commissioner would need to show there was, on the facts, a reimbursement agreement, there was a purpose for someone to pay less tax and that it was not an ordinary commercial or family dealing. On the last point, it seems perfectly arguable that simply leaving the UPE uncalled in the trust is just as much an ordinary commercial or family dealing as putting it on a complying Division 7A footing, but who wants to run that gauntlet?

Is the Commissioner going rogue?

Maybe, but it wouldn't be the first time, and while we can legitimately grumble about the Commissioner's failure to apply the law as interpreted by the judiciary, imagine the mess we'd be in if he committed to applying the Full Federal Court decision for now, only for the High Court to overturn it later (or the government changing the law). And the ATO isn't ignoring the decision entirely. Pending finalisation of the appeal, and where a decision turns on whether or not a UPE is a s109D(3) loan, the ATO will not seek to finalise:

» decisions on issuing amended assessments;

» decisions on private ruling applications that go directly to this issue; or

» objection decisions in relation to objections to prior year assessments (for which no settlement has been reached).

However, if a decision is required to be made (for example, because the taxpayer's period of review will elapse or a taxpayer gives notice requiring the Commissioner to make an objection decision), the ATO's decisions will be based on its existing view of the law.

How likely is a law change?

The government first announced various targeted amendments to Division 7A in its 2016-17 Budget. In its 2018-19 Budget it clarified that one of the proposed amendments would clarify that UPEs are Division 7A loans. While this announcement is yet to be implemented, it does suggest the previous government was on board with the idea and clearly Treasury was also. There was also a Treasury Consultation Paper dated October 2018 which canvassed the UPE issue in the context of Division 7A.

The *Bendel* decision, and the outcome at the High Court, might well galvanise whatever party is running the country after next month to belatedly legislate to overcome the Full Court's decision. Whether such legislation would apply retrospectively remains to be seen, but you couldn't rule it out, given that advisers should arguably have been aware of the government's views on the issue.

What action should practitioners take?

While the High Court appeal will be a tough one for the Commissioner, a legislative amendment looms as the most likely threat. In light of the Full Court's decision, taxpayers are perfectly entitled to deal with their 2023-24 UPEs on the basis that they are not Division 7A loans. But such a decision would be a courageous one (in a *Yes Minister* sense), given that it potentially exposes them to the application of s100A.

Discretion might perhaps be the better part of valour here, but what form does that take? Converting UPEs into complying loan agreements makes them into actual loans, complete with a schedule of repayments and the *Bendel* decision will not help. Perhaps the only way to benefit from the Full Court's decision might be not to convert the UPE, but notify the Commissioner that the taxpayer has relied on the Full Court's decision in *Bendel*, which represents the law as it currently stands. In the event that decision is overturned by the High Court or the law is amended, you will expect him to exercise his discretion in s109RB ITAA 1936 and allow you to put things right without penalties being imposed. That might minimise the Division 7A risk but still leaves the very real s100A threat.

Is a win against the Commissioner ever really a win?

Federal Court confirms plumber was a contractor and not an employee

The Federal Court has dismissed an appeal against an AAT decision which held that a licensed plumber engaged by Hatfield Plumbing was a sub-contractor and not an employee under s12(3) of the SGAA. It found the Tribunal had not made any errors in law in reaching its decision.

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 by examining the conduct of the parties in deciding on the true nature of the relationship in terms of s12(3) SGAA.

Findings by AAT

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 [AAT 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. The Commissioner appealed against the AAT's decision.

Basis for appeal

The Commissioner argued that the Tribunal had erred in law by:

- applying principles that are applicable to working out the common law meaning of "employee" when interpreting the s12(3) SGAA (particularly the degree of control exercised by the putative employer), and taking irrelevant considerations into account; and
- wrongly applying the s12(3) test by concluding from the evidence that H was not an "employee" under that provision.

Consideration by Federal Court

After canvassing a number of relevant decisions, including *Jamsec* and *Personnel Contracting*, the Federal Court held that there was no bright line separating the factors to be considered in determining whether someone is an "employee" under common law or under s12(3) and that the Tribunal's decision making was not attended by any errors of law.

