Monthly Tax Update

June 2025

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Monthly Tax Update

June 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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COVID opens the door on occupancy costs (and car use)

Based on the Victorian government's COVID mandates that were in place during the whole of the 2020-21 financial year, combined with restrictions imposed by his employer, the ART has allowed claims by a Melbourne based ABC employee for a percentage of his rental outgoings, as well as for the cost of driving his car between his apartment and the ABC studios at Southbank.

While the Commissioner will be keen to restrict this decision to its own facts (assuming he doesn't appeal), it may have application even well after the COVID restrictions have been lifted, depending on the facts.

Facts

The Applicant, Mr Hall, is a sports presenter and producer employed by the ABC in Melbourne, focusing mainly on the NRL and A-League football competitions. He moved to Melbourne from Sydney to take up his position early in 2020, shortly after the Victorian government imposed severe lockdowns in an attempt to slow the spread of the pandemic. In addition, the ABC had its own COVID protocols, which included the edict that *"anyone who can work from home should remain at home"*. Any return to the workplace required prior approval from a Divisional Director or other senior person.

Knowing that he would be required to work mainly from home, the Applicant rented a two bedroom apartment in Armadale, with the spare bedroom set aside for his ABC-related use. He shared the apartment with his wife, who conducted an on-line yoga business from the lounge/dining room area. The spare room contained an office desk and work chair, Mr Hall's laptop and other computer equipment, a bookcase which held both work-related and personal materials, and a built-in wardrobe which stored some personal items, including a vacuum cleaner. The spare room was used almost exclusively by the Applicant for work purposes.

Mr Hall had two separate roles at the ABC. His Digital Role involved producing the ABC Sport Digital Radio station. This role was undertaken exclusively from his apartment and accounted for about 75% of his time. He also had a Live Role which accounted for the other 25% of his time. The Live Role involved producing ABC live sports broadcasts, mainly for NRL football.

The Live Role could only be carried out from the Southbank Studios. He would therefore travel between his apartment and the Southbank Studios using his own car, for which the ABC provided him with a secure parking spot. He used his car because the ABC strongly discouraged the use of public transport, and he felt that using his bike late at night wasn't safe.

Critically for the Applicant's claim for car expenses, the Tribunal accepted his evidence that before driving out to Southbank to carry out his Live Role, he would generally spend a few hours each time on working in his Digital Role at home.

Occupancy costs

The Applicant claimed 16.18% (being the proportion in area for the spare room) of his 2020-21 rental payments of $36,326, or $5,878. The Commissioner disallowed the claim.

The Tribunal canvassed a long line of High Court cases involving claims for occupancy costs, including *Thomas* (1972), *Faichney* (1972), *Handley* (1981), and *Forsyth* (1981). None of those taxpayers were successful in their claims for occupancy costs, mainly because they lacked the essential character and they were seen as being of a private or domestic nature.

The Tribunal chose to distinguish the present case from those decisions (three of which involved barristers working at home in the evenings while maintaining chambers elsewhere) in view of the exceptional circumstances that prevailed during the COVID pandemic:

> *"the nature of a workplace and the means of working which prevailed in the 1950s, 1960s, 1970s, and 1980s are not the way of the modern working world, much less the working world of Melbournians during the quite extraordinary income year 2021."* at [61]

The reality was that, in respect of the Applicant's Digital Role, the combination of the ABC's edicts and the Victorian government's severe COVID restrictions meant that for the 2020-21 income year the Applicant's spare room was his workplace.

The Tribunal therefore allowed the objection decision in relation to the Applicant's claim for a proportion of his rental expenses.

Car expenses

The Applicant used the cents per kilometre method for calculating the cost of using his own car to travel between home and the ABC studios. Based on Mr Hall's evidence, the Tribunal accepted that in driving his car from his apartment to the Southbank Studios and back, he was traveling on work rather than to work:

> *"On the days when Mr Hall closed his laptop at home, picked up his car keys and drove to the Southbank Studios or AAMI Park, he was at work the entire time and his travel was therefore 'on work', as were the return journeys on those days."* at [76]

The number of business kilometres was worked out by multiplying the number of trips undertaken (99 for the year, supported with work rosters tendered in evidence) by the round trip distance between his apartment and the Southbank Studios (16 kms). Including a one off round trip to AAMI Stadium for the A-League grand final in June 2021 results in a total estimate of 1,595 business kms.

The Commissioner challenged the reasonableness of Mr Hall's estimate of his business kms for reasons that are not apparent from the Reasons for Decision. However, the Tribunal held that he had made a "reasonable estimate" under s28-25 ITAA 1997 and applied the prescribed rate of 72 cents per kilometre to allow a deduction of $1,148.40.

ATO guidance on occupancy costs

The ATO's decision to disallow Mr Hall's objection does not sit well with its own guidance on occupancy costs. In QC 72163 the ATO indicates that in order to claim occupancy costs, a taxpayer has to show that:

- *"the nature of your income earning activities requires you to have a place of business*
- *it was necessary for you to work from home because your employer doesn't provide you with an alternative place of business*
- *the area of your home that you use for work is exclusively or almost exclusively used for work purposes and isn't readily capable of being used for any other purpose."*

That seems to fit Mr Hall's circumstances pretty well.

QC 72163 includes a couple of examples, one of which involves Abdul, whose employer shuts down their office, but requires him to use his home office for face to face client meetings and to keep files. Abdul set aside a lockable room that was not readily given over to other purposes and used that room exclusively for business.

The facts are not strictly identical, but the important commonality is that neither Abdul nor Mr Hall had a workplace they could access and their home office was exclusively or nearly exclusively used for business purposes.

Options for taxpayers working from home

While Tribunal cases have no precedential value, neither does ATO guidance material carry the force of law. This decision appears to be well reasoned, and while it is likely to be appealed, it represents a reasonably arguable case for adopting a less restrictive approach to the deductibility of occupancy costs.

