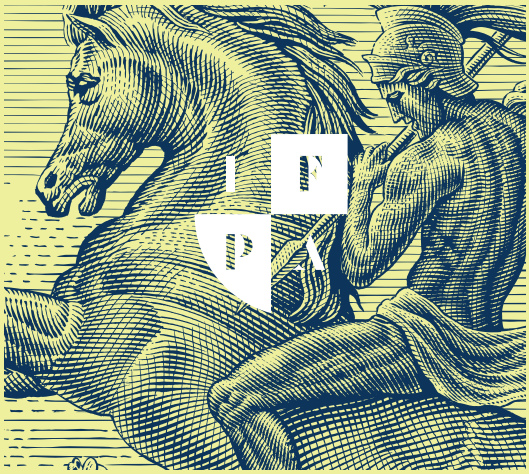
Monthly Tax Update

May 2025

INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA



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

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

Monthly Tax Update

May 2025

These notes are a compilation of key case law, regulator updates and industry insights for you to easily stay abreast of the ever-changing tax landscape.

We hope you enjoy this update.

Warm regards,

The Team at the Institute of Financial Professionals Australia

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Contents

Billabong founder enjoys partial success at Full Federal Court

In a majority decision, the Full Federal Court has upheld the Commissioner's Part IVA determination cancelling a capital loss arising from the transfer of listed shares to a self-managed super fund (SMSF), while the taxpayer, Mr Merchant, had a partial but significant win in relation to one of two dividend stripping determinations arising from the forgiveness of loans by corporate entities controlled by him.

Facts and previous decision

The relevant facts and the reasons for decision by the Primary Judge (Thawley J) are set out in detail in our July 2024 Notes. Please contact Member Services if you require a copy.

The two main issues on appeal were:

1. The making of a Part IVA determination cancelling a capital loss arising from the transfer of high cost Billabong (BBG) shares in 2015 by Mr Merchant's family trust (MFT) to his SMSF, chrystallising a capital loss of $56.6 million in anticipation of the sale of all of the shares in Plantic – a start-up company wholly owned by the group since 2010 and which required ongoing financial support.
2. The application of the dividend stripping provisions in s177E(1)(a)(ii) to the forgiveness of debts owing by Plantic to two Merchant group companies, GSM and Tironui, for no consideration on the basis that the transactions were schemes having substantially the effect of a scheme by way of or in the nature of dividend stripping.

There was also a TOFA issue in relation to the expiration of MFT's future payment rights under the sale agreement. All three judges on the Full federal Court agreed with the decision of the Primary Judge (PJ) that no deduction was available in relation to this issue.

The BBG sale agreement and the Part IVA issue

Majority view

One of the main and most likely lines of attack on the Part IVA determination was that the PJ had considered Mr Merchant's actual purpose rather than his objective purpose. The PJ may have unintentionally left the door ajar for such an argument by the unfortunate use of language in his reasons for decision:

> *"Section 177D(1) provides an objective test used to determine actual purpose."* at [PJ 250(a)]

and:

> *"the real reason for the BBG Share Sale was to crystallise a capital loss in the MFT which was regarded as beneficial whether Plantic was sold by way of asset sale or by way of share sale."* at [PJ 362];

The majority (McElwaine, Hespe JJ) preferred to place the PJ's comments in context, however, and found that he had not misunderstood the need to determine dominant purpose on the basis of objective findings of fact.

> *"In our view, when the summary is read in entirety and with the cross referencing to the authorities, it cannot be concluded that the primary judge fundamentally misunderstood the statutory task. The balance of his Honour's reasons (as demonstrated in addressing the second issue) are replete with reference to the objective task."* at [163]

Nor did the majority accept the appellant's argument that the PJ had impermissibly strayed into considering findings of subjective purpose on the part of scheme participants in relation to the BBG share sale.

The appellant also argued that the PJ had unduly focused on the tax consequences of the BBG share sale and had given insufficient weight to the underlying commercial objectives at play – achieving the best sale price for Plantic; MFT's need of a cash injection; getting the BBG shares into a concessional superannuation environment; the liberation of cash out of the SMSF. The resulting CGT loss was merely a context in which these commercial objectives were achieved. Tax avoidance was not the main game here.

The majority was not accepting of this argument, the problem for the appellants being that the BBG share sale was made to a related party so that there was no change in the underlying ownership and control of the BBG shares. Also, the significant capital loss that resulted from the sale was unrelated in any commercial sense to the anticipated sale of the Plantic shares. Moreover, the PJ had decided, on an objective view of the evidence, that MFT was not in fact in need of a cash injection at the time of the BBG share sale and the Appellant's argument that the BBG shares represented a good investment for Mr Merchant's SMSF was rather shaky, given BBG had ceased to pay dividends in 2012.

Dissenting view

The dissenting judge on the other hand (Logan J), considered the PJ had fallen into serious error by reason of his references to his above references to "actual purpose" and "the real reason", and should not have upheld the Commissioner's Part IVA determination.