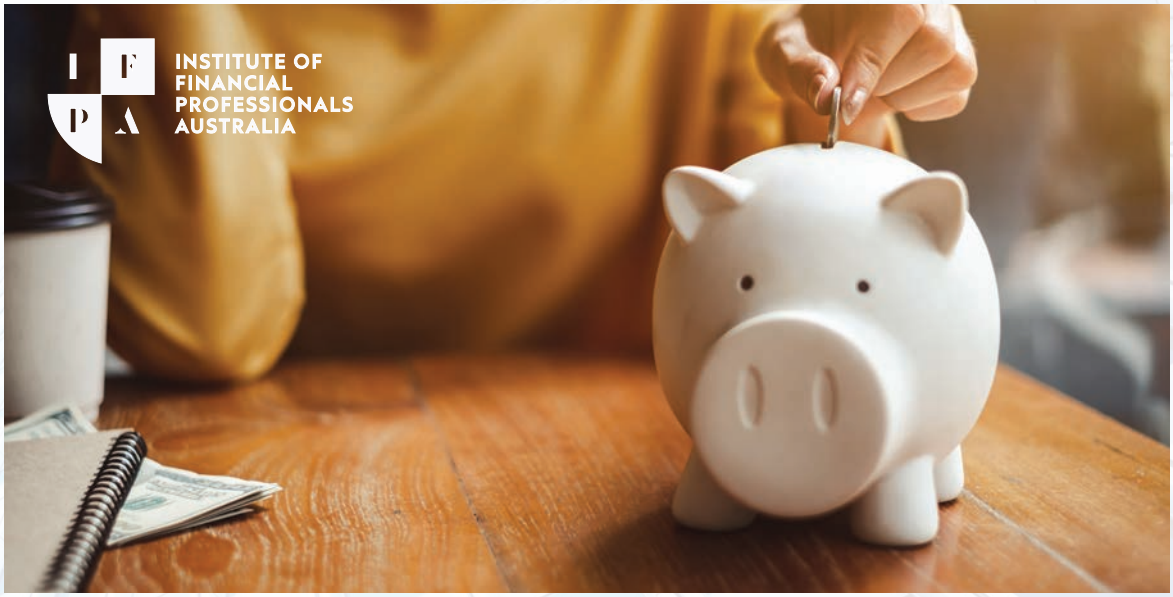
> *"Mr Hargreaves was engaged to produce a result, time and time again. That is what the Tribunal found. Had the Tribunal, having made that finding, concluded other than s 12(3) had no application, it would have committed an error of law. But it did not do that. For these reasons, the appeal is dismissed." at [40]*

Appeal

The Commissioner doesn't seem to like losing these cases and has decided to have another crack by appealing to the Full Federal Court.

C of T v Hatfield Plumbing Pty Ltd (Trustee) [2025] FCA 182 (14 February 2025), Logan J

INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA – WEBINARS



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Presenter: **Natasha Panagis**

Natasha is IFPA's Head of Technical Service.

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Her ability to interpret and disseminate complex information in an understandable and practical manner has made her a sought-after commentator in the media.

Actively involved in shaping Australia's financial services industry, Natasha's policy and advocacy positions influence government, regulators, and key stakeholders.

McPartland Full Federal Court decision

The McPartlands' third attempt to overturn default assessments raised by the Commissioner, this time at the Full Federal Court, has again been unsuccessful. The Full Court ruled there had been no error of law either in the original Tribunal decision or the finding of the Primary Judge that the Appellants could not discharge the onus of proving the disputed assessments were excessive or what their correct taxable income was.

The McPartlands were unsuccessful in having an earlier AAT decision remitted back to a differently constituted Tribunal on the basis that the original AAT decision (which we reported on in May 2022) was attended by errors of law.

Facts and issues

After the couple had failed to lodge their income tax returns for 2015 to 2017, an ATO audit found that they had used funds belonging to companies they controlled to finance their private expenditure such as home loan repayments, personal travel, handbags and personal credit card repayments. The audit also revealed that their private expenditure was far in excess of the Centrelink payments they said they relied on to fund their living costs. The ATO treated those amounts as assessable income in the nature of directors' fees and allowances and assessed a total of $936,000 spread equally between them.

The taxpayers objected on the basis that most of the payments identified represented the repayment of loans the McPartlands had made to one of the companies controlled by them. In the absence of any loan documentation or other evidence of loan repayments (aside from an accounting journal entry in the books of the company), the Tribunal did not accept their explanations and upheld the default assessments raised by the Commissioner.

Federal Court appeal

A taxpayer can only appeal to the Federal Court against an AAT decision where the Tribunal has made an error of law in considering the matter before it. Questions of fact are not generally challengeable, unless the Tribunal has failed to properly consider sound evidence pointing to a particular factual scenario.

One ground of appeal was that the Tribunal had misunderstood or misapplied the burden of proof requirement in s14ZZK(b)(i) TAA1953 by erroneously stating that it involves a two-step process – firstly proving the amended assessment is excessive and secondly showing what the correct assessments should be.

However, the court ruled this was mostly a semantic issue and that the Tribunal had done no more than correctly reflect the law as established in cases like *Rigoli* and others. The Commissioner's amended assessment can only be shown to be excessive by comparing the taxable income arrived at by the Commissioner with the correct taxable income. It is not enough to pick apart the Commissioner's asset betterment statement or his bank account analysis.

The appellants' other alleged errors of law were either not accepted by the Court or, if there were errors of law (for example, in relation to the sale of private assets and some confusion around a business overdraft and a home loan), the Court did not consider they were sufficiently material to warrant the case to be remitted to the AAT for a fresh hearing.