The Tribunal stresses that its decision only applies to the 2020-21 year of income, when the COVID rules were at their most rigorous. Later years would depend on the facts and circumstances that apply then.

However, anyone who was mandated by law and/or by their employer to work from home would not have had a workplace to go to, other than their spare bedroom. For whatever period the spare room was used exclusively or nearly exclusively for business or employment related purposes, they would have an entitlement to a proportion of their occupancy costs based on floor areas. Those occupancy costs can include:

» mortgage interest

» rent

» council and water rates

» land taxes

» house insurance premiums

These costs would be deductible (on a pro rata basis) on top of the additional running costs that in most cases will already have been claimed.

Remember, however, that a claim for occupancy costs will likely have a negative impact on a person's entitlement to their main residence capital gains tax exemption and involves onerous record keeping requirements. Taxpayers should also consider getting a market valuation for the property at the time it was first partially used for income producing purposes.

The two-year window for making an amendment request for the 2020-21 financial year is well and truly shut for most individual taxpayers, but there may be scope for requesting additional time for lodging an objection for the 2020-21 years.

After the COVID restrictions

In relation to later income years, including the current year, a taxpayer's entitlement to a claim for occupancy costs will depend on the circumstances. If a taxpayer just sets up on the dining room table and the dining room is used for other purposes throughout the year, there is probably no strong entitlement to a claim for occupancy costs.

However, if a spare room is used exclusively or nearly exclusively for business purposes and a workplace is not being offered by the employer, then there should be a strong case for deductibility based on this Tribunal decision and the *Abdul* example in QC72163.

There are thousands of employees who do not even reside in the same State or Territory as their employer. They communicate through Zoom or Teams and have never set foot in Head Office. Those employees should be entitled to a pro rata claim for occupancy costs, provided they use a designated room exclusively or nearly exclusively for business purposes.

Taxpayers and their advisers should review the circumstances of such clients and consider challenging the ATO's position that the room has to be separately identifiable as a place of business.

Hall v C of Taxation [2025] ARTA 600 (21 May 2025), Deputy President Thompson SC

Payments to financier a non-deductible guarantee payment

A payment made under a guarantee arrangement is usually of a non-deductible capital nature.

Facts

The taxpayer was a member of a group of companies. It was a special purpose vehicle for the purpose of acquiring and developing three commercial properties. The taxpayer and another group company purchased the properties in 2002 for $3.1m. This was funded by a loan facility from a bank in the amount of $3m.

In 2003, a refinancing arrangement was undertaken for the Groups global financing needs with another financial institution (Suncorp) – which resulted in a loan of $27m to consolidate and payout other existing facilities within the Group (including the bank loan for $3m). It also included a requirement that security be provided by various Group companies, including the taxpayer, by way of a Deed of Guarantee and Indemnity in respect of the loan.

In 2010, the three properties were sold for $5m – and three separate contracts of sale were entered into between the taxpayer and three third parties. The taxpayer returned this amount as assessable income.

Soon after, a fourth contract, described as a deed of agreement, was also entered into between one of the purchasers under the three separate contracts for the sale of the properties and another company in the Group (not the taxpayer). This was for the right, title and interest in relation to certain documents (the D.A. Documents) for the sum of $3.85m. In relation to this Fourth Contract the taxpayer did not return any of the amount as assessable income.

Tribunal decision

In *WCVB v FCT 2024* [2024] AATA 1259, the Tribunal accepted that it was appropriate to treat a portion of the proceeds of sale under the fourth contract (some $946,000) as amounts that were assessable to the taxpayer in view of the proximity and connection of that contract with the prior sale of the three properties.

However, the Tribunal allowed the taxpayer a deduction for interest for $1.8m paid to Suncorp as an outgoing incurred in gaining or producing its assessable income on the basis that Suncorp required the taxpayer to pay the net proceeds from the sales of the properties to it as a condition of giving its consent to their sale – and therefore the interest outgoing was incurred in gaining or producing its assessable income from the sale of properties (the "nexus issue").

Arguments on appeal

The taxpayer appealed the decision claiming that that the quantum of the interest deduction should be increased by an additional $946,000 (so that the total of the interest deduction was $2.8m) arguing that it was a corresponding outgoing incurred in relation to the increased assessable amount arising under the 4th contract which it was required to be paid to Suncorp. That is, the nexus requirement had been met.

By way of cross-appeal, the Commissioner argued that no deduction should be allowed for any of the interest – being the original $1.8m allowed plus the additional $946,000 sought. The Commissioner claimed that all of the net settlement proceeds paid to Suncorp were paid in relation to the discharge the taxpayer's guarantee obligation between the parties and were of a non-deductible capital nature.

In short, the matter turned on the proper construction of the payments made to Suncorp.

Decision

The Federal Court in effect said that the issue in all the circumstances was not whether the interest incurred had the necessary connection with deriving the taxpayer's assessable income from the property, but what was the character of the payments made to Suncorp.

In this regard, it held that the proper characterisation of the payment to Suncorp was one made under a guarantee arrangement and that therefore the payment was on capital account and hence not deductible.

> *The proper characterisation of the payment to Suncorp of the net sale proceeds was one under the Guarantee and in accordance with Email and Bell & Moir, the payment to Suncorp would be on capital account and hence not deductible. The Tribunal erred in relation to its characterisation of the proceeds of sale and the Decision should be set aside. The Commissioner's cross-appeal must be allowed and because there is only one outcome, the objection decision affirmed.* (at para 152)

In arriving at this decision, the Court also emphasised that the AAT had not properly considered the nexus test in relation to the repayment of the net proceeds from the sales of the properties to Suncorp and the earning of its assessable income. It had instead applied a "but for" test – that is, but for Suncorp agreeing to the sale of the properties the taxpayer would not have been able to earn assessable income by way of profit on the sale of the properties.

Accordingly, in terms of the characterisation of the payment, it concluded that the character of the payment (both original $1.8m allowed plus the additional $946,000 sought), in terms of the refinancing arrangement with Suncorp, was that of a non-deductible guarantee payment.