The BBG transaction involved the sale of ASX listed shares at market value, which on the face of it seems hardly to suggest tax avoidance of the blatant, artificial and contrived kind. Indeed, Logan J attached some significance to the fact that the Commissioner conceded at the hearing that, had the BBG shares been sold on the open market for the same price (and realised the same capital loss), the s177D determination would not have been made.

Also, immediately before the sale of the BBG shares to the SMSF, the sale of the Plantic shares was merely a possibility, and fell short of a reasonable expectation, which the PJ and the majority seem to have hitched their wagon to in considering purpose. In his Reasons for Decision, Logan J cautions against the "false wisdom of hindsight" by taking the upcoming sale of the Plantic shares as a given when weighing up the purposes of the scheme participants.

The loan forgiveness and dividend stripping issue

Majority view

In relation to the dividend stripping issue, the majority ruled that the PJ had failed to properly distinguish between the purpose and effect of the scheme (being the loan forgiveness by the two group companies). The distinction is important in relation to the question of whether the Commissioner's cancellation of the capital loss arising from the BBG sale is to be factored into consideration of s177E.

The Commissioner's s177D determination had retrospective effect and, contrary to the approach taken by the PJ, this requires a quantitative analysis of the effect of the debt forgiveness on the two group companies concerned without the capital loss on the BBG share sale being factored in. The majority works through the impact of the debt forgiveness on those two companies and MFT absent the BBG sale in paras 374 to 395. The dividend stripping rules have to be applied separately for each creditor company, Tironui and GSM.

In relation to Tironui, the analysis shows that the debt forgiveness amount ($4.2 million) eliminated the majority of its retained earnings as at 30 June 2015 ($4.6 million):

> *"The amount of the debt forgiveness represented substantially all of the retained profits of Tironui. The purpose of the scheme was to enable an associate of Mr Merchant to receive capital proceeds in an untaxed form whilst relieving him of the potential liability for top up tax on a distribution of profits of Tironui. The Tironui debt forgiveness had the substantial effect of a scheme by way of or in the nature of dividend stripping."* at [391]

The situation for GSM was quite different, however, as its retained earnings as at 30 June 2015 were $218.9 million, meaning that the debt forgiveness amount of $50.2 million was less than 25% of is retained earnings.

The majority concluded that, absent the BBG capital loss being available to the MFT but taking into account some $40.1 million in non-BBG capital losses, there would still have been significant taxable income in MFT, which would have flowed through to GSM as the beneficiary with a 100% entitlement. Indeed:

> *"The effect of the cancellation of the BBG Capital Loss was to subject an amount equal to a substantial proportion of the debt forgiven amount to tax at a higher rate than would have been payable by Mr Merchant had he received a fully franked dividend from GSM (and in fact GSM had the available franking credits to fully frank that dividend)."* at [402]

This outcome was not regarded by the majority as "having substantially the effect of a scheme by way of or in the nature of dividend stripping".

Because the effect of the s177D determination cancelling the BBG capital losses, the $50.2 million attributable to the GSM debt forgiveness is excised from the s177E assessment issued to Mr Merchant and approved by the PJ. That still leaves the $4.2 million attributable to the Tironui debt forgiveness, but all up this is a big win for Mr Merchant, perhaps making it a one all draw when taking the cancellation of the BBG capital loss into account.

Dissenting view

Loan J just didn't see that the loan forgiveness transactions came close to falling within the dividend stripping rules at all, and was again critical of the PJ for undertaking an actual purpose analysis.

> *"The point is that nothing about the debt forgiveness rendered the capital gain made on the Plantic shares "tax free". The debt forgiveness increased the amount of the capital gain."* at [55],

and:

> *"a debt forgiveness which maximises an assessable capital gain is, in itself, the antithesis of "dividend stripping"."* at [76]

Logan J also makes some general observations about tax administration in this area:

> *"There is a considerable risk in the administration of taxation legislation of seizing upon beneficial taxation outcomes and seeing in them a dominant purpose on the part of a person to obtain the tax benefit. It is all too easy in such circumstances to leap to that conclusion and to tailor the logic to fit. Especially that is so where there is revealed in exchanges with tax advisors references to apprehended tax benefits."* at [80]

Comments

The majority observed that the PJ expressed the view that the application of both s177D and s177E to the two interrelated transactions was unfair to the taxpayer and asks, rhetorically, why the possible application of the compensating adjustment provisions in s177F(3) were not considered by either of the parties:

> *"It is of concern that neither party raised the potential application of s 177F(3) in their submissions prior to the issue being agitated by the Court below. Before us, the Commissioner conceded that the outcome of the decision of the primary judge (which upheld both the s 177E Determinations and the s 177D Determinations) was not "fair and reasonable" but declined to articulate what, if any, s 177F(3) compensating adjustments were contemplated."* at [410]

Each side takes something positive away from the majority decision, although neither will be totally happy either. There must be a strong likelihood of special leave applications being lodged with the High Court, possibly from both sides.

Merchant v C of T [2025] FCAFC 56 (22 April 2025), Logan, McElwain and Hespe JJ

Payment not an "excluded" ETP but decision limited to facts and evidence

A Court or Tribunal's power to review an ATO private ruling decision is limited to the facts and arguments set out in that ruling .However, all is not lost if these are inadequate to the taxpayer's case – the taxpayer can always instead apply for review of the relevant assessment.