Full Federal Court appeal

The Taxpayers were nothing if not determined, and appealed to the Full Court of the Federal Court against the decision of the Primary Judge, arguing she had erred in holding that remittal to the Tribunal for reconsideration would have been futile. They also argued that the Tribunal's rejection of their claim that certain bank deposits represented loan repayments amounted to an error of law and that the Tribunal had fallen further into error by concluding that they had failed to disclose all the relevant facts and therefore had not demonstrated that the assessments were excessive and what their correct taxable income was.

Unfortunately for the McPartlands, the Full Court held that neither the Tribunal nor the Primary Judge had erred in law. The taxpayers had failed to put all the required information before the AAT and their appeals were dismissed.

McPartland v C of T [2025] FCAFC 23 (12 March 2025), Goodman, O'Sullivan and McEvoy JJ

INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA WEBINAR

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Details

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Presenter

Stuart Sheary

Stuart Sheary is a highly respected financial services professional with over 20 years of industry experience, specialising in superannuation, social security, and self-managed superannuation funds (SMSFs). With a strong technical background and a deep understanding of Australia's financial and regulatory landscape, Stuart has built a career dedicated to providing financial professionals with clear, actionable guidance in these complex areas.

Stuart is well known for his ability to simplify intricate legislative and technical matters, equipping advisers with the knowledge they need to navigate regulatory changes and strategic financial planning.

Remitted residency case goes Commissioner's way

After the Federal Court found the AAT had made several errors of law in deciding a contested residency dispute, the case was remitted back to the Tribunal for reconsideration. Following the remitted hearing, the ART has now decided that while the Applicant, Mr Quy, was not an Australian resident according to ordinary concepts, he was caught under the domicile test because he had not detached himself from Australia to a sufficient degree, nor had he established a permanent place of abode outside Australia.

Facts

We wrote this case up for the April 2024 *Tax Discussion Group Notes* and again for the August 2024 *Tax Discussion Group Notes*. if you can remember the facts you can probably skip the next bit.

Mr. Quy is a mechanical engineer who commenced employment with CBI Constructions in 1986. He accepted a posting to Dubai in 1998, when his wife and three young daughters accompanied him there. When the Dubai work of the firm dried up as a result of the GFC, the taxpayer and his family returned to Perth in 2009 where he continued his employment with CBI. He bought a home in Perth in 2010 and also owned two investment properties in Sydney.

In 2015 the Appellant accepted a new posting to Dubai, but this time his daughters remained behind in Perth as the eldest two were at university and the youngest was completing High School. Mrs. Quy did accompany her husband to Dubai initially, but ended up spending far more time in Perth over the years in question in order to support her daughters and also to care for her sick mother. In Dubai Mr. Quy lived in accommodation provided by his employer where his employer was the lessee of the apartment and paid the utilities bills.

The taxpayer regularly returned to Perth when taking leave and stayed in the family home when he did. According to immigration records he spent 47 days, 29 days, 34 days and 41 days in Australia in the 2017, 2018, 2019 and 2020 income years respectively, having left for Dubai in September 2015. The Dubai assignment came to an end in 2021, when the applicant accepted a posting to Thailand. During his time in Dubai, CBI paid his salary into a Dubai bank account.

Mr. Quy supported his family financially throughout this period, allowing his daughters to reside in the Perth property rent-free while paying the mortgage and all other costs, including utilities.

While living in Dubai, he also maintained registration for three cars and a motorcycle and renewed his driver's licence using his Perth home as the address. He maintained private health insurance in Australia for the entire period, even though his employer provided health cover in Dubai.

The law

The "ordinary concepts" residency test is set out in s6(1) ITAA 1936 as:

> *"a person other than a company, who resides in Australia . . ."*

There is no legislative guidance on the meaning of "resides in Australia", and applying the law therefore relies on the ordinary meaning of the word "resides".

The alternative and broader domicile residency test follows in s6(1)(i):

> *"a person: whose domicile is in Australia, unless the Commissioner is satisfied that the person's permanent place of abode is outside Australia".*

Both residency tests are applied on a facts and circumstances basis, which often creates uncertainty and involves compliance costs. There is quite a bit of case law but, as this decision shows, it can be difficult to know how to weigh up sometimes conflicting factors.

There are two other residency tests, but they have no application in this case since the Applicant was not physically present in Australia for more than half the year of income in any of the five years in dispute. Nor was he a member of a Public Sector Superannuation Scheme.

AAT decision

The Tribunal took note of the Applicant's ongoing family ties to Australia (he financially supported his wife and daughters who were living in Perth), as well as his failure to establish significant personal and social ties in Dubai while he was living there in holding that he remained an Australian resident under both the ordinary concepts test and the domicile test.

Federal Court decision

Logan J took a different view in deciding the appeal, however. In relation to the ordinary concepts test, he held that the AAT had erred in law by misconstruing the intention of the Applicant in relation to the place where he chose to reside. The relevant intention is an intention to treat a place as home for the time being, not on a transient basis but not necessarily forever either.