Charles Apartments Pty Ltd v FCT [2025] FCA 461, 9 May 2025

GST: Claim for $30M in GST input tax credits denied

You must exist as a separate entity from the parties you are dealing with in order to be registered for GST and claim input tax credits.

Facts

The taxpayer (Mr E) claimed to be the public officer for "ANTHONY WILLIAM EVANS", a non-resident unincorporated association identified by tax file number" (the alleged entity).

The alleged entity obtained GST and ABN registrations and lodged BASs claiming some $30m in refunds. These refunds arose out of input tax credit (ITC) claims relating to acquisitions said to have been made by the alleged entity from Mr E.

However, the Commissioner withheld the refunds that had been claimed and issued amended assessments of net amount denying the ITCs claimed. He also cancelled the alleged entity's GST and ABN registration.

In addition, he issued assessments of administrative penalties, totalling $27m (calculated at the rate of 75% of the shortfall for the first tax period and uplifted by a further 20% for the subsequent tax periods).

The taxpayer objected against the assessments of net amounts and penalties and the two cancellation decisions. The Commissioner disallowed the objections, and the taxpayer sought review of those objection decisions – and the Commissioner sought to have the taxpayer's application for review of the penalty decision dismissed.

Issues

» Did the alleged entity exist as an entity separate from Mr E? (If not, then there was no entity carrying on business activities that could seek or claim the ITC credits.)

» Should the Commissioner's application for dismissal of the taxpayer's application for review of the objection decision relating to the administrative penalties be granted?

Decision

Cancelling ITR credits – did the alleged entity exist as an entity separate from Mr E?

After considering the relevant Australian legislation (including the definition of "entity"), the Tribunal dismissed the taxpayer's application for review of the decision to cancel ITR credits because it concluded that on no view could it be determined that the alleged entity existed as an entity separate from Mr E.

It followed therefore that there were no creditable acquisitions and no activities carried on by the alleged entity separate from the activities of Mr E that could be characterised as carrying on an enterprise.

In arriving at its decision, the Tribunal noted the following matters:

» The taxpayer's argument that the application of United States legal concepts and statutes was the relevant law to consider was wrong, as the only laws relevant to the determination of the issues were those made by the Australian Parliament.

» None of the statutes referred to by the taxpayer had any relevance to his entitlement to ITCs or to GST or ABN registration. Instead, the matter fell for consideration under the s11-5 (creditable acquisition) and s184-1 (entity) of the *GST Act 1999*.

» The taxpayer did not identify any legal basis for claiming to be an unincorporated association, a company or a bank – and no amount of form-filling or assertion can transform what remains in reality himself, a natural person, into an association, company or bank.

» The taxpayer did not identify any arguable basis on which he could be said to satisfy the requirements for entitlement to ITCs given he has parted with no money in connection with alleged transactions and has identified no transaction on which GST was paid or is payable by Mr E as supplier.

In short, the Tribunal found that the taxpayer had not identified any basis on which it could be concluded that the alleged entity has a separate existence or capacity to himself in his own right. Nor was there any basis on which it could be said that there was or may be an enterprise carried on by the alleged entity involving transactions between Mr E and the alleged entity.

It followed that the taxpayer could not establish entitlement to the ITCs or the registrations – the statutory entitlements for which are premised upon an entity carrying on an enterprise.

In relation, to the taxpayer's claims that there were transactions arising between Mr E and the alleged entity apparently based on a concept of securities being created by Mr E's receipt or acceptance of invoices or liabilities and the acquisition of the securities said to be so created by the alleged entity, the Tribunal noted that claims by Mr E of the unilateral creation of securities in this way in earlier, unrelated litigation were roundly rejected by the court in each case.

Dismissal of review of administrative penalties imposed

The tribunal said that the main reason for dismissing the Commissioner's application (for the dismissal of the taxpayer's application for review of the objection decision relating to the administrative penalties) is that it was not possible for the Tribunal to determine what prospects of success the application may have without first hearing evidence relevant to the Commissioner's finding that the taxpayers intentionally disregarded the law and to whether remission of the penalties to any extent is appropriate.

Evans and FCT (Practice and procedure) [2025] ARTA 545, 6 May 2025

Amounts assessable to partner for timing differences after retirement

Constituent documents (such as partnership deeds, trust deeds, retirement deeds) are crucial to how amounts are taxed.

Facts

The taxpayer was a partner in an accounting firm from 2012 to 2016.

He signed a partnership retirement deed when he retired in 2016 which among other things provided that the *"outgoing Partner's taxation timing differences of $313,008"* would be rolled out over the years ending 30 June 2018 to 30 June 2022 and that a partner will return the timing differences as taxable income" in those years. As a result, the partnership prepared income tax returns for the taxpayer on this basis ie, the amount of $313,008 was returned on the basis of $62,602 of partnership income for the income years ending 30 June 2018, 2020 and 2021.

The taxpayer unsuccessfully objected to the assessments.

Before the Tribunal the taxpayer argued, among other things, that:

» he was not a partner in the partnership in the relevant years and therefore did not have any interest or entitlement as a partner in the net income of the partnership

» he was not able to negotiate the terms of the partnership agreement or partnership retirement deed and that he signed the partnership retirement deed because he was obliged to do so, and

» he did not physically receive the amount of $62,602 "in money or in kind" from the partnership in any of the relevant years.

The Commissioner argued, among other things, that:

» it was not necessary for the taxpayer to be a partner of the partnership for the relevant amounts to be included in his assessable income in each year

» the taxpayer did not need to be a partner of the partnership in the relevant years to have assessable income included in his assessments under s92 of the ITAA 1936

» the issue was whether he derived those amounts in question in terms of having them applied for his benefit or at his direction per s6-5 of the ITAA 1997, and

» the taxpayer's contentions seek to ignore the express binding legal obligations entered by him under the 2012 partnership agreement and the partnership retirement deed.

Decision

The ARTA ruled that the taxpayer had not discharged the onus of proving that the assessments were excessive.

