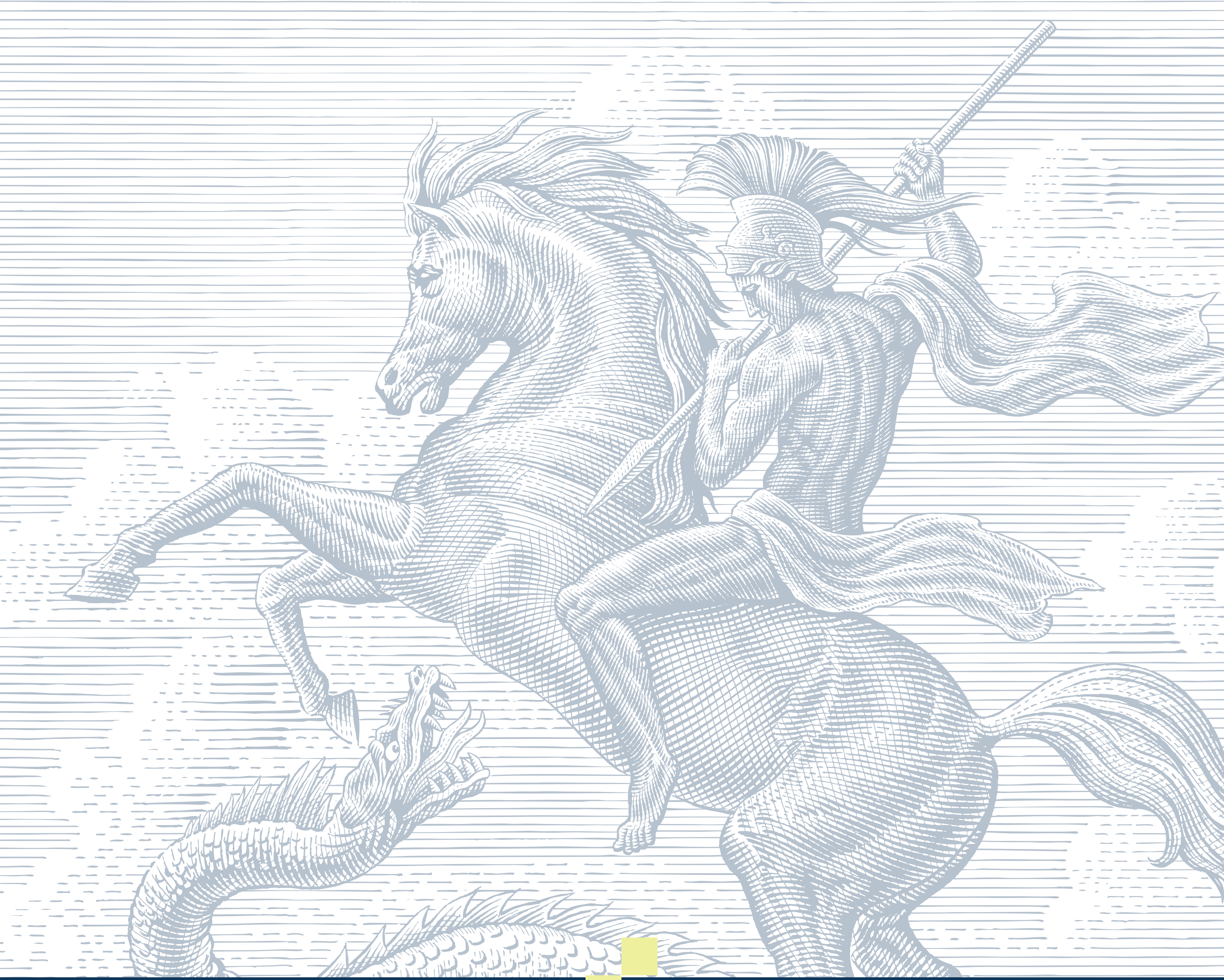


Monthly Tax Update

March 2025

INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA

Monthly Tax Update

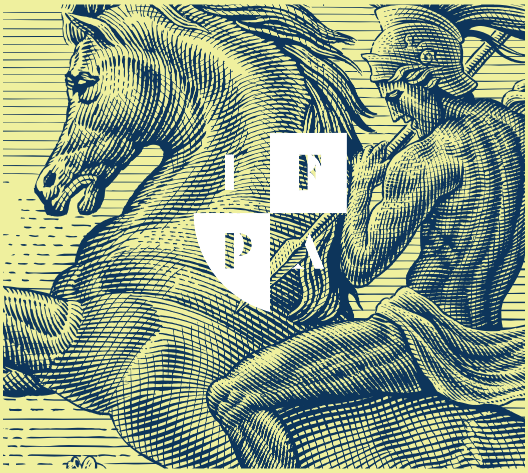
March 2025

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



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

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CASES

STOP PRESS: UPEs are not Division 7A loans – it's the law!