Also, the court held that the word "permanent" in the term "permanent place of abode" in para 6(a)(i) ITAA 1936 was misconstrued by the Tribunal. It has to be worked out in relation to a particular year of income and it doesn't mean that a taxpayer has to have the intention of living in a particular location forever. The Commissioner conceded these errors had occurred.

The case was therefore remitted back to the Tribunal to reconsider the residency issue in light of the errors of law identified by the Federal Court.

Second round at the Tribunal

Ordinary concepts test

The ART reached a different view from the earlier AAT conclusion on the question of Mr Quy' place of residence under ordinary concepts. The ART considered a number of different factors in deciding that Mr Quy was not an Australian resident under ordinary concepts.

» His physical presence in Australia was minimal during the income years in question, which pointed to him not being an Australian resident.

» The employment and remuneration arrangements in place also pointed to him not being an Australian resident.

» The nature and extent of his family and other personal Australian connections were equivocal in the Tribunal's view.

» The maintenance of property, investments and other Australian assets suggested he was not an Australian resident.

So far so good on the ordinary concepts front – Mr Quy was not an Australian resident.

Domicile test

Both parties agreed that Mr Quy had acquired and retained his Australian domicile after migrating here as a child. The question for the Tribunal was therefore whether he had abandoned his Australian residency (in each of the income years) and whether he had taken up a permanent place of abode in Dubai. In this regard the Tribunal observed:

> *"The word 'permanent' does not require the person to have formed an intention to live or reside or have a place of abode outside Australia 'indefinitely' without any definite intention of ever returning to Australia. The question is whether the person has abandoned any residence or place of abode they may have had in Australia. It is to be contrasted with a 'temporary' or 'transitory' place of abode outside Australia." at [105]*

In reaching its conclusion about the domicile test, the Tribunal looked at a number of the same factors as it did in applying the ordinary concepts test, but in the context of determining whether the Applicant had abandoned his Australian residency and established a permanent place of abode in Dubai.

One line of enquiry involved an examination of Mr Quy's accommodation in Dubai and the manner of his living outside Australia. Mr Quy rented an apartment in Dubai for most of the period he was located there, but the lease was in the name of his employer, who also paid the utilities bills. He did take some key personal possessions with him when he first moved to Dubai, but his apartment was mostly furnished by the local Ikea store, using an allowance received from his employer.

The Tribunal also considered evidence regarding a number of social activities in Dubai allegedly engaged in by the Applicant and his wife (during the limited time she was present in Dubai). The Reasons for Decision suggest the Tribunal was reluctant to accept his uncorroborated evidence about those activities at face value:

> *"The evidence relating to accommodation and social arrangements of the Applicant in Dubai is equivocal in the context of the 'domicile' test and would not provide a sufficient basis for being satisfied that the Applicant had established a place of abode in Dubai that was more than temporary or transitory." at [116]*

The other question addressed by the Tribunal was whether the Applicant had established a permanent place of abode outside Australia. Here, the somewhat tenuous personal and social links to Dubai and the Applicant's continued attachment to Australia through his family connections and his maintenance of real property in Australia, owning a number of motor vehicles and maintaining his Australian health insurance cover proved fatal to his claim that he was not an Australian resident, notwithstanding his extended absence overseas:

> *"Having regard to all of the facts, the Tribunal cannot be satisfied that the Applicant had a 'permanent place of abode' outside Australia in any of the Relevant Years." at [124]*

So, Mr Quy was regarded by the Tribunal as not having quite cut his Australian ties, while not really establishing himself in Dubai either, which makes him an Australian tax resident.

A lot of effort without much reward.

Comment

The uncertainty of the facts and circumstances approach to deciding the question of residency must be unsettling for many practitioners and their expat clients. How can you be certain you're weighing up all the right factors in the right way?

The ART even considered the information about residency provided by the Applicant and his wife when completing their Outgoing and Incoming Passenger Cards when traveling between Australia and Dubai. As if any arriving or departing passenger is going to put their mind to the finer points of *Addy, Applegate* and *Harding* as they're about to put their tray table up in preparation for landing.

It's not as if no ideas have ever been put forward about how we could move away from the uncertain facts and circumstances approach to establishing residency. The outcome in this case would have been quite different under the Board of Taxation's 2019 report on residency for individuals. The Board's proposed 45-day ceasing residency rule for permanent residents leaving Australia would have made Mr Quy a non-resident in 2020, while the proposed overseas employment rule may have taken him out of the Australian tax net for one or two of the earlier years as well. Given the outcome in this case, and the perceived need to protect Australia's tax base, that perhaps explains why the report has been put on the backburner.

In the meantime, you can always ask the Commissioner by way of a ruling request, or self-assess on the basis that the taxpayer is an Australian resident and object against the assessment later (which is what Mr Quy did).