Facts

The Commissioner issued two private rulings to the taxpayer in relation to whether a payment of some $260,000 received by the taxpayer was an employment termination payment (ETP).

The payment was received by the taxpayer in connection with the settlement of a protracted and unpleasant dispute with his employer over the taxpayer's concern that the employer was not properly applying the transfer pricing provisions. A Deed of Release between the parties effected the settlement after the taxpayer lodged complaints with the Fair Work Commission.

The first ruling was issued in November 2023 and it ruled that the payment was an *"employment termination payment"* as defined in s995-1 and s82-130 of the ITAA 1997. A second private ruling was issued in April 2024 by agreement between the ATO and the taxpayer because the first ruling had not considered whether the payment was an "excluded payment" under s82-10(6)(d) (ie, being compensation for "personal injury, harassment, discrimination, unfair dismissal etc). The Commissioner ruled that the exclusion did not apply in the circumstances.

The Commissioner also issued an assessment for the 2024 year to reflect his rulings.

Crucially, in issuing the second private ruling the Commissioner did not put all the factual scheme in that ruling that was contained in the first ruling. This material went to the issue of the nature of the payment and the effect of the relevant deed of settlement. Further, it did contain all the taxpayer's evidence.

The taxpayer objected to the second private ruling and the Commissioner disallowed the objection. The taxpayer then sought review before the Tribunal of that decision.

Broadly, *before the Tribunal* the taxpayer argued that the payment was also for the harassment and discrimination he endured in his dispute with his employer and that the deed of release was entered into to settle his claims – including his allegations of unfair dismissal. But note these matters had not been set out or fully expanded in the second private ruling.

Issues

Whether all the taxpayer's evidence at the hearing and before the Tribunal could be taken into account by the Tribunal in reviewing the second private ruling – or whether it was limited to the scheme and evidence outlined in the second ruling.

Whether the taxpayer has met his burden of proof in demonstrating that the second private ruling is incorrect in whole or in part ie, that the payment was in whole or part an excluded payment under s82-10(6)(d) of the ITAA 1997.

Decision

Issue 1 Evidence that could be taken into account

Various aspects of the taxpayer's evidence were not set out in the scheme of the second private ruling and therefore could not be considered by the Tribunal on review of the second private ruling. This was because of case law precedent that any information that is not set out in the scheme of a private ruling cannot be taken into account by a Court or Tribunal on review.

Issue 2 Did the exclusion apply on the available evidence

The exclusion in s82-10(6)(d) did not apply on the available evidence.

Some of the matters that were not in the scheme of the second private ruling, but which were led in evidence before the Tribunal, were ***critical*** to the taxpayer's case:

> *"...there are some critical matters in the Applicant's evidence and/or in material before the Tribunal that are "additional facts" as they are not set out in the scheme of the private ruling, and cannot be said to be merely clarifying facts that are set out. This means the Tribunal is constrained and cannot consider these matters when determining whether the private ruling is correct. The correctness of the conclusions in the private ruling must be assessed only in relation to the facts outlined in the private ruling scheme"* (para 95).

This critical evidence related to, among other things, the taxpayer's employment contract and events surrounding the signing of the Deed of Release – and whether it involved issues of harassment, discrimination and/or unfair dismissal.

Because those matters were not in the private ruling scheme and because of the constraints on the Tribunal's review of the second private ruling, the Tribunal could not be satisfied that the exclusion applied ie, it could not be satisfied that the payment was primarily for harassment and discrimination and to settle all his claims etc.

Other

However, the Tribunal said that the taxpayer could consider objecting to the assessment where he could set out all of the facts and arguments that had not been able to be considered in this case because of his decision to object to the second private ruling.. and that *"the final determination of this issue in the context of s82-10(6)(d) is for another case to consider".*

XRXR and FCT (Taxation and business) [2025] ARTA 357, 9 April 2025

Residential development of farmland not a business

The Federal Court has ruled that the Appellant, Mr Morton, who arranged for the development, subdivision and sale of his pre-CGT farmland through a third party was not carrying on the business of developing land, nor was he engaged in a profit-making scheme. Hence the net proceeds from the sale of farmland known as "Dave's Block" were not assessable income in the 2019 and 2021 years of income, as alleged by the Commissioner.

Facts

Mr Morton had owned and farmed Dave's Block in Tarneit, in Melbourne's west, since 1980 when he acquired it from his father. Covering some 10 acres, Dave's Block was part of a larger 384 acre property known as Morton's Farm, which had been worked as a single farm by Mr Morton's father since the 1950s.

After the land was rezoned as residential in 2010, Mr Morton entered into a legal agreement with a specialist property developer to develop, subdivide and sell the land as part of a residential housing estate. The legal and commercial terms of the agreement with the developer are significant.

Under the agreement, the property developer undertook to obtain all the necessary approvals and undertake all of the development work, including subdivision and sales. The developer was also responsible for financing the project, and Mr Morton was not prepared to offer any of his land as security to assist the developer in arranging finance. Critically, Mr Morton was not at risk with regard to the development work, but neither did he stand to share in any gain arising from that part of the project. The proceeds from the sale of the subdivided lots were split between the parties on a percentage basis, leaving the developer exposed to any losses arising from cost overruns or other contingencies.