In doing so the ARTA firstly confirmed, as a question of fact, the following matters:

» The taxpayer entered into the partnership agreement and the partnership retirement deed and was contractually bound by the terms of those documents.

» Under clause 2.9 of the partnership retirement deed, the taxpayer agreed to return taxation timing differences totalling $313,008 as taxable income in five tranches of $62,602 over the 30 June 2018 to 30 June 2022 financial years under the concessional arrangements offered by the partnership, rather than having the $313,008 assessed in the 30 June 2017 financial year.

» It was the benefit of being able to pay reduced income tax in the period when he was a partner of the partnership between 2012 and 2016 which the taxpayer agreed in the partnership documents to have unwound by being assessed for the timing differences amounts in the 30 June 2018 to 30 June 2022 financial years.

The ARTA then found the taxpayer had not shown that he had ceased to be in a tax law partnership in the relevant years (as he had argued). Further, he remained in a tax law partnership after 30 October 2016 because he was in receipt of statutory income (being work in progress amounts). In any event, he did not need to be a partner of the partnership in the relevant years to have assessable income included under s92 of the ITAA 1936.

The ARTA then said that the actual or constructive receipt of part of the income of the partnership in the relevant years was not required. This was because s6-5(4) of the ITAA 1997 provided that an amount is received when "it is applied or dealt with in any way on your behalf or as you direct", and that actual receipt of the amount is not the critical element. In this case the amount in question ($62,602) was applied by the partnership at the taxpayer's direction and for his benefit in each of the relevant years in accordance with the 2012 partnership agreement and the partnership retirement deed.

Other

The ARTA also noted that the current application had arisen in the unusual circumstances that the taxpayer has misunderstood his obligations under the partnership documents and sought to avoid the assessment and payment of tax under the concessional approach. The ARTA also said that the adoption of a strict black letter approach may well have required that a taxpayer in the taxpayer's position would be liable to be assessed for the full amount of the work in progress adjustments (ie, $313,008), brought forward to the date of his retirement and included in his tax return for the year of his retirement (ie, 30 June 2017).

KRBM v C of T [2025] ARTA 556 (13 May 2025), General Member Darian-Smith

Taxpayer obtains reinstatement of tribunal proceedings

The objectives and purposes of the new *Administrative Review Tribunal Act 2024* will be significant in any consideration of an application for reinstatement of review matters that may have previously been dismissed by the Tribunal.

Facts

The taxpayer lodged an application for review of a matter involving whether the taxpayer was carrying out a property development business. (The taxpayer had been granted an extension of time to lodge as the applications for review were filed between 1.5 and 5 years late.)

The taxpayer subsequently failed to comply with various procedural requirement and directions of the Tribunal, including: failure to lodge a statement of position within required time; and failure to lodge a Statement of Facts, Issues and Contentions ("SFIC") by the required time – and an inadequate explanation given.

Consequently, the Tribunal dismissed the proceedings under s100 of the *Administrative Review Tribunal Act 2024*. Two months later the taxpayer sought reinstatement of the proceedings pursuant to s102 of the Act.

Note: The taxpayer was represented by a person who had no Tribunal experience and the issue which led to dismissal were his responsibility as he had misunderstood what was required.

Arguments

The Commissioner opposed reinstatement for the following reasons:

» the procedural history as demonstrating the Taxpayer's failure to progress his case

» no real reason for the Taxpayer's non-compliance, and

» continuing failure to file an SFIC without explanation.

The Taxpayer argued the proceedings should be reinstated because:

» he has good prospects of success on the merits of the case

» there is prejudice to the taxpayer if the application is refused, and

» the Commissioner's prejudice can be alleviated by the imposition of GIC.

Decision

The Tribunal considered that on balance, it would be appropriate for the taxpayer's matter to be reinstated ("*..it was a close-run decision as opposed to being clear cut*"). It did so after considering the relevant factors set out in case law as follows:

Explanation for the issue that resulted in dismissal

The Tribunal found that this factor was neutral in terms of reinstatement, notwithstanding the serious (but not extreme) nature of the taxpayer's failure to comply. In doing so it noted the Tribunal is intended to be an accessible forum including for the inexperienced or those who represent themselves. The Tribunal concluded that this factor was not clearly against reinstatement due to the Tribunal's objectives as set out in the ART Act.

Merits of the substantive case

The Tribunal found that this factor was **very marginally** in favour of reinstatement. In doing so it noted that the submissions made to date by the taxpayer are at best weak and at worst irrelevant – but also that a merits assessment is ***"necessarily superficial."*** The substance of the Taxpayer's case was that the reasons which motivated the sale of the relevant properties were not business-related but rather to raise funds because of a marital split. The Tribunal concluded that at a high level, it cannot be said that the Taxpayer's case has no or very limited prospects of success.

Prejudice

The Tribunal concluded this factor was in favour of reinstatement, as the substantive prejudice of failing to reinstate is to the Taxpayer. In doing so it dismissed the Commissioner's claim that there is prejudice to it from not commencing recovery action – as this ignored the fact that the Commissioner can take recovery action when proceedings are filed and its policy is to do so where there is a risk to the revenue.

Public interest

It considered this factor was neutral, and in doing so noted the following: there was a public interest in the Tribunal being able to meet its objectives – which include the prompt resolution of issues in dispute and to be "fair and just"; the Tribunal's objectives also included there being as little formality and expense as possible for the case to be properly heard and the Tribunal being accessible; and there is a significant public interest in disputes being able to be heard before the Tribunal. to parties of diverse needs.

Other matters

The taxpayer was given the benefit of the doubt in respect of its *"assurance that a barrister with tax and Tribunal experience could be engaged from this point forward and the Tribunal could have confidence the case would be properly put"*. The Tribunal also emphasised that if the pattern to date was repeated by the Taxpayer, the matter would likely be dismissed again forthwith pursuant to s100 of the ART Act.