On 19 February 2025 the Full Court of the Federal Court overturned 25 years of ATO administrative practice by dismissing the Commissioner's appeal against a 2023 AAT decision reported as *Bendel v C of T* [2023] AATA 3074 (28 September 2023).

In the AAT decision, the Tribunal held that an unpaid present entitlement (UPE) arising from a trust distribution made to a private company beneficiary where the private company has not called for payment of the UPE amount is not a loan for Division 7A purposes.

The Full Court has now confirmed that a "loan" for the purpose of s109D(3) requires a transaction which creates an obligation to repay an amount or which in substance effects an obligation to repay. The creation of an obligation to pay an amount is not sufficient.

We will do a deeper dive into the legal analysis of the Full Court's decision next month, but in the meantime, there are some practical uncertainties that will have to be negotiated by practitioners and their clients.

Firstly, how will the Commissioner respond? He has 28 days in which to make a formal application for Special Leave to appeal to the High Court. We don't like his chances, given that this was a unanimous decision by the Full Federal Court, but you never know.

He might explore the application of alternative legal lines of attack, such as s100A ITAA 1936, or Part IVA. Or he might graciously accept defeat and engage constructively with the professional bodies in how to unravel 25 years of complying loan agreements.

Finally, in the event there is no High Court appeal, the Commissioner could approach the government for a law change. That would not be a quick or smooth process, with a federal election looming, and if the Commissioner is looking to overturn *Bendel* altogether, that could be portrayed as a retrospective attack on small businesses and families.

Instead of responding with a patch-up fix, perhaps the government could instead look at rebuilding Division 7A from the ground up. Hope springs eternal.

So what should practitioners and their clients do now? It depends on the circumstances.

While company returns are due for lodgement shortly, it may be worth waiting a week or so to see the Commissioner's response to the Full Court's decision. But even if the Commissioner ploughs on and seeks Special Leave to appeal to the High Court, the law as it currently stands, and which both taxpayers and the Commissioner now have to comply with, is that a UPE owing to a private company beneficiary is not a Division 7A loan.

Taxpayers who have had Division 7A adjustments made to past returns should consider objecting to any amended assessments raised. If a group is currently under a Division 7A review, the ATO should probably back off pending clarification of the ATO's position.

And finally, take care to ensure that Subdivision EA does not apply to your client. That provision targets an indirect loan from a corporate beneficiary with a UPE via a trust. The *Bendel* decision will not assist those cases.

The Commissioner created this mess when he had his UPE brainwave 25 years ago. Hopefully he will step up and help clean it up.

Commissioner of Taxation v Bendel [2025] FCAFC 15 (19 February 2025)

Unexplained bank deposits taxable after all

The Full Federal Court has unanimously overturned a decision regarding unexplained bank deposits made by a Primary Judge, ruling that a "concession" made by the Commissioner about the scope of the dispute was not as broad as it was thought to be in the earlier decision. In doing so, the Full Court sheds a welcome light on some aspects of the onus of proof in cases involving unexplained deposits.

Facts

The appellants are a married couple of Chinese origin who ran two restaurants and take-away outlets at various locations in Victoria through two discretionary trusts. They also controlled a property trust which conducted property investment activities in Victoria.

On conducting an audit, the ATO uncovered the existence of seven substantial deposits made into the bank account of the property trust comprising cash and bank cheques in the 2017 and 2018 financial years, totaling $735,000. Those deposits were not treated by the property trust (or anyone else) as assessable income.

Not satisfied with the couple's explanation that these deposits represented a mix of equity contributions and loans made by their parents as beneficiaries of the property trust, the Commissioner treated the $735,000 as assessable income of the property trust under s6-5 ITAA 1997. As presently entitled beneficiaries, the couple was then assessed on the amount of the deposits in their personal returns over the two income years.

Importantly, the amended assessments were raised under s166 ITAA 1936 rather than the usual s167 default assessments that are more commonly issued in such cases. The amended assessments related to the unexplained deposits only.

The taxpayers objected and requested a review of the objection decision after the objections were disallowed.

Previous litigation

The Tribunal – *CVMW v C of T* [2023] AATA 4039 (30 November 2023)

The AAT was the taxpayers' initial port of call, with the first round going the Commissioner's way.

In common with the Commissioner, Senior Member Lazanas was not persuaded by the Applicants' evidence about the generosity of their parents and found the suggestion that they would have illegally brought large amounts of cash into the country to make loans or equity contributions to an entity controlled by their Australian adult children difficult to accept:

> *"Their evidence, in the absence of any independent contemporaneous documentation or records, was not credible in all the circumstances. Even if their evidence regarding the different cultural attitudes to cash were accepted … it would carry little weight." [AAT 84]*

The AAT also rejected the suggestion that the treatment of the deposits as loans or equity injections in the books of account of the property trust should be accepted as prima facie evidence of the character of the deposits. In view of the evidence, the Tribunal felt that the reliability of the financial records of the property trust was suspect.