The physical work involved was extensive, and included:

» earthworks, including sewerage and drainage

» landscaping, including the construction of parks

» installation of utilities such as water, electricity, gas, and NBN connections

» construction of roads, including markings, kerbs, median strips, street signs and bridges

» construction of footpaths, driveway crossovers, and bin pads, and

» installation of street lighting.

The work was completed late in 2018 and sales of individual lots commenced in the 2018-19 income year.

The Commissioner issued amended assessments for 2019 and 2021, treating the net sales proceeds as assessable income and increasing Mr Morton's taxable incomes in those two years by $4.4 million in total. Mr. Morton objected, claiming the proceeds represented capital receipts and appealed against the disallowance of the objections. The Commissioner argued the proceeds were income from carrying on a property development business or a profit-making undertaking or scheme.

Consideration by the court

In considering the matter, the court referred to a number of precedential cases which establish that where a property has not been acquired for resale at a profit (as was clearly the case here), the mere realisation of the value of the property in an enterprising way does not generally constitute the carrying on of a business or the carrying out of a profit making scheme.

Those cases include *Californian Copper* (Privy Council, 1904), *Hudson's Bay* (Privy Council, 1909), *Scottish Australian Mining* (HCA, 1950), and *Williams* (HCA, 1972).

Something of an outlier was *Whitfords Beach* (HCA 1982), where the mere realisation argument did not stand scrutiny because the introduction of new corporate shareholders meant the corporate entity had clearly embarked on a new business enterprise following the change in shareholders.

The court ruled in Mr Morton's favour because of a number of critical factors:

» The land was not purchased for the purpose of resale and Mr Morton had not embarked on a business venture involving the land at a later time.

» The rezoning in 2010 put the financial viability of the farm at risk due to higher rates and land tax. Mr Morton had not set in motion the events that led up to the subdivision project.

» He continued to farm the property up to 2015 in spite of the earlier rezoning.

» While the property developer conducted itself in a business-like manner, Mr Morton had no active involvement in the development work and had no business infrastructure relating to the project. The fact that the developer was organised in a business-like manner in no way impacted on Mr Morton. To argue otherwise would be akin to saying that a householder who engages a plumber is somehow engaged in the plumbing business.

» Mr Morton did not expose himself to the risks and rewards of the development project – those risks were all assumed by the property developer.

» The large scale of the overall project did not in and of itself turn it into a business or a profit making scheme.

» The property developer was not the agent or manager for Mr Morton.

Comment

The scale and scope of the development activities may well have amounted to a business had they been undertaken by Mr Morton himself, either on his own or jointly with someone else. But he decided that he lacked the requisite skills and appetite for risk to become directly involved and by contracting the development work out to a third party he probably left money on the table for the property developer. By avoiding any direct involvement in the development work he is being treated by the tax system as having disposed of a pre-CGT asset – subject, of course, to any appeal the Commissioner might decide to bring.

Morton v C of T [2025] FCA 336 (11 April 2025), Wheelahan

Long distance truck driver succeeds in large claim for meals, for now

A long distance truck driver fighting the disallowance of his claim for meal expenses was probably lucky to convince the ART that an amount in excess of $30,000 had been incurred during the 2020-21 year in gaining or producing his assessable income. Having cleared that hurdle, the Tribunal held that the substantiation exception in s900-50 ITAA 1997 applied to relieve him of the normal requirement to produce written evidence covering his entire claim.

These cases come up more often than they should, and the Commissioner should consider changing his approach to administering the law in relation to these sorts of claims.

Facts

The Applicant, Mr Shaw, is an employee truck driver based in Perth. His truck runs cover long distances across sparsely populated areas.

He received a travel allowance from his employer which he declared, and in the year ended 30 June 2021 he was away from home for 310 nights. Relying on advice from his accountant, he multiplied that number by the Commissioner's reasonable travel allowance amounts set out in TD 2020/5 ($105.75 per day allocated across three meals), resulting in a claim of $32,782.50. The amount of the claim was in excess of the travel allowance received.

Mr Shaw and his accountant then fell into the common trap of thinking that he was not obliged to provide receipts or other documentary evidence to back up his claim because it fell within the limits set in TD 2020/5.

They were wrong about that. The limits set out in TD 2020/5 are an administrative safe harbour but they do not represent an automatic statutory deduction. Perhaps they should.

On audit, the ATO disallowed Mr Shaw's $32,782.50 claim in its entirety. On objection, the Commissioner was prepared to accept that he would have spent a somewhat stingy $19 per day on meals, being $5 for each of breakfast and lunch, plus (wait for it) $9 for dinner. So, a coffee for breakfast, a sausage roll for lunch and maybe two sausage rolls for dinner.

There is nothing in the Reasons for Decision that explains where those numbers came from, but multiplied by Mr Shaw's 310 nights away from home, it results in an allowable deduction of $5,890, leaving $26,892.50 in dispute.

Mr Shaw sought to have the objection decision reviewed by the Tribunal.