Djuric and FCT (Practice and procedure) [2025] ARTA 469, 24 April 2025

Resident of nowhere avoids tax on $8.2 million

The Applicant, Mr Kirtlan, who moved from Perth to London with his family in 2005 for business reasons and returned to Australia in 2008 has succeeded in being treated as being a non-resident of Australia for the income years ended 30 June 2006, 2007 and 2008. Because he lodged his UK returns on the basis that he was not a resident of the UK but of Australia, he escaped income tax altogether on UK sourced income of $8.2 million derived over that period.

This remarkable outcome was achieved not because the Tribunal held that he was not an Australian resident, but because it was not satisfied the Applicant had engaged in evasion. The amended assessments would otherwise have been out of time.

Facts

From 2000 onwards, Mr Kirtlan worked in a corporate advisory capacity out of Perth through his own corporate vehicle, servicing mainly clients engaged in the mining industry. In that role, he came to have an equity interest in three ASX-listed companies and became involved in the management of those companies. He was also involved in advising other companies.

Mr Kirtlan moved to London in April 2005 in order to better advance the interests of the companies he was advising, taking his wife and daughter with him. The family rented a house in London on a 12-months lease, starting in May 2005. In communicating with clients and business associates at the time he informed them that his London move was an indefinite one.

In spite of those intentions, it transpired that Mrs Kirtlan was unhappy about living in London, prompting the Applicant to break the lease on the London house and return to Perth with his family in November 2005. On their return to Perth they moved into a property they owned, and which had been rented out during the time they were in London. They also collected their pets and motor vehicles from relatives who had been looking after them.

Mr Kirtlan returned to London in February 2006 where he rented a flat and remained based in London to attend to his business affairs. In the meantime the couple bought a more expensive property in Perth later in 2006 for his family to reside in. His daughter was enrolled in a school in Perth.

Mr Kirtlan was physically present in Australia for 173 days in the 2006 income year, 187 days in the 2007 income year and for 249 days in the 2008 income year. He made numerous trips back to Perth while he was working in London, while Mrs Kirtlan and his daughter would sometimes visit him in London or meet in other locations. When in Australia he stayed with his wife and daughter at their home in Perth. Early in 2008, the onset of the GFC meant that the corporate advisory work dried up, causing him to surrender the lease on his London flat and rejoin his family in Perth where he has lived and worked ever since.

Based on the advice of his accountant, Mr Spence, whom he knew well and regarded as a good friend, the Applicant lodged his 2006, 2007 and 2008 tax returns on the basis that he was not a resident of Australia, meaning that the $8.2 million UK sourced income was not being subjected to Australian tax. At the hearing, the Applicant provided an affidavit from Mr Spence, stating that, based on his extensive knowledge about his client, he had formed the view that Mr Kirtlan and his family were moving to the

UK on a permanent basis in 2005.

At about the same time, Mr Kirtlan somewhat strangely lodged his UK returns for the years in question on the basis that he was an Australian resident. When confronted with this stark inconsistency at the hearing, the Applicant claimed he couldn't recall having noticed that aspect of the UK returns, saying they were prepared by a UK firm of accountants who must have made a mistake. The Tribunal had some reservations about this, but was obviously not empowered to consider UK tax law:

> *"it would defy commonsense to accept that a businessman of Mr Kirtlan's experience was not aware of the consequences of not bringing substantial income to account in any tax jurisdiction and that his UK tax position was dependent upon his residency status."* at [71]

The Commissioner belatedly reviewed the three income tax returns in question and formed the view that Mr Kirtlan was an Australian resident during the relevant years and was therefore liable to tax on his worldwide income, including the UK profits. Because the amended assessments would otherwise have been out of time, the Commissioner also formed the view that in claiming not to have been an Australian resident in those three years he had engaged in evasion.

Amended assessments were raised by the Commissioner, resulting in a shortfall of $3.8 million, plus penalties of $1.9 million. The Applicant sought a review by the ART when the Commissioner disallowed his objections.

The residency issue

In this case, the question of whether Mr Kirtlan was an Australian resident at the relevant times is not of much consequence in its own right. However, it has a major bearing on the sole issue the Tribunal was required to adjudicate on – whether the Applicant had engaged in evasion in claiming not to be an Australian resident.

The Tribunal canvasses a number of relevant factors, some of which would suggest Australian residency and some of which suggest otherwise.

Starting with the Commissioner's case, there is the issue of the very long periods of time Mr Kirtlan spent in Australia, particularly in the 2008 income year (when most of the $8.2 million was derived). Added to that is his answering the question "In which country are you a resident?" with "Australia" in his 2006 UK return and ticking the *"I am . . . not a resident of the UK"* box in both his 2007 and 2008 UK returns. The 2008 return also included the statement *"My visits to the UK will cease in March 2008"*, which the Tribunal considered was inconsistent with being a UK resident.

On the other hand, Mr Kirtlan's statements made to third parties, which the Tribunal accepted as being genuine, were consistent with the intention to live and work in London on an indefinite basis. So was him taking out a lease on a house in London to accommodate himself and his family (although, how else was he meant to house himself?). Apparently, both Mr and Mrs Kirtlan (when she was present in London) opened bank accounts, joined a sporting club, took out health insurance, registered for the National Health Service and purchased a motor vehicle.

In the end, the Tribunal did not venture a concluded view on the residency issue, except to say:

> *"If the question for the Tribunal were whether Mr Kirtlan has proved that he was not an Australian resident at the relevant times, the factors raised by the Commissioner would be a considerable hurdle for Mr Kirtlan to overcome."* at [74]

The evasion issue

The Tribunal observed, at [11], that evasion is something more than the mere avoidance of tax. Some blameworthy act or omission on the part of the taxpayer, such as deliberately failing to disclose income without a credible explanation, is required.