Quy v C of T [2025] ARTA 174 (28 February 2025), General Member C Willis

Tribunal has no jurisdiction to hear application for judicial review

The Administrative Review Tribunal (and the former AAT) only have jurisdiction to hear applications from taxpayers against "reviewable objection decisions" – and the exercise of a discretion by the Commissioner is not a "reviewable objection decisions.

Facts

The taxpayer filed her tax returns for the 2022 and 2023 income years and in mid-September 2023 she received notification from the ATO that she was entitled to a refund of $10,612. She then found out that this amount had been transferred to her Integrated Client Account to offset a pre-existing debt – without apparent explanation or notice to her.

She then sent letters and made formal complaints to the ATO about this matter and was advised on several occasions, in correspondence titled "the Outcome of Your Complaint", that the refunds had been dealt with in accordance with the ATO's powers.

She then applied to the Tribunal seeking 'judicial review pursuant of these decisions" pursuant to s18-70 of the TAA 1953.

Decision

The Tribunal found that it had no jurisdiction to hear the matter for the following reasons:

Firstly, it did not have any jurisdiction to conduct a judicial review of such decisions – rather, an application must be made to a Court with appropriate jurisdiction (ie the Federal Court).

Secondly, the Tribunal found that it only had jurisdiction to hear an application against a reviewable objection decision – and no such objection decision had been made by the Commissioner in this case in relation to exercising the discretion to apply the refunds to the taxpayer's outstanding debt. Nor did the correspondence received by the taxpayer amount to a reviewable objection decision.

Rather, the Tribunal said that it was the operation of the law in s8AAZLA and s8AAZL(3) and (4) of the TAA 1953, which determined the treatment of a credit due to a taxpayer who has an outstanding debt – notwithstanding Practise Statement Law Administration PSLA 2011/21 which sets out the circumstances in which a refund may be made to a taxpayer who has an RBA deficit debt (ie, when the Commissioner could exercise a discretion).

In this regard, the Tribunal also noted that PSLA 2011/21 stated that the ATO accounting system rules generally apply automatic offsets in accordance with ss8AAZL(1) and (2).

Segler and FCT [2024] AATA 4286, 11 October 2024.

Bona-fide redundancy payment – reduced hours relevant

The offer of a new role with reduced hours (and therefore reduced pay) and changes in working days is sufficient to amount to "constructive dismissal" and therefore any resulting ETP to be classified as a bona-fide redundancy payment.

Facts

The taxpayer was employed at a school as an Early Learning assistant. Following a restructure of the Early Learning department she was offered either a termination payment or a new role, but at a reduction in weekly hours of 20% or 40% and change in working days (with the corresponding reduction in wages). She chose not to accept the new role and her position was terminated and she was paid 13 weeks' pay amounting to some $15,000.

The taxpayer applied for a private ruling as to the correct treatment of her payment ie as a basic termination payment or a as a tax-exempt redundancy payment (per s 83-175 of ITAA 1997). The ATO ruled that the payment was an ETP and subsequently disallowed her objection to the ruling.

Arguments

On appeal to the Federal Court the taxpayer argued that:

» Per TR 2009/2, where a position is made redundant (as to opposed to the person) there is a bona fide redundancy – and that this includes where a new position is offered but it does not closely approximate the prior position (ie a constructive dismissal).

» In this case the new position was not closely approximate (or an "appropriate alternative") because it involved a significant reduction in hours, and therefore remuneration – as well as a change in working days.

The Commissioner argued that:

» On the facts the requirements of the new role (in terms of skills and duties) were not sufficiently different from the prior one – and that, therefore, the payment was not a genuine redundancy payment.

» The issue of "reduced remuneration" could not be raised on appeal because it was not a fact set out in the scheme as defined in the private ruling or the objection decision. As a result, the issue of reduced remuneration would have to be inferred from that fact – and, therefore, it could not be considered by the court.

Decision

In allowing the taxpayer's appeal, the Federal Court found that the new role offered was materially different from the taxpayer's prior role. This was mainly because *"the concepts of "duties" and "responsibilities" were wide enough to incorporate days and hours of work"*. Furthermore, if it were necessary to determine the issue, the new position was not an "appropriate alternative" as a reduction

in hours (and therefore remuneration) and change in working days was a material change from the original position.

In short, the Court found that *"an alternative role will be 'too dissimilar' or will not 'closely approximate' the pre-restructure role, or will involve 'significant changes in the work performed,' where the post-restructure job involves materially fewer hours of work to be performed and hence materially less remuneration to the employee"*(para 78) – as was the case here.