What the law says

The law is kind of clear about what is required, although you have to read it carefully. Meal expenses are a work expense deductible under s8-1 ITAA 1997, so the place to start is s900-15 (all references are to the ITAA 1997):

> *"(1) to deduct a work expense:*
>
> *(a) It must qualify as a deduction under some provision of the Act outside this division.*
>
> *and*
>
> *(b) You need to substantiate it by getting written evidence"*

The term "written evidence" is defined in s900-115 as a document that sets out the name of the supplier, the amount of the expense, a description of what was supplied and the date. Absent any other provision, the substantiation rules would require truck drivers to maintain written evidence for each and every meal they buy while traveling – quite a burdensome task.

But the law cuts a bit of slack for those who are in receipt of a travel allowance:

> ***"900-50 Exception for domestic travel allowance expenses***
>
> *"(1) You can deduct a travel allowance expense for travel within Australia without getting written evidence or keeping travel records if the Commissioner considers reasonable the total of the losses or outgoings you claim for travel covered by the allowance"*

At face value, that looks like it means that you don't need to produce any written evidence where you are in receipt of a travel allowance and your claim for meal expenses does not exceed the reasonable limits published each year by the Commissioner. But remember, in order to qualify for a deduction in respect of a work expense it firstly has to be a deductible amount, in this case under s8-1. And in order to be deductible under s8-1, an amount has to be incurred.

So, in order to get to the provision that relieves you from having to keep written evidence about your meal expenses, you first have to run the gauntlet of s8-1, which requires that you have incurred the relevant amount, for which you need some form of written evidence. How Kafkaesque.

And if that's how the substantiation rules work, what is the use of even having the substantiation exception? Little wonder that taxpayers and even some of their advisers sometimes get confused.

What the Commissioner says

The Commissioner has said in his guidance material (TR 2004/6) that in the context of the substantiation exception, the requirement to show that an amount has been incurred involves a lower bar than that involving the need for "written evidence". But quite how much lower isn't made clear, as what counts as satisfactory evidence for a claim *"will vary according to individual circumstances and the nature of the claim."* at [para 15]

Thankfully, the ATO's guidance is a lot clearer in example 3 of para 28, TD 2023/3, which considers the situation involving Glenn, a truck driver traveling between Melbourne and Adelaide. As well as having his work diary, Glenn would need to show that he received an allowance for meals on each travel day and demonstrate his typical spending pattern on meals. This could be achieved by way of diary entries, bank records and receipts kept for a representative sample of trips.

Mr Shaw's evidence

The Applicant was unable to provide evidence about his expenditure on specific meals, but he was accepted as being a witness of truth by the Tribunal. He explained that because he traveled to a lot of remote locations, including driving up to the Pilbara and across the Nullarbor, it was often necessary to sleep in his cab in locations where there were no food outlets. He therefore had a freezer and a hotplate in his cab which he would use to prepare his meals.

Mr Shaw's evidence was that he would regularly transfer money to his partner's bank account on a Monday so that she could undertake a big shop for the provisions he would need on his travels for the coming week. On cross examination he conceded that on occasion his partner might use some of those funds to also buy groceries for the family, although he indicated these private purchases were infrequent and involved only small amounts.

Mr Shaw provided bank statements for the period from April 2020 to April 2021 which illustrated the money transfers made to his partner. He also estimated that when he did purchase food on the road, he would typically spend about $122 per day, which was in excess of the Commissioner's guidelines. However, he was happy to forego the additional claim if it simplified his substantiation obligations.

Consideration by Tribunal

In reaching its decision, the Tribunal was critical of both parties for the way they had approached the case.

It will come as no great surprise that the Tribunal was unimpressed with the unrealistically low spending levels the Commissioner was prepared to concede in allowing the objection in part:

> *"the objection decision allowed $19 per day for Mr Shaw's meals while on the road. This is, in the Tribunal's assessment, an absurdly inadequate amount."* at [30]

And:

> *"The Tribunal is not sure how the Commissioner thinks anyone would fund three meals a day for $19 in the Relevant Year, let alone for an individual of Mr Shaw's stature."* at [31]

At the same time, the taxpayer's representative was rebuked for wrongly thinking that the substantiation exception in s900-50 amounts to a statutory deduction where the claims are within the Commissioner's published reasonable expenditure guidelines:

> *"If a tax agent in Australia takes a similar approach to Mr Shaw's tax agent in the context of TD 2020/5, they should change their practice as that is not supportable at law."* at [35]

Practitioners with truck driver clients would do well to heed this advice. Otherwise they could themselves be at risk if their clients have their claims adjusted and penalties applied.

The Tribunal helpfully puts Mr Shaw's representative straight by referring to the need to keep proper records for a short period to establish the amounts incurred for the full year of income. This advice is consistent with the Commissioner's guidelines in TR 2004/6, TD 2023/3 and TD 2020/5:

> *"From a practical perspective, a well-advised truck driver claiming the maximum reasonable daily amount (or in fact any amount) would maintain full substantiation of meal expenses for a short period in each year when relying upon TD 2020/5. That is what is said in TD 2020/5."* at [39]

While Mr Shaw was not able to provide full substantiation for even a short representative period, the Tribunal was prepared to accept an arbitrary basis for apportioning the grocery shopping as between purchasing provisions for his on the road meals and private purchases. In doing so, the Tribunal pointed out there is publicly available information about grocery shopping spending patterns the Commissioner could have relied on. The Tribunal also accepted the bank statements provided and took account of Mr Shaw's evidence about his eating and spending habits in deciding that, on balance, he had incurred the relevant expenditure on meals.