In view of Mr Spence's disposition by way of his unchallenged affidavit, the Tribunal decided that Mr Kirtlan was entitled to rely on his accountant, whom he knew as a close friend who was very familiar with his personal and professional circumstances, to make the right call as to his Australian tax residency:

> *"is it not the case that acting on the advice of a properly informed accountant would provide a credible explanation for a shortfall in a taxpayer's returns such that there could not be said there was evasion?"* at [76]

While the Tribunal was acutely aware that its decision might mean that, contrary to the spirit of the tax legislation, a significant amount of income might go untaxed in either jurisdiction, that is an inevitable consequence of having time limits on the amendment of assessments. Those time limits are there to bring certainty and finality to taxpayers' affairs, unless there has been fraud or evasion.

Comment

It is difficult to say which revenue authority is missing out here, HMRC or the ATO. Probably HMRC, which could argue for UK residency on the basis of Mr Kirtlan's arguments put to the ART.

A quick scan of the UK tax rules suggest they have a 20-year window for amendments where the taxpayer has done something blameworthy, which might apply to claiming not to be a UK resident three times without any apparent basis.

Don't be surprised if the Commissioner appeals this decision. In the context of the clearly opposing claims about residency in the UK and Australia, a court might conceivably reach a different view about culpability and the evasion issue.

In the meantime, good luck to Mr Kirtlan for achieving this windfall tax outcome.

Kirtlan and C of T [2025] ARTA 539 (8 May 2025), Senior Member R Olding

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No second chance for disqualified SMSF trustee

The ART has upheld the Commissioner's decision to disqualify the responsible officer of the corporate trustee of a SMSF who withdrew $122,000 from the SMSF over a six-year period to keep up his mortgage repayments.

Facts

The Applicant, Mr O, established the SMSF of which he and his wife were the members in 2014. He was the director and the responsible officer of the fund's corporate trustee. After encountering financial difficulties in 2017, he began to withdraw funds from the SMSF which were used to keep a roof over his head by applying those funds to the repayment of mortgages over his home as well as two investment properties.

Those withdrawals continued for six years until June 2023, in spite of Mr O being informed after a number of separate independent audits of the SMSF that they were not legally permitted. There were 117 separate withdrawals made all up. He only began to repay the withdrawn amounts after the Commissioner notified him in November 2023 that an audit of the fund was about to commence.

Making those withdrawals was in contravention of numerous provisions of the *Superannuation Industry (Supervision) Act 1993* (SIS Act), including s65 (conferring impermissible financial assistance to members); the sole purpose test in s62(1); ss83 and 84 (about in-house assets); s109 (making investments on an arm's length basis).

Mr O put it to the Commissioner (and the Tribunal) that the withdrawals were always intended to be repaid with interest, and in fact he made the final payment in May 2024 – about two months after the Commissioner formally disqualified him from acting as a responsible officer for the fund.

Two-stage process

The Commissioner's decision as regulator under the SIS Act was made under s126A(2) which provides:

> *(2) The Regulator may disqualify an individual who is, or was, a responsible officer of a trustee, investment manager or custodian (the body corporate) if satisfied that:*
>
> *(a) the body corporate has contravened this Act or the Financial Sector (Collection of Data) Act 2001 on one or more occasions; and*
>
> *(b) at the time of one or more of the contraventions, the individual was a responsible officer of the body corporate; and*
>
> *(c) in respect of the contravention or contraventions that occurred while the individual was a responsible officer of the body corporate--the nature or seriousness of it or them, or the number of them, provides grounds for the disqualification of the individual.*

So, before he can disqualify Mr O from being a responsible officer of an SMSF trustee, he must first be satisfied that the nature and seriousness of the breaches provide grounds for disqualification. The Commissioner arrived at that state of satisfaction easily enough and, given Mr O's conduct, so did the Tribunal:

> *"It is remarkable that despite this clear and repeated advice from an expert in superannuation he continued to contravene. By continuing to frequently access the fund for his own purposes, the Applicant showed a contumelious disregard for the law."* at [27]

But that only gets the Commissioner (or the Tribunal) so far – they "may" disqualify the offending trustee.

The Tribunal observed that the disqualification sanction is there to safeguard the integrity of the superannuation system and a key factor is therefore whether Mr O presents as a future compliance risk. Given the nature, time and seriousness of the past contraventions, the Tribunal felt it was likely the Applicant might reoffend in the future.

On the other hand, Mr O claimed he had learned his lesson and gave a number of unconvincing undertakings about enrolling in superannuation courses and gaining a better understanding of the seriousness of his contraventions. The Tribunal was not very receptive to these undertakings, pointing out that he has had plenty of time to undertake some courses already.

One also gets the impression the Tribunal felt that Mr O was not showing a great deal of contrition over what he had done and was minimising things by referring to errors and misunderstandings when his behaviour was probably more calculated than that. The Tribunal also observed that he had not offered to step aside from his SMSF and appoint an independent person as trustee or responsible officer.

Unsurprisingly, the Tribunal upheld the Commissioner's decision to disqualify Mr O.

Omibiyi v C of T [2025] ARTA 553 (12 May 2025), Deputy President P Britten-Jones

ALCOA successfully challenges major transfer pricing adjustments

In a transfer pricing case with a difference, the ART has ruled that while Division 13 ITAA 1936 applied in relation to an international transaction involving two unrelated parties, the Applicant, ALCOA, had not received less than arm's length consideration for the supply of alumna to a Bahraini smelter.

Different how?

Most transfer pricing cases involve the (alleged) shifting of taxable profits within a multi-national group – usually out of high tax Australia into a lower tax jurisdiction – refer *Chevron, Glencore* and others.

A recent ART case involving ALCOA serves as a reminder that the transfer pricing rules can be triggered when unrelated parties to an international agreement are not dealing with each other on an arm's length basis and the consideration received is less than might be expected under arm's length conditions. To be safe from a transfer pricing adjustment it is not enough that the relationship between the parties is an arm's length one – the parties have to also be dealing with each other on an arm's length basis.

That independent parties are dealing with each other on an arm's length basis should generally be easier to establish than it is for related entities. There were unusual circumstances in the ALCOA case which led the Tribunal to conclude the unrelated parties were not dealing with each other at arm's length.