On the onus of proof question, the Tribunal held that the Applicants needed to show that the mystery deposits were not in the nature of assessable income in the hands of the property trust:

> *"Therefore (the Applicants) have to prove that the Deposits made into the Property Trustee Company's bank accounts in the 2017 and 2018 income years are not income within the meaning of s 6-5 of the ITAA 1997". [AAT 10]*

At the same time, there was no onus on the Commissioner to prove what the deposits represented:

> *"[It is] also not for the Commissioner to advance a positive case as to the likely source (and therefore character) of the Deposits." [AAT 91]*

The Tribunal ruled that the Appellants' inability to satisfactorily explain the source of the deposits was fatal to their position:

> *"In circumstances where the Tribunal rejected the evidence of the Applicants, as explained above, it is difficult to see how they can discharge their burden of proving the assessments are excessive." [AAT 85]*

The Applicants had failed to show the amended assessments were excessive, and the objection decisions were therefore upheld.

The Federal Court – *Liang v C of T* [2024] FCA 535 (14 May 2024)

The taxpayers enjoyed much better luck with their subsequent appeal to the Federal Court, with Logan J taking quite a different view on the onus of proof question.

In hearing the appeal, there were two critical questions of law for the court to decide:

1. Whether the AAT had misunderstood the meaning and effect of s14ZZK of the *Taxation Administration Act 1953* in relation to the burden of proof; and
2. Whether the AAT had failed to discharge its function, notwithstanding reaching a conclusion that it could not rely on either the oral evidence of the taxpayers or the descriptions given to the various deposits in the Trust's accounts. In other words, could the taxpayers succeed in spite of the AAT rejecting their evidence regarding the source of the funds?

Importantly, the Federal Court took the view that, rather than placing the onus on the Appellants of proving what their actual taxable incomes were, the Commissioner had taken the tactical decision to confine the dispute to the question of whether the unidentified deposits had the character of ordinary income. While this may (or may not) have placed the Commissioner at a disadvantage, the court in fact commended the Commissioner for doing so, labelling the decision as:

> *"an exemplary display of good public administration and fairness to taxpayers for the Commissioner so to have identified the issue for determination by the Tribunal." [FCA 60]*

In the court's view, however, that choice by the Commissioner was enough to warrant setting aside the objection decision:

> *"Given the way in which the parties had confined the issue, if that material admitted of, and only of, a conclusion that whatever the Deposits were, they were not ordinary income, the Tribunal was obliged to set aside the objection decision. And that was so even though the Tribunal had rejected the descriptions offered by Mr Chen and Ms Li as also reproduced in the books of account." [FCA 53]*

In the court's view, including the unexplained deposits in the assessable income of the property trust by way of amended assessments under s166 rather than by way of a default assessment under s167 made all the difference:

> *"In this case, given the way in which the issue was confined, it was not sufficient for the Tribunal merely to act upon a rejection of the evidence of Mr Chen and Ms Li. The Tribunal remained obliged, particularly in light of the deliberate submission made to it, as to what ought to be concluded even if their evidence were rejected, to determine whether, on the material before it, the Deposits constituted income under ordinary concepts. This, it failed to do." [FCA 59]*

The court therefore held that the Appellants had discharged the onus of proving the amended assessments were excessive and allowed the appeals, which had the somewhat curious upshot of inverting the onus of proof, apparently because of the "concession" the Commissioner had made in confining the scope of the dispute. And in the meantime no one, excepting perhaps the Appellants, was any the wiser about the source of the mystery deposits.

Appeal to the Full Federal Court

Not surprisingly, the Commissioner appealed to the Full Court of the Federal Court, where the main ground of the appeal was the exact scope of the "concession" made by the Commissioner about the scope of the dispute.

In considering this issue, the Full Court quoted extensively from exchanges that took place between the Primary Judge and counsel for the Commissioner in the earlier hearing. The Full Court's analysis of those exchanges suggests that the Commissioner's "concession" may have been more nuanced and limited than the Primary Judge had thought.

It's a fine point, but the Commissioner's position has never been that the source of the mystery deposits could only have been from property related interest, dividends, rent, or gains made with a profit-making purpose. The unexplained deposits could have been assessable income sourced from anywhere at all. The Appellants haven't clarified the source (at least not to the AAT's satisfaction), and the Commissioner simply doesn't know.

Therefore, it was wrong for the Primary Judge to rule that the Appellants should succeed in proving the amended assessments are excessive by simply proving the deposits were not in the nature of assessable income from property investment. In the view of the Full Court, the Appellants also had to positively prove what the deposits represented (other than the loans/equity narrative already rejected by the Tribunal).