However, before arriving at this conclusion, the Court dismissed the Commissioner's claim that the issue a reduction in pay could not be argued on appeal, saying:

> *"I consider there to be an air of unreality to the respondent's submissions in this regard. The facts of the scheme include that the applicant's new or proposed role as an early learning assistant would involve decreased working hours. The facts of the scheme also include that one of the new roles would involve a reduction in working hours from 34.56 hours to 28.5 hours. I accept, as the applicant submits, that as a matter of common sense and human experience there is an obvious inference to be drawn from that fact that her renumeration in such a role would also be reduced." (at para 31)*

Note also the Court also rejected the Commissioner's claim that the taxpayer could not rely on cases involving the Fair Work legislation for the meaning of redundancy.

Comment

The Commissioner has appealed the decision to the Full Federal Court.

Baya Casal v DFCT [2025] FCA 87, 18 February 2025

CGT small business concession – farmland not an active asset

An asset does not satisfy the active asset requirement in relation to being "held ready for use" in a business merely because the taxpayer runs another related business. More is needed (eg, clear intention). Nor is it an active asset when it is used only as a financial asset (or as security).

Facts

The taxpayer ran a cattle business with his wife. In 2007, he inherited interests in two nearby tracts of dairy farmland from his father. However, the farming operations were carried out by his two brothers under a family arrangement.

In the period from his father's death to the sale of his interest in the land in 2016, the brothers continued to operate the dairy farm – including under an arrangement entered into in 2011 whereby the brothers continued to use the inherited farmland in return for the taxpayer being given rent free access to another tract of land for use in his beef cattle business.

In 2016, the taxpayer sold his interest in the farmland for a capital gain for which he sought to apply the small business concessions. The concessions were denied by the ATO on the basis that his interest in the land did not qualify as an active asset under s152-35 (in that they were not active assets for required period – being for half the period they were owned ie 4 ½ years).

Taxpayer's argument

The taxpayer argued that while the farmland was not actually used in carrying on a business by himself (or affiliate or connected entities), it was being held ready for such use (at least from 2011) – and that it was only a family dispute with his brothers that prevented him from actually using the farm for this purpose, but that nevertheless it was being held for that purpose.

Decision

The ART affirmed the ATO's objection decision under review and ruled that the taxpayer's interest in the land did not qualify as active assets in terms of the required "holding period" rule in s152-35. In doing so, the ART made the following observations:

In many cases a taxpayer's intentions at the time of acquisition of the asset will be helpful in determining whether an asset was "held ready for use" in carrying on a business. However, it was not particularly helpful in this case where the taxpayer did not acquire the asset as a result of any intentional act, but rather inherited it.

From the point in time that he acquired his interest in the land in March 2007, until October 2009, the applicant had no clear view about how he could deploy his interest in the land – as evidenced by the fact that he decided not to make any alteration to the original family arrangement that may have disturbed his brothers' use of the land as a dairy.

Under the new 2011 arrangement with his brothers (whereby he continued to have access to an alternative asset for his cattle business in exchange for giving his brothers exclusive use of the inherited farmland in his business), there was no holding of the interest in the inherited farmland "ready for use" by the taxpayer.

Rather, the taxpayer's interests in the farmland were deployed as a financial asset to gain access to different farmland for his cattle farming business – while the inherited farmland was used exclusively by another person (his brothers) in his farming business. And in this situation, case law made it clear that there was a distinction between using land as a financial asset and its physical use in the business – and that when used only as a financial asset (or as security), an asset does not become an active asset.

In these circumstances, the ART was satisfied that the taxpayer had not held his interest in the inherited farmland "ready for use in carrying on" his cattle business for the requisite period of time. Consequently, his interests in the farmland were not an active asset.

Comment

If the brothers had been an "affiliate" or a "connected entity" of the taxpayer, he would have been able to argue (per s 152-40(1)) that his interest in the land was an active asset as it was being used or held ready for use by an affiliate or connected entity in their business .

VSVS and FCT (Taxation and Business) [2024] ARTA 249, 6 November 2024

No FBT on council car park – not commercial

Whether a car park provided to employees will be subject to FBT will depend on whether it is "commercial" – and this will require a facility operated with a commercial purpose, such as by generating revenue through fees charged to users.

Facts

The dispute centred on whether a local car park facility in the Toowoomba CBD used by the Toowoomba Regional Council (TRC) for its employees at no charge, but which was not owned by TRC, constituted a "commercial parking station" for FBT purposes under ss 136 and 39A of the *Fringe Benefits Tax Assessment Act 1986* (the Act), thereby triggering FBT liability for the council as an employer.

The TRC applied to the Commissioner for a private ruling and the Commissioner ruled that these parking facilities met the definition of a "commercial parking station," meaning the provision of parking was a taxable fringe benefit. TRC challenged this ruling, arguing that its car park did not satisfy the statutory definition due to its non-commercial nature, given that it was not operated for profit or open to the public.

Issue

The primary issue was whether the TRC's car park facility qualified as a "commercial parking station" under the Act. This required interpreting the term "commercial" in the context of sections 136 and 39A, which define the conditions under which parking provided by an employer becomes a taxable fringe benefit.