Facts

The dispute centres around the supply of significant amounts of refined alumina by ALCOA to a Bahraini smelter (Alba) in the 1993 to 2009 financial years. Over this period, ALCOA's sales to Alba generated revenues in the hundreds of millions. In some years ALCOA was Alba's sole or major supplier of alumina. This created an interdependency which had an impact on negotiations around volumes and price. ALCOA has been a major supplier of alumina since Alba commenced smelting operations in 1971.

There were different supply agreements agreed between ALCOA and Alba over the period, but what they all had in common was a bifurcation between what was termed Formula Tonnage (FT, covering up to 600,000 metric tons per year) and Market Tonnage (MT, covering tonnages in excess of 600,000 metric tons per year). The two tonnages were priced differently, after what appears to have been real (and sometimes acrimonious) bargaining between ALCOA and Alba. The FT prices were invariably higher than the MT prices, but the average of the two was seen by ALCOA as being satisfactory, particularly in the context of the high sales volumes going into Alba.

In the late 1980s a local businessman, D, managed to insert himself into the bargaining process as a "fixer" who helped smooth over the price negotiations between the parties. He received a 1% commission on direct sales to Alba for his troubles, an outgoing which was not challenged by the Commissioner and which was not seen by the Tribunal as being indicative of a non-arm's length dealing.

From 1993 MT sales were invoiced to one of D's entities (DE), while from 2002 to 2009 all of the alumina sales (FT and MT) were invoiced to DEs.

The evidence established that the alumina invoiced to the DEs was then on sold to Alba at a significant markup. This practice created a margin which D used for his personal enrichment and to pay bribes to certain Alba executives and to Bahraini officials. In US anti foreign bribery proceedings, ALCOA's parent company made certain admissions which tended to support these findings of fact.

The Commissioner made determinations under s136AD(1) as to what the arm's length price for the MT supplies made to the DEs should be, resulting in an overall increase in taxable income of $644 million with a tax shortfall of $214 million.

What was the international agreement?

The main bone of contention between ALCOA and the Commissioner was whether the focus should be just on the MT or to also include the FT. The negotiated price for the MT, particularly for sales to the DEs, was much lower than the FT price, so the Commissioner was keen for the relevant international agreement only to include the MT sales, those sales being the only non-arm's length sales. ALCOA, on the other hand, argued that it made no commercial sense to consider the MT in isolation – both the direct and indirect sales of alumina to Alba should in its view be considered together.

The Tribunal resolved this issue in favour of the Commissioner, although the FT sales were nevertheless considered to be highly relevant by the Tribunal in working out the arm's length price for MT supplies.

Were ALCOA and the DEs dealing at arm's length?

While the Tribunal was not concerned with the 1% fee collected by D for his work as a "fixer", it held that the interposition of the DE and subsequent charging of significant markups to Alba, crossed the line:

> *"facilitating the payment of bribes is inconsistent with an arm's length dealing"* at [353]

This is notwithstanding ALCOA's suggestion that what had occurred simply reflected business norms practised in the Middle East and that, in any event, the payment of bribes can be an arm's length dealing.

Whether the price was right

Determining what the arm's length price for the MT sales might reasonably be expected to be involved considering the evidence of expert witnesses from each side about Comparable Uncontrolled Prices (CUP). Predictably, those witnesses were at odds about whether to consider the MT sales in isolation (the Commissioner's experts) or whether the FT and MT pricing should be considered together (ALCOA's experts).

Ultimately, the Tribunal decided the two were commercially linked and should be considered together:

> *"Market Tonnage cannot be considered in isolation from Formula Tonnage because they form part a single commercial arrangement."* at [390]

This conclusion was consistent with the evidence given by an ALCOA lay witness, who insisted the focus in price and volume negotiations was always on the overall average price achieved from the supply of both FT and MT.

Information about the pricing and volumes arrangements achieved by other alumina refiners is not readily available. However, when compared to alumina sales made to other independent ALCOA customers, the prices received from Alba were at the higher end of the range:

> *"After adjustment for the LME price and for volumes, the prices received in respect of supplies to Alba were higher than those received from 32 of the 44 independent companies which had long-term contracts with Alcoa."* at [184]

It also emerged from the evidence of one of the Commissioner's experts that in four of the income years in dispute ALCOA received consideration equal to or in excess of the price range indicated by the Commissioner's own witness as representing arm's length consideration:

> *"it is somewhat remarkable to observe that Alcoa received a price equal to or above what in Mr Meurer's opinion was arm's length consideration for the years 2002 and 2007, 2008 and 2009. It follows that on the Commissioner's own evidence, Alcoa did not receive less than arm's length consideration for those years. It is difficult to understand how the Commissioner pursued a claim with respect to those four years when the opinion of his own expert did not support his case."* at [502]

The Tribunal concluded that ALCOA had proved the amended assessments were excessive and replaced the Commissioner's objection decision with one allowing each of the objections in full.

Old law?

Readers will have noticed this case involved the application of Division 13, which was replaced by Division 815 ITAA 1997 as from 2013. However, there are likely to still be a few legacy cases in the pipeline so that the decision will be directly relevant to those. Tribunal cases are non-binding, but with two Deputy Presidential Members and one experienced Senior Member making up the Tribunal, it is likely that the principles applied in the decision will be followed by other Tribunals.

The need to consider all of the surrounding commercial contexts in determining arm's length consideration for a hypothetical agreement between independent parties having the same characteristics as the real parties and the real transactions is also likely to carry through to Division 815.

Comment

The ATO's expert witnesses were not at fault in this case – they were instructed by the ATO not to take the FT supplies into account. This turned out to contrary to the decided cases, which take a more expansive and contextual view of how to determine CUP.

The Commissioner's ambitious attempt to apply the transfer pricing rules where the relationship between the parties is an arm's length one could potentially impact on a small to medium business, although the ATO seems to prefer chasing the big dollars.