In considering the decided High Court cases on the question of how a taxpayer can discharge the onus of proving that an assessment is excessive (*Elsey*, 1969; *Gauci*, 1975; *McCormack*, 1979; *Dalco* 1990), the Full Court drew a useful distinction:

> *"A distinction is to be drawn between showing an error where all material facts are known and showing an error where all material facts are not known." [FCAFC 34]*

The Full Court also put into context the following quote by Windeyer J in *Elsey*:

> *"I do not think the Act requires one to start with a presumption that all moneys which a taxpayer receives from any source form part of his assessable income." [HCA 13]*

The issue in contention in *Elsey* was the proper characterisation of receipts arising from the disposal by Mr Elsey of a number of properties on the Gold Coast in the mid-1960s. Unlike the present case, the source of the deposits and the nature and scope of the taxpayer's activities in Elsey were known. It was the taxpayer's purpose in acquiring the land and the nature of his subsequent dealings with it which the court had to determine.

In cases such as *Liang*, where the source and nature of the certain deposits remains unknown, showing the amended assessments are excessive becomes much more difficult:

> *"It would be a very rare instance where a taxpayer was able to prove an amount was not income under ordinary concepts without positively establishing the source and character of the amount." [FCAFC 43]*

Given that the AAT had rejected the Appellants' evidence about the source of the unidentified deposits, the Full Court overruled the decision of the Primary Judge and held that the Tribunal was correct in ruling the Appellants had not discharged the onus of proving the assessments were excessive.

Comment

In the context of unidentified cash deposits, the Full Court's decision probably puts the onus of proving that an assessment is excessive at a level that most observers would regard as appropriate. But it was only the Full Court's detailed analysis of the exchanges between the Primary Judge and counsel for the Commissioner that clarified the precise nature of the Commissioner's "concession" about the scope of the dispute.

Without wanting to give the Commissioner free advice about how to administer the law, perhaps a safer bet would have been to raise default assessments under s167 on the two individuals using the asset betterment method and treating the $735,000 as cash investments made into the property trust, shared equally between them. That would have left the taxpayers with the task of proving exactly what their correct taxable income was, which would have been very difficult, having regard to the unexplained deposits.

Taxpayers running a cash business who receive gifts, loans, or equity from family members will always be susceptible to attack by the Commissioner where the transactions are carried out on an informal basis and remain largely undocumented. The Tribunal was probably right in rejecting the couple's evidence but, taking cultural factors into account, things could conceivably have happened the way they claim.

C of T v Liang [2025] FCAFC 4 (31 January 2025), Perram, Wheelahan and Hespe JJ

Farmer fails to prove deposits not his income

If you're going to show that an assessment is excessive, you are going to need the appropriate records to do so – claims, contentions and counter-claims will not suffice.

Facts

The taxpayer was a qualified accountant and registered tax agent who also ran a large cattle station in Western Australia through a family company (Stacpoole Pastoral) of which he was a co-director and a joint shareholder.

The Commissioner issued default assessments to the taxpayer for the 2016 to 2020 years in for undeclared assessable income of some $750,000 (or some $450,000 in taxable income after adjustment for deductions) on the basis that unexplained deposits into a joint bank account he held with his wife were ordinary income assessable of the taxpayer from cattle sales.

The taxpayer contended that the Commissioner wrongly attributed to him, income of Stacpoole Pastoral, and/or income which should have been shared with his wife. He also argued that the cattle sale proceeds were deposited into his account to pay an amount to his bank required under a "deed of forbearance" extending credit to the taxpayer.

The issue before the Tribunal was whether the assessments were excessive (and if not the correctness of penalty applied and whether any shortfall interest charge should be remitted).

Decision

The ART found that the taxpayer had not met the onus of proving that the assessments were excessive, nor that there was no fraud or evasion.

Claim that moneys were income of Stacpoole

In relation to this claim, the ART found that the taxpayer had failed to keep sufficient records to demonstrate this, noting, among other things, the following:

» he did not deny that cattle sale proceeds were deposited into his joint account;

» he failed to keep appropriate records at the company level that the proceeds were income of the company (eg the company tax returns per se were insufficient without more evidence);

» he failed to keep appropriate records at the individual level that the proceeds were income of the company ie no attempt was made to quarantine the funds – *"the cattle sales proceeds deposited into the joint account were not managed in a way which retained their character as income of Stacpoole Pastoral"*; and

» where there is intermingling, a failure to create and retain records will make it harder for a taxpayer to discharge their onus of proof; and

Finally, in relation to the taxpayer's claim that the cattle sale proceeds were deposited into his account to pay an amount to his bank required under a deed of forbearance extending credit to the taxpayer, the Tribunal found that this did not detract from the case that it was still his income, in absence of evidence to the contrary stating: "I do not accept that the Deed provides any basis for the Tribunal to find that the deposits into the joint account did not take on the character of ordinary income once in his hands".