That conclusion triggered off the substantiation exception in s900-50.

Importantly, the Tribunal further held that, in any event, s900-200 would also apply to allow a deduction for the amount claimed. That section provides that a right to deduct an outgoing is not affected by a failure to follow the rules in Division 900 where the taxpayer had a "reasonable expectation" that they would not need to do so in order to claim the deduction.

This is not the first time s900-200 has been applied in support of a truck driver's claim for meal expenses. In *Gleeson v C of T* [2013] AATA 920 (20 December 2013), Senior Member G Lazanas, having already ruled that the meals expenditure claimed had been incurred for s8-1 purposes, also held that the s900-200 exception applied in any event – at [61-63]. In that case, the Tribunal member was satisfied, on the basis of advice given to Mr Gleeson by his tax agent, as well as ATO guidance material that could easily be misinterpreted, that he had a reasonable expectation that he would not have to follow the substantiation rules in order to get his deduction for meal expenses. That same line of reasoning could easily be applied to most long distance drivers caught short on their written evidence.

Comment

All things considered, Mr Shaw was probably a little lucky to strike a Tribunal member who was prepared to adopt a practical approach on what he needed to prove to establish how much had been incurred in meal expenses.

However, the Commissioner may wish to consider changing the way he administers the law in relation to long distance truck drivers. The reasonable travel allowance caps that are published every year don't seem excessive and most drivers seem happy to keep their claims within those limits.

The caps can result in claims of up to around $30,000, and while the Commissioner might not welcome such large claims, meals purchased while traveling overnight for employment reasons have always been a legitimate tax deduction.

It is surely not unreasonable for the Commissioner to accept claims based on fatigue management records that establish the number of nights away from home and to apply that number to the Commissioner's caps. That would operate much like a statutory cap which, while not part of the law, would be well within the Commissioner's power of general administration.

Also, it doesn't look as though the Commissioner gave any thought to the potential application of s900-200 by trying to establish whether Mr Shaw had a reasonable expectation that he could safely claim any daily amount that falls within the Commissioner's published guidelines. This is an important part of the substantiation rules and it should not have been left to the Tribunal to rectify that oversight.

The reasonable expectation rule in s900-200 is a further reason for the Commissioner to accept, under a fair and practical approach to tax administration, that drivers restricting their claims for meal expenditure to the annual caps published by the ATO are taken to have incurred that level of expenditure for s8-1 purposes.

Anything less would just be perpetuating an unwarranted "gotcha" approach to tax compliance that frankly does the ATO no credit.

Unless and until the ATO's approach to claims for meal expenses is changed, drivers and advisers need to understand the technical requirement to maintain proper written evidence of meal expenditure for at least a two-week representative period each year to demonstrate how much has been incurred for the full year of income. The s900-50 exception to the requirement to maintain written evidence can then be applied to the balance of the claim.

Appeal

The Commissioner is digging in on this one and has lodged an appeal against the ART decision to the Federal Court.

Shaw v C of T [2025] ARTA 224 (19 March 2025), General Member J. Dunne

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A verbal conversation with, or assurance from, a TPB official cannot legally or effectively remove a TPB-imposed services condition.

Facts

In 2014, the applicant was granted tax agent registration subject to a "BAS Services" condition, which restricted him to providing Business Activity Statement (BAS) services and explicitly prohibited him from preparing and lodging income tax returns (ITRs) for clients. This condition was imposed based on his qualifications and experience at the time of his registration.

Between 2014 and 2021, the applicant breached this condition by regularly lodging ITRs under his own registration number (RN), an action outside the scope of his authorized services. Following an investigation, the Tax Practitioners Board (TPB) issued a "cease and desist" letter, but he continued to lodge ITRs. Consequently, in June 2021, the TPB terminated his registration and imposed a 12-month non-application period, effective from 19 August 2021.

The applicant sought review of the TPB's decision. He argued that he was unaware of the need to lodge ITRs under a supervising tax agent's RN and claimed a conversation with a TPB officer led him to believe the BAS Services condition was no longer effective.

Note: He later altered his evidence, suggesting the conversation was with someone other than a TPB officer. He also provided a personal memo documenting the alleged conversation, which instead confirmed his awareness of the registration condition.

Issues

» Whether he breached the BAS Services condition of his tax agent registration.

» Whether the TPB's decision to terminate his registration and impose a 12-month non-application period was lawful and appropriate.

» Whether his claims regarding the alleged conversation with a TPB officer were credible and sufficient to overturn the TPB's decision.

Decision

The ART upheld the TPB's decision to terminate the applicant's tax agent registration and affirmed the 12-month non-application period.