Specifically, the Act stipulates that a car parking benefit arises if the parking is provided near the employee's workplace and there is a "commercial parking station" within a one-kilometre radius that charges a fee for all-day parking.

Arguments

TRC contended that its car park, used exclusively for employees and not offered to the public for a fee, lacked the commercial character necessary to fall within the statutory definition.

The Commissioner, however, argued that the term "commercial" should be interpreted broadly, focusing on the economic activity associated with providing parking rather than requiring a profit motive or public access.

Decision

Justice Logan allowed TRC's appeal, overturning the Commissioner's private ruling. The court held that the car park facility provided by TRC to its employees did not constitute a "commercial parking station" under the Act. In reaching this conclusion, Logan J emphasised the context and purpose of the

legislation, finding that the term "commercial" carried a degree of ambiguity that required a purposive interpretation.

The court reasoned that a "commercial parking station" implies a facility operated with a commercial purpose, such as generating revenue through fees charged to users, typically the public or a broad class of customers. TRC's car park, by contrast, was being operated to a different end to a commercial car parking facility" (as explained in para 43 as follows):

> *These facts, in my view, make it obvious that the Grand Central car parking facility is being operated to a different end to a commercial car parking facility. It is obvious from the range of fees that it is being operated to the end of complementing the operation of the shopping centre. It is being operated to the end of being an attractive force that brings in business to the shopping centre, and more particularly its tenants. It is certainly, for those reasons, being operated in trade or commerce, but considered as a car parking facility alone, the range of free parking is inconsistent with it being operated commercially for profit, as opposed to commercially in the context of a shopping centre, not a standalone car parking facility.*

Logan J further noted that the statutory scheme was intended to address situations where employer-provided parking competed with or substituted for commercial parking options available in the market. In this case, the TRC's employee-only parking did not undermine or replicate the commercial parking stations operating in the Toowoomba CBD, such as those charging fees to the public. As a result, the provision of parking did not give rise to a taxable fringe benefit.

Comments

The Commissioner has now appealed the decision to the Full Court.

The Commissioner has also issued an Interim Decision impact statement on the decision and said that until the appeal process is finalised, it does not intend to revise the current ATO view relating to car parking fringe benefits and the meaning of commercial parking station, as set out in TR 2021/2 *Fringe benefits tax: car parking benefits*.

Note that the threshold for liability for FBT in relation to commercial parking is that for the last income year before the relevant FBT year, either the taxpayer's gross total income was $10 million or more, or the taxpayer's aggregated turnover was $50 million or more.

Toowoomba Regional Council v FCT [2025] FCA 161

Deduction for intra-group service fees allowed

A deduction will not be disallowed for otherwise deductible payments made between entities within the same group as long as the payments – and the contractual source of them – are bona-fide in all respects.

Facts

The taxpayers were two entities in a corporate group that carried on a large family real estate business – with an emphasis on rental property management. The group had been structured in such a way that certain entities within the group held the business assets (eg rent rolls) for asset protection purposes, while the operating entities (ie the two taxpayers) carried on the business.

Under informal arrangements within the group, the taxpayer paid service fees to the entities which held the business assets for the use of the assets. The amount of these service fees was based on professional advice as to what was appropriate. (Note also that earlier formal licence agreements between the parties were no longer relied on). In the income years in question (2015 to 2019), the taxpayers claimed deductions of some $19m for the payment of these fees.

The Commissioner disallowed these deductions and imposed shortfall penalties of some $5m. The taxpayer appealed to the Federal Court following the disallowance of their objections against the amended assessments.

Issues

» Were the fees deductible under s8-1 of the ITAA 1997?

» What was the source of the taxpayers' liability? Were the informal arrangements sufficient – and was the evidence of the controllers of the group (father and son) acceptable as to this matter?

» Did the amount and payment of the service fees suggest a tax avoidance purpose?

Decision

The Federal Court allowed the taxpayers appeals and allowed a deduction for service fees.

The Court first found that the evidence of the controllers (and relevant employees) was credible and bona-fide in the circumstances in respect of the existence of the arrangements (including that the earlier licence agreements were not the source of the occurrence of the expenditure).

As a result, the Court found that a contract existed (in accordance with parole evidence rules under contract law) and that the taxpayers were subject to a liability to pay the fees. In this regard, the Court also stated that:

> *"The cases I have cited above (and those referred to in them) about inferring the existence of contracts in circumstances of great informality in business show that the informality of relationships between entities in [this] group are hardly unique. Perfection in documentation does not dictate eligibility to a deduction under s 8-1 of the ITAA1997."*

The Court then found that the fees were deductible under s 8-1 as they were directed to the end of gaining or producing the taxpayers' assessable income and/or in carrying on their business for that purpose as required by s8-1.

In terms of whether the expenditure was "coloured" by any tax-avoidance purpose, the Court emphasised that the amount of the service fees was reasonable and based on professional advice – and that there was no disproportion between the expenditure and the income derived in terms of the Fletcher principle.