Claim that income should be equally apportioned to his wife

While accepting that his wife worked on the farm in supporting her husband and her family, the Tribunal did not accept that she was employed by Stacpoole Pastoral in any way. There was no documentary evidence before it to support such a contention – and, moreover, his wife had never reported any salary or wages in her income tax returns.

Furthermore, the Commissioner had assessed the taxpayer based on his role as director of Stacpoole Pastoral and at no time was his wife a director of Stacpoole Pastoral. And while she was a shareholder of Stacpoole Pastoral, there was no evidence before the Tribunal that any dividend had ever issued to Ms Behrendt during the tax periods.

In short, the Tribunal found that there was no evidence before the Tribunal which supported the taxpayer's contention that 50% of the cattle sale proceeds deposited to the joint account should be shared with his wife.

Fraud and evasion issue

The Tribunal found that the taxpayer had not demonstrated that the Commissioner should not have formed the opinion that there had been evasion in the years 2016 to 2018.

Specifically, it found that he failed to demonstrate the omission of these amounts from his assessable income were not attributable to a blameworthy act.

Penalties and interest

The Tribunal found it inappropriate to disturb the Commissioner's imposition of penalties and interest. In particular, it said it could not be satisfied that the taxpayer had discharged his onus of proving that his conduct did not demonstrate intentional disregard of a taxation law and therefore it could not be satisfied that the base penalty of 75% imposed should be remitted. It, likewise, found the same in respect of the 20% uplift factor imposed for the years 2017 to 2020.

Smith and FCT (Taxation and business) [2024] ARTA 49, 19 December 2024

Distribution an assessable dividend – not a return of capital

A distribution will be an assessable dividend under s44(1) of the ITAA 1936 if it is paid to a shareholder "...out of profits derived by it from any source". Its application is not limited to profits derived only from revenue or income sources. Profits can also be derived from capital sources.

Facts

The taxpayer was an Australian resident who held shares in an overseas family company that operated a manufacturing business in Hong Kong.

In 2020, the company sold the factory premises for a profit of some $A30m. The taxpayer received a distribution of some $A4m from his share of the profits from this sale

The taxpayer applied to the Commissioner for a private ruling about the assessability of the distribution arguing that it was not an assessable dividend that was subject to Australian tax. Instead, he claimed that it was a return of capital subject to CGT event G1 under the CGT regime. In particular he argued:

- as the distribution was funded from the capital proceeds of the sale of the premises it should be considered to be of a capital nature
- the sale of the premises was the first step directed towards winding up the company and that, accordingly, the distribution was a return of capital to the shareholders; and
- the term "share capital account" should include any account relating to the company's capital.

The Commissioner determined that the distribution was a dividend assessable as ordinary income. The taxpayer unsuccessfully objected to the adverse private ruling and then applied for review by the Administrative Review Tribunal.

Before, the Tribunal the Commissioner argued that the distribution was assessable as a dividend under s44 of the ITAA 1936, noting that:

- the payment was recorded in the company's financial statements as a final dividend
- the distribution was not debited against the share capital account of the company; and
- the shares held by the taxpayer were not cancelled following payment of the distribution

The Commissioner also noted that when the company sold its remaining assets several years later it was still not wound up.

Decision

The Tribunal affirmed the Commissioner's decision and agreed with his arguments.

Firstly, it agreed that no amount had been debited against a "share capital account" (as defined by ITAA 1997) because the term did not extend to any account relating to a company's equity. Rather, it referred specifically to an account of a company's share capital (or any other account where the first amount credited was an amount of share capital).

Secondly, it found that the distribution was a dividend paid out of company profits that was assessable to the taxpayer as ordinary income pursuant to s44(1) of ITAA 1936. It said:

> *57. The sale of the Premises resulted in a gain to the Company between the 2020 and 2021 years. The Company therefore made a profit in the 2021 income year. This is consistent with the Financial Statements which include the sale proceeds in the Company's "profit".[41]*
>
> *58. Subsection 44(1) of the ITAA 1936 specifically refers to dividends paid to a shareholder "...out of profits derived by it from any source". There is nothing inherent from a plain reading of the legislation to suggest its application is limited to profits derived only from revenue or income sources.*
>
> *59. This is consistent with the decision of the High Court in Federal Commissioner of Taxation v Slater Holdings Limited [1984] HCA 78; (1984) 156 CLR 447. In that case, the Court considered that the term "profits" in the context of section 44(1)(a) included capital profits.[42]*
>
> *60. The Distribution was therefore a dividend paid to the Applicant out of profits derived by the Company. The Distribution is assessable to the Applicant as ordinary income.*

Having concluded that the distribution was a dividend, the Tribunal ruled that CGT event G1 (company makes a payment in respect of a share that is not a dividend) had no application.

Finally, in relation to the taxpayer's argument that the sale of the premises was the first step directed towards winding up the company, the AAT found that the company had not commenced any winding up at the time of the distribution (or any time later). Furthermore, it said that the distribution was made by the company and not a liquidator or a person required by law to carry out the winding up of a company.