It found on the evidence that the applicant breached the BAS Services condition by lodging ITRs under his own RN from 2014 to 2021. Further, his continued lodgment of ITRs after receiving the TPB's cease and desist letter demonstrated disregard for the registration condition.

In so finding, the ART rejected his claim that a conversation with a TPB officer led him to believe the BAS Services condition was ineffective. It also found that his personal memo contradicted his assertion, indicating he was aware of the condition.

In addition, it found that his subsequent change in evidence – claiming the conversation was with a non-TPB officer – further undermined his credibility, as he provided no corroborating documentary evidence. In any event, the ART held that a verbal conversation, even if it occurred, could not legally or effectively remove the BAS Services condition.

Accordingly, the ART found the TPB's termination decision to be lawful and appropriate, given his repeated breaches and failure to comply with regulatory requirements. It also found that the 12-month non-application period was reasonable especially considering his age and circumstances.

In doing so the ART said that tax agents are bound by the conditions of their registration, and breaches undermine the integrity of the tax system and public trust and that in this regard, his actions, particularly after the cease and desist letter, demonstrated a lack of adherence to professional obligations.

Finally, the ART also agreed with the TPB's contention that in all the circumstances the applicant lacked the professional judgment required of a registered tax agent and that therefore he also failed to meet the fit and proper person requirement for registration.

Mihajlovic and Tax Practitioners Board [2025] ARTA 353,10 April 2025

Investor loses valuation and CGT arguments in forestry scheme case

The Federal Court has dismissed a taxpayer's appeal in relation to a matter involving his $10m investment in a forestry managed investment scheme. Broadly, the Federal Court agreed with the Commissioner that the effect of exercising a Put Option and the execution of a Novation Deed by the taxpayer in relation to his forestry interest had the effect of giving rise to an assessable amount under s394-25 ITAA 1997 by reference to a reduction in the market value in the appellant's forestry interest of some $4.7million.

The court also held that the relevant product ruling (PR 2011/12) was not binding on the Commissioner as the taxpayer had not acted in accordance with the ruling in a material way.

Facts

Mr Aitken was an initial participant in the AgriWealth 2011 Softwood Timber Project. He took up 337 half hectare timberlots on 30 Jume 2011 at a total cost of $10,143,700, using mainly funds advanced by the Manager of the project. The total fee for each timberlot came to $30,100, which included a $343 fee for a put option, exercisable by 16 June 2016. His investment entitled him to a revenue deduction under Division 394 of $9,082,150 in the 2010-11 income year, being the GST-exclusive establishment service fee. That deduction was not in dispute.

On 1 July 2015, four years after making his investment, he exercised the Put Options in relation to all 337 timberlots. This entitled him to the payment of the $14,000 Put Option strike price totaling $4,718,000, which was applied to the loan originally advanced by the project Manager. The terms governing the project contemplated that Mr Aitken would transfer all of his interests in the timberlots to the project Manager within five business days. That transfer was never effected, however, as it was overtaken by a Deed of Novation which excised Mr Aitken's carbon sequestration and salinity rights and credits from his interests in the forestry rights before novating the remaining forestry rights and obligations in favour of the Manager.

There was a difference of views as to the market value, or the reduction in the market value of Mr Aitken's forestry interests on 1 July 2015. The Commissioner argued the market was equal to the put option's strike price of $14,000 for each timberlot, while Mr Aitken asserted total market value was around $300,000 in total (for the 337 timberlots), which was all that should be included in his assessable income in the 2015-16 income year. There was also a dispute about whether PR 2011/12 was binding on the Commissioner.

The law

Division 394 is an incentive provision which treats certain qualifying forestry investments on a revenue basis in relation to both the invested amounts and any proceeds received. There are conditions that have to be met, including a minimum direct forestry expenditure percentage of 70% by the Manager and a minimum participation commitment by investors of four years.

The Division achieves its aims in relation to forestry proceeds by adopting a notional CGT approach, so that the actual receipt of what might normally be income is expressly excluded from inclusion

as assessable income. Instead, the inclusion of assessable income in relation to forestry rights is determined under the CGT rules, but without giving investors the benefits of concessional CGT treatment.

The main operative provision is s394-25:

> *"(1) This section applies if:*
>
> *(a) you hold a *forestry interest in a *forestry managed investment scheme as an *initial participant in the scheme; and*
>
> *(b) at least one of these conditions is satisfied:*
>
> *(i) you can deduct or have deducted an amount for an income year under section 394-10 in relation to the forestry interest;*
>
> *(ii) the condition in subparagraph (i) would be satisfied if subsection 394-10(5) were disregarded; and*
>
> *(c) a *CGT event happens in relation to the forestry interest, other than a CGT event that happens in respect of thinning.*
>
> *(2) Your assessable income for the income year in which the *CGT event happens includes:*
>
> *(a) if, as a result of the CGT event, you no longer hold the *forestry interest--the *market value of the forestry interest (worked out as at the time of the event); or*
>
> *(b) otherwise--the decrease (if any) in the market value of the forestry interest as a result of the CGT event.*
>
> *(3) Any amount that you actually receive because of the *CGT event is not included in your assessable income (nor is it *exempt income)."*

Consideration by the court

A CGT asset is any form of property, including a legal or equitable right that is not property. It was common ground that Mr Aitken's rights under the Put Option were CGT assets, and that the potentially applicable CGT events were event A1 (the disposal of an asset) and event C2 (the ending of an intangible asset).