Complying with Australia's transfer pricing rules is hard, and it can take up considerable resources. It is especially difficult where taxpayers don't even realise they are in the transfer pricing space because they were dealing with an independent counterparty and thought they were dealing on an arm's length basis.

Alcoa of Australia Ltd v C of T [2025] ARTA 482 (30 April 2025)

Deputy President G Lazanas, Deputy President P Britten-Jones and Senior Member R Olding

Two more default assessment cases

A couple of recent ART decisions demonstrate the frightening way in which many taxpayers can come off second best when challenging default assessments raised by the ATO. By failing to maintain detailed business records they risk being unfairly taxed on much larger amounts than they should be.

ZFPR v C of T [2025] ARTA 572 (8 May 2025)

A Perth based business man who had migrated to Australia in 2024 and established successful businesses came to grief when he was unable to explain certain transactions involving payments made directly to him or for his benefit by companies controlled by him. Over the seven years in dispute, his tax shortfall, penalties (75%) and SIC totaled $6 million.

As tends to be the way in these disputes, the Applicant's main line of defence was that the payments made by the companies represented the repayment of loans he had made to them before the start of the period under review. Unfortunately for the Applicant, there was an almost total absence of business records, certainly not of him making loans to anyone.

He was evasive and argumentative when giving evidence and failed to call certain witnesses whose evidence might have shed further light on things. The Tribunal drew adverse inferences from that.

Given that the Applicant's counsel conceded the Commissioner's finding of fraud or evasion, the Tribunal upheld both the primary assessments and the penalty assessments.

There may well have been more than a grain of truth about the Applicant's claim regarding the earlier loans, but absent business records and a lack of corroborating evidence, the Applicant had virtually no chance of defending himself against the default assessments. But that was a problem of his own making.

CMYT JDRJ v C of T [2025] ARTA 551 (9 May 2025)

C and J are spouses who both work in the family jewelry business. They had immigrated to Australia in about 1990, together with other family members. As well as working in the family business, C also ran his own company dealing in bullion and precious jewelry and high end watches. He also dealt in bullion and jewelry on his own account, which he claimed was a private hobby. On conducting an audit, the Commissioner found unexplained bank deposits and raised default assessments totaling $1.85 million between the two Applicants.

All this activity was conducted out of his father's family business in which he was employed. Inevitably, he lacked accurate reliable business records to show what was what. There was the usual claim about gifts and loans, which may well have had some veracity, but did not persuade the Tribunal. Supporting witnesses turned out not to be all that supportive when cross-examined. The Tribunal concluded that the large sums involved were much more likely to represent payment for goods supplied by C or J.

There was also a CGT issue around the sale of silver bullion, which had not been returned as assessable income. C acknowledged the transactions were taxable, but that he was entitled to a cost base and the 50% discount. He claimed the silver bullion was acquired as a gift from his father on his wedding, while some of it was brought to Australia when he first came here. Silver bullion doesn't grow on trees and must have come from somewhere. If it came into his possession in the way he claims he would be

entitled to a cost base founded on market value at the relevant time. Absent reliable records, however, the Tribunal agreed with the Commissioner that there was no reliable basis for factoring in a cost base.

The Tribunal also gave short shrift to C's private hobby argument. While the dealing on his own account was separate from his work as an employee in the family business and the dealings of his company, it was closely allied to those other activities and was carried out with an eye to profit.

In calculating the taxable results of C's separate "private" activities, the Applicants complained that the Commissioner was taxing them on the gross proceeds of jewelry and silver bullion transactions which involved high nominal amounts but very small margins. The Tribunal acknowledge that criticism, but pointed out that in defending a default assessment it is impermissible to choose which parts of the asset betterment to challenge. The onus is always on the taxpayer to show what their correct taxable income is. Maybe so, but C and J were almost certainly assessed on a much larger net profit than they had actually achieved from their "private" dealings.

Save for a very small penalty adjustment which worked in the Applicants' favour, he Tribunal upheld both the primary and penalty assessments (at 75% plus the 20% mark-up in the later years).

As we never tire of saying, maintain sound business records at all times and if you do bring along corroborating witnesses try to make sure they can hold up for at least a couple of minutes of cross-examination.

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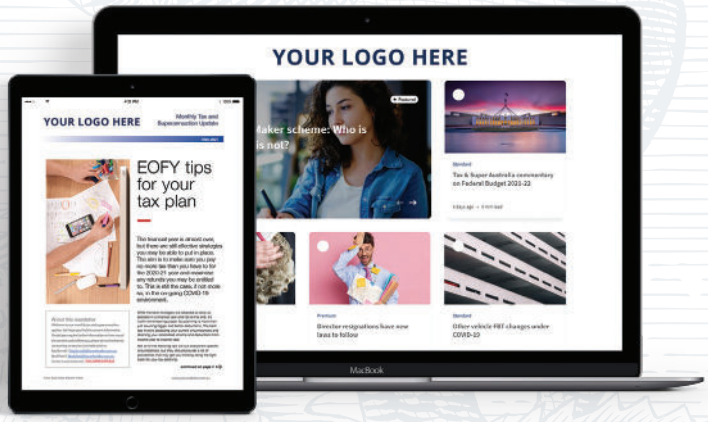

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Status of Tax & Superannuation Matters @ 23 May 2025

(This table is not intended to be comprehensive.)

Parliament opens on 22 July 2025.

Status of Tax & Superannuation Matters @ 23 May 2025	
Legislation	
Awaiting the legislative program of the new Parliament, which is not expected to sit until July 2025.	
Scheduled Parliamentary sitting days	
Awaiting government announcements	
Appeals	
Aitken v C of T [2025] FCA 372 (17 April 2025)	The taxpayer has appealed against the decision of the Federal Court about his $10 million investment in the managed forestry investment scheme.
Morton v C of T [2025] FCA 336 (11 April 2025)	The Commissioner has appealed against a Federal Court decision that proceeds from the subdivision and sale of rezoned farmland were not assessable income.