Cheung v FCT [2024] ARTA 152, 4 December 2024

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No R&D in developing health program and app

You will not satisfy the requirement of carrying out "core R&D" activities unless you carry out those activities per the scientific method – and not just merely in accordance with scientific principles.

Facts

The taxpayer company created a program (and an accompanying app) to assist with physical, mental and emotional health for a cost of some $135,000. The program was titled "the 6 Pillars program" and was based on "movement, nutrition, breathing, hydration, sleep and mindfulness being conducted on an integrated basis".

The taxpayer applied to register the project with Industry Innovation and Science Australia (IISA) in relation to the various "R&D activities" carried out in 2019 in developing the program (including the app, a tool system and a touchscreen mechanism to collect data) on the basis that it was "core R&D" activity under s355-25(1) of the ITAA 1997. This section provides:

> *(1) **Core R&D activities** are experimental activities:*
>
> *(a) whose outcome cannot be known or determined in advance on the basis of current knowledge, information or experience, but can only be determined by applying a systematic progression of work that:*
>
> > *(i) is based on principles of established science; **and***
> >
> > *(ii) proceeds from hypothesis to experiment, observation and evaluation, and leads to logical conclusions; and*
>
> *(b) that are conducted for the purpose of generating new knowledge (including new knowledge in the form of new or improved materials, products, devices, processes or services).*

However, the IISA ruled that the activities were neither a core R&D activity nor a supporting R&D activity – essentially on the grounds that the activities were not carried out in a scientific manner and that, in particular, the activities were not of an "experimental" nature (in that the outcome could not be known or determined in advance on the basis of current knowledge).

In relation to the claim of the lack of a scientific method, the taxpayer argued, among other things, that as there were no research papers in relation to its research activity, and that as the activities were applied to individual participants, then the outcome of the activity could not be predicted or determined in advance (as per the scientific method).

Decision

The Tribunal concluded that none of the taxpayer's activities in the 2019 year met the definition of core R&D activities for the following reasons:

- It was not satisfied that the taxpayer carried out its activities in terms of the "scientific method" as required; nor was it satisfied that the taxpayer's activities were "conducted for the purpose of generating new knowledge."
- Likewise, it was not satisfied that "the outcome of the activities could not be known or determined in advance on the basis of current knowledge, information or experience" that was available in the 2019 income year (contrary to the taxpayer's claims).
- It was a "nonsense" to say that the "individualisation" involved in the work meant an activity met the definition of core R&D activities in terms of scientific method.
- While the taxpayer's activities were *systematic*, the evidence before the Tribunal did not establish a progression of work per the scientific method. Asserting there was such a progression is different to evidencing that there was such a progression.
- On balance, the taxpayer's work was consistent with the principles of established science – but this was a separate test eg in terms of the *observation and evaluation* requirement, while it could be said there was observation, there is little demonstrating how the tests undertaken were *evaluated*. Further there was little to no analysis showing the Tribunal what led to the conclusions nor why they are logical.

Finally, although unnecessary to decide, the AAT found that the exclusion provisions in s355-25(2)(d) for "social sciences" etc would not have applied to exclude the taxpayer's activities if they had been found to be core R&D activities.

Comment

The taxpayer, who was self-represented, used AI to find supporting cases – and AI duly obliged! However, during the course of the proceedings, it became apparent that AI had just invented the cases. No such cases existed. The Tribunal then issued a general waring against using AI for such purposes, saying adverse inferences can be drawn against an applicant and, to ensure they are not, applicants "are encouraged to use publicly available databases to search for case law and not to seek to rely on artificial intelligence".

Body by Michael Pty Ltd and Industry Innovation and Science Australia (Taxation and business) [2025] ARTA 44, 24 January 2025

Silver not in an investment form

The ART has confirmed an objection decision on a Private Binding Ruling (PBR), holding that the sale of precious metal materials (PMM) were not the supply of "precious metals" under s195-1 of the GST Act 1999. This meant the sales could not be treated as GST-free supplies.

Facts

Siltech is a precious metals refiner of precious metal materials (PMM) which it acquired from various suppliers in the form of silver jewelry, silver electrical nodes, rolled silver foil and Canadian Maple silver coins.

In the PBR request, Siltech asked the Commissioner to confirm that all of the PMM were "precious metals". As far as is relevant, the s195-1 definition of "precious metal" is:

> *"silver (in an investment form) of at least 99.9% fineness"*

The Commissioner ruled that the Canadian Maple silver coins fell under the definition, but the other items did not. The Applicant objected and requested a review by the ART after the objection was disallowed.

Applicant's arguments and Tribunal's response

Siltech argued the various items were silver because they were made up predominantly of silver. The Tribunal found no legislative basis to support that suggestion and ruled instead that the disputed PMM items were not silver as such, but silver jewelry, electrical nodes and rolled foil.