In terms of the fact that the various entities involved in the transactions were members of the same group and that they were under the effective control of the same persons, the Court dismissed this issue given the lack of any tax avoidance evidence and the fact that the taxpayers and the related parties (including the controllers) were all separate entities.

Finally, the Court said that it was not a profit stripping case given that it could not be said that that valuable assets and expertise necessary for the carrying on of the business were held by sham entities and were really those of the taxpayers – *"ordinary care, common sense and understanding of commerce would challenge thinking that it was a profit stripping case"*.

S.N.A Group Pty Ltd v Commissioner of Taxation [2025] FCA 240 (21 March 2025), Logan J

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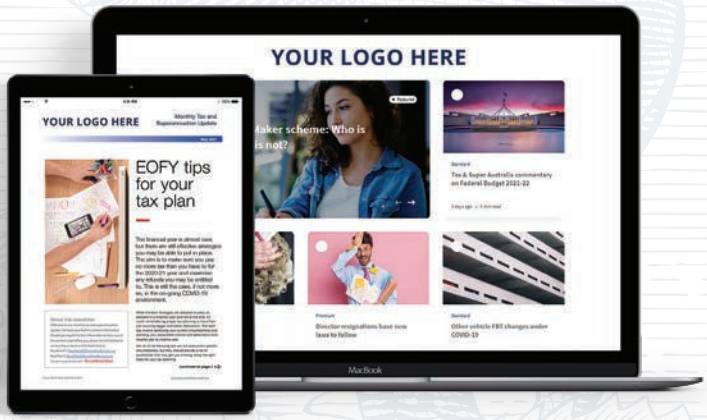

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Status of Tax Matters @ 31 March 2025

(This table is not intended to be comprehensive)

Status of Tax Matters @ 31 March 2025	
Legislation	**Status**
Treasury Laws Amendment (Tax Incentive and Integrity) Bill 2024 » Tightens up the definition of fuel efficient vehicle for Luxury Car Tax purposes. » Removes tax deductibility of SIC and GIC. » Extends the period within which the Commissioner must notify a taxpayer of their decision to retain a BAS refund. » Extends $20,000 IAWO to 30 June 2025.	Act No 29 of 2025
Treasury Laws Amendment (More Cost of Living Relief) Bill 2025 » Enacts two 1% rate reductions to the $18,200 to $45,000 personal tax brackets, commencing on 1 July 2026 and 1 July 2027. » Increases Medicare Levy low-income thresholds in line with CPI movements.	Introduced, passed by both houses and given Royal Assent, all in Budget week. Act No 28 of 2025
The following revenue bills have lapsed with the calling of the election on 28 March 2025.	
Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023 (If the government is re-elected, it is expected to persist with trying to legislate this measure.) and ***Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023***	In combination, these two bills were aimed at reducing the tax concessions available to individuals with total superannuation balances exceeding $3 million.
Treasury Laws Amendment (Miscellaneous Measures) Bill 2024 (This bill was to amend the *Australian Charities and Not-for-profits Commission Act 2012* to provide two new exceptions for the public disclosure of protected ACNC information about new and ongoing investigations, make minor and technical amendments to Treasury portfolio legislation including to the *A New Tax System (Goods and Services Tax Act) 1999, Fuel Tax Act 2006* and the *Taxation Administration Act 1953* and amend the *Payment Systems (Regulation) Act 1998* to modernise the payments regulatory framework.)	

Status of Tax Matters @ 31 March 2025	
Scheduled Parliamentary sitting days	
The Federal Election will be held on 3 May 2025	
Appeals	
A very busy month on the appeals front, with the Commissioner doing most of the appealing.	
Commissioner of Taxation v Bendel [2025] FCAFC 15	The Commissioner has sought special leave to appeal to the High Court against the unanimous Full Federal Court decision that Division 7A cannot apply to a UPE owing to a private corporate beneficiary (see above).
C of T v Hatfield Plumbing Pty Ltd (Trustee) [2025] FCA 182	The Commissioner has appealed to the Full Federal Court against the decision of the Primary Judge that a contract plumber was not an employee for the purposes of s12(3) SGAA (see above).
Baya Casal v DFCT [2025] FCA 87	The Commissioner has appealed to the Full Federal Court against a decision by the Primary Judge that an ETP arising from a job restructure involving a reduction in hours (and less pay) as well as a change in working days was a bona fide redundancy payment (see above).
Toowoomba Regional Council v FC of T [2025] FCA 161	The Commissioner has appealed to the Full Federal Court against the decision by the Primary Judge that a car park operated by a regional shopping centre was not a "commercial" car park for FBT purposes (see above).
C of T v Liang [2025] FCAFC 4	The taxpayers have sought special leave to appeal to the High Court against the decision of the Full Federal Court confirming that they have not discharged the onus of proving their default assessments were excessive.