On the "investment form" question, the Applicant argued that the PMM items were acquired with the subjective intention of generating income or profit and therefore fell within the scope of the definition. The Tribunal did not accept this argument, ruling instead that to be in an investment form the silver items have to be in a form capable of being traded on the international bullion market (ie. a bar, wafer or coin bearing a mark that identifies and guarantees its fineness and quality).

The objection decision was accordingly upheld.

Siltech PMR Pty Ltd v C of T [2025] ARTA 26 (7 January 2025) Senior Member R Olding

Use it or lose it – late claim for GST input tax credits fails

The Administrative Review Tribunal has confirmed that under the GST law, claims for input tax credits are lost where they are made more than four years after the due date for lodgement of the relevant GST returns.

Facts

The Applicant, Ms Karagounis, operated a cleaning business between 2010 and 2023. She was registered for GST and accounted for her GST obligations on a cash basis. Due to health and other reasons she was tardy in complying with her lodgement obligations, and her BAS statements for the six GST periods ended December 2015 to March 2017 were lodged together on 10 July 2021, making all of them more than four years late.

Relying on s93-5 of the *GST Act 1999*, the Commissioner denied the Applicant's claim for input tax credits for the six GST periods, given that the GST returns were lodged more than four years after their due date. The Commissioner argued he had no discretion to nevertheless take the input tax credits into account (even if he wanted to).

At the hearing and in her closing submission, the self-represented Applicant raised various allegations about the Commissioner's alleged poor conduct. These were deflected by the Tribunal, which indicated it had no jurisdiction to consider such matters, leaving the Applicant's entitlement to $10,680 in input tax credits as the only issue to be determined.

Commissioner's arguments

The text of s93-5 is very clear:

> ***93-5 Time limit on entitlements to input tax credits***
>
> *(1) You cease to be entitled to an input tax credit for a creditable acquisition to the extent that the input tax credit has not been taken into account, in an assessment of a net amount of yours, during the period of 4 years after the day on which you were required to give to the Commissioner a GST return for the tax period to which the input tax credit would be attributable under subsection 29-10(1) or (2).*
>
> *Note: Section 93-10 sets out circumstances in which your entitlement to the input tax credit does not cease under this section.*

In the Commissioner's submission, the Applicant had therefore ceased to be entitled to the input tax credits because those credits had not been "taken into account in an assessment of a net amount" during the period of four years after the day that the taxpayer was required to file her GST returns.

Applicant's arguments

The Applicant sought to rely on s93-10, which sets out the circumstances under which a taxpayer's entitlement to input tax credits does not cease under s93-5. Unfortunately for her, she misread the terms of the provision.

Consideration by the Tribunal

Not surprisingly, the Tribunal sided with the Commissioner and held that the Applicant was not entitled to the input tax credits as the relevant GST returns were all lodged outside the four-year period specified in s93-5.

The s93-10 carveout only applies where a taxpayer has made supplies that have been treated as input taxed, but where the Commissioner changes his mind within the four-year timeframe and treats them as creditable. The Applicant ran a cleaning business. She made no input taxed supplies and her arguments were misconceived.

The objection decision denying her entitlement to input tax credits was accordingly confirmed.

Comment

This case is further proof, if any is needed, of the importance of taxpayers staying on top of their GST lodgement obligations. If they don't catch up on their outstanding lodgements withing the four-year timeframe they miss out on their input tax credits, which seems rather harsh.

It is the responsibility of all taxpayers to comply with their ATO lodgement and payment obligations, but without excusing the late lodgements in this case, one wonders how the ATO allowed her to fall so far behind.

Karagounis v C of T [2024] ARTA 80 (11 December 2024), General Member J Dunne

Taxpayer's unsuccessful FOI request

The ART has upheld an Internal Review Decision by the ATO denying (with a couple of limited exceptions) the Applicant's access to documents relating to family trusts he and his family had been associated with for many years. The self-represented Applicant needed the information for the purposes of personal legal proceedings and his dealings with Services Australia.

Background and facts

The problem for the Applicant, Mr Akers, was that some six years before making the FOI request, in his then capacity of trustee, he arranged for the ABNs and GST registrations of the trusts to be cancelled. This meant that, at the time of making the FOI request, he was a different entity to each of the trusts and he was not seeking the information in the capacity of trustee for the trusts.

While persons are not required to explain the reasons for making their FOI request, the self-represented Applicant indicated he needed the trust information in the context of some legal disputes he was involved in, as well as a dispute with Services Australia about his eligibility for certain social security benefits.

The particular documents sought under the FOI request were described as the 2016-17 income year profit and loss statements and balance sheets for two family trusts, trust income tax returns, as well as documents that wound up the trusts. Most of the documents sought included TFNs for the trusts.

Notwithstanding Mr Akers' previous involvement with the trusts, the Commissioner denied access to all but two of the documents located by him on the basis that doing so would be an illegal breach of the secrecy provisions in Div 355, Schedule 1, *Taxation Administration Act 1953*. This made the documents exempt from production under s38 *Freedom of Information Act 1982*.

The Applicant requested an internal review of the decision, which confirmed that:

» the documents sought related to the trusts, which has been terminated

» the Applicant did not have authority to deal with the ATO on behalf of the trusts; and

» the requested documents were exempt from production under s38 of the *FOI Act*.

The Internal Review Decision was referred to the Tribunal for review.

Applicant's arguments

The Applicant's argued that, as the appointer and trustee of the trusts and his involvement in attending to tax compliance obligations for the trusts, the documents sought were not protected from disclosure as they were personal to him and his family and the *FOI Act* allows an agency to release personal documents. Disclosure was alternatively permitted because he was a "primary entity" or a "covered entity" under Div 355.

Failing that, the Applicant argued the Commissioner should recognise his special circumstances by exercising his discretion to release the documents sought, in spite of the technical operation of Div 355 and s38. The Applicant also argued that the information ceased to be protected once the trusts were no longer operational.

Consideration

1. The first finding made by the Tribunal was that each of the disputed documents included “protected information” as per s355-30(1) *TAA 1953* – ie. the information was disclosed or obtained under a taxation law, related to the affairs of an entity and identified the entity.
2. As for the argument that the *FOI Act* allows for the disclosure of personal information of the Applicant, the Tribunal ruled that, in spite of him being a trustee at the time the trusts were deregistered, information about the affairs of the trust is not personal information about the Applicant, certainly not at the time of making the FOI request.
3. On the “same entity” argument, the definition of term “entity” in s960-100 required a finding that the Applicant could not be regarded as being the “same entity” as either of the two trusts. As such, releasing information about trusts to the applicant would involve disclosing it to another entity, in breach of Div 355.
4. The Tribunal dismissed the “covered entity” as being misconceived – the Applicant is not a tax agent, BAS agent or legal practitioner.
5. The Tribunal also held that there was nothing in the law which provides that the information ceased to be protected after the trusts were deregistered.
6. The discretion the Applicant asked the Tribunal to exercise does not exist under the law.
7. And finally, s8WB *TAA 1953* makes the unauthorised recording, use or disclosure of TFNs an offence, further dictating against the release of the documents sought (although one would think the offending TFNs could have been redacted).

The Internal Review Decision denying the Applicant access to the documents sought was therefore confirmed.

Comment

It does seem a little odd that the Applicant, who had been closely involved with the tax affairs of the trusts right up to the time of their deregistration, was unable to gain access to the documents sought. There are no third parties who would come to harm as a result of disclosure and it is difficult to conceive of a public interest basis for the refusal. But the law is black and white, with no room for discretion. Perhaps there should be.

Business and tax records of entities that are being de-registered for any reason (inactivity; closing down a business structure) should be retained in case they are unexpectedly required in relation to future events.

Akers v C of T (Freedom of Information) [2025] ARTA 60 (3 February 2025) General Member C Willis

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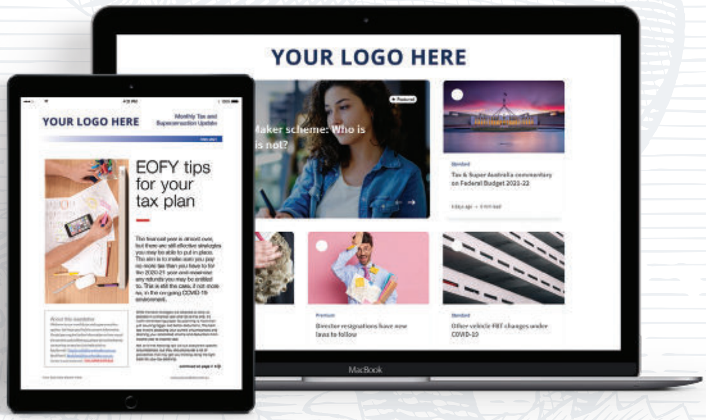

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Status of Tax Matters @ 24 February 2025

(This table is not intended to be comprehensive)

Status of Tax Matters @ 24 February 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.	Before the House of Representatives
Administrative Review Tribunal (Miscellaneous Matters) Bill 2024 » Amends 52 Commonwealth Acts to support the establishment of the Administrative Review Tribunal (ART)	Act No 14 of 2025

Scheduled Parliamentary sitting days

The Budget sittings are scheduled for both houses from 25th to 27th March 2025, but whether those eventuate is very much in the lap of the PM and the possible announcement of an election date.

Appeals

There are no appeals to report this month.

INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA WEBINAR

Designer trusts: split, cloned, umbrella and corporate trusts

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

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Details

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

Presenter

Matthew Burgess
Director, View Legal

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

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

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

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