The court found that the exercise of the Put Option occurred before the entering into of the Novation Deed, although both occurred very early on 1 July 2015.

Mr Aitken argued there could only be one CGT event affecting his forestry interest since the provision refers to "event" in the singular. That argument was waived away by the court, relying on the *Acts Interpretation Act 1901*, which provides that words in the singular include the plural (and vice versa).

Mr Aitken also argued that there had been only one CGT event that had happened in relation to his forestry interests, and which gave rise to assessable income, and that was the entering into of the Novation Deed. While the exercise of the Put Option is a CGT event, his argument went, the Put Option is an entirely different CGT asset than the underlying forestry interest. For s394-25 to apply, the words "in relation to" mean that a CGT event had to apply to the forestry interest directly, which it did not.

The Commissioner argued that the words should be given a broad interpretation, and cited extensive case law to support his position. It is enough for there to be a CGT event which can be shown to have had the effect of reducing the market value of the forestry interest. The court firmly endorsed the Commissioner's position and ruled that the exercise of the Put Option was caught by s394-25(1)(c). And the amount of assessable income applicable to the Appellant is determined under s394-25(2)(b), since he continued to hold an interest in the carbon sequestration and salinity rights and credits that were split off under the Novation Deed.

Taking both the exercise of the Put Option and the execution of the Novation Deed into account, the court held there were two CGT events that gave rise to assessable income in Mr Aitken's hands:

> *"The first CGT event was the exercise of the Put Option, giving rise to assessable income equal to the decrease in the market value of Mr Aitken's forestry interest: s394-25(2)(b)."*
>
> *"The second CGT event was Mr Aitken's novation of the rights (and obligations) over the timber component of his forestry interest, but not those over the carbon sequestration and salinity rights and credits component, giving rise to assessable income equal to the market value of that part of the forestry interest he no longer held any rights over as a result of the CGT event: s394-25(2)(a)."* at [126,127]

The next step for the court was to determine the amounts of assessable income attributable to each of the two CGT events. Starting with the exercise of the Put Option, and weighing up case law that refers to willing but not anxious buyers and sellers who are all fully informed about the attributes of the timberlots, the court could see no good reason why the market value immediately before the exercise date would not be at least the amount of the strike price, or $14,000 for each timberlot.

Mr Aitken and his expert valuer had argued otherwise, suggesting the much lower figure of $896 for each timberlot, the basis for which is not apparent from the Reasons for Decision. The court then put the reduction in the market value attributable to the exercise of the Put Option as $X. The value of $X becomes conveniently irrelevant when taking into account the impact of the second CGT event, the Novation Deed.

The Novation Deed involves the disposal of the timber component of Mr Aitken's forestry interest in favour of the Manager for the same consideration as the Put Option strike price - $14,000 per timberlot. The court held that the market value of the forestry interest after the exercise of the Put Option (putting aside the excise of the carbon sequestration and salinity rights and credits) is the same as the market value of $X used in calculating the impact of the first CGT event.

Putting the two CGT events together, the amount of assessable income for the 2015-16 income year is:

> *$14,000 minus $X plus $X = $14,000 or $4,718,000 for the 337 timberlots*

The court also noted that the "evidentiary silence" surrounding the execution of the Novation Deed in a form that was at odds with PR 2011/12, and Mr Aitken's failure to attempt to put a value on the retained carbon sequestration and salinity rights and credits meant he had failed to discharge the onus of proving the amended assessment was excessive.

Finally, although not strictly necessary to decide, the court held that the Commissioner was not bound by PR 2011/12 as there had been material departures from the ruling in respect of the financing arrangements, the carve-out of the carbon and salinity rights and the use of the Novation Deed to supersede the exercise of the Put Option.

Aitken v FCT [2025] FCA 372 (17 April 2025) Bromwich J

Private Ruling: 15 year small business exemption - meaning of "in connection with retirement"

Question 1

Will section 152-105 of the *Income Tax Assessment Act 1997* (ITAA 1997) apply to reduce the capital gain that arose from the sale of a business by a sole trader?

IFPA: The issue was whether the CGT event was in "connection with the taxpayer's retirement", as required under s 152-105 of the ITAA 1997 – notwithstanding that under the sale agreement, the taxpayer becomes an employee in the business sold for a transitional period (albeit, with significant reduction in working hours)

Answer

Yes

» **This ruling applies for the following periods:**

Income year ended 30 June 2016

» **The scheme commences on:**

1 July 2015

Relevant facts and circumstances

» You are a sole trader who has conducted a business for over XX years.

» You sold your business to an unrelated party.

» At the time of the sale, you were over 55 years of age.

» A requirement of the business sale is that you become an employee in the business sold for a transitional period with significant reduction in working hours.

» In order to obtain the best sale price for your business, you agreed to this requirement.

» At the end of the transitional period, your working hours will be nil.

» You could not have retired without the sale of your business. The funds from the sale of the business would be used to fund your retirement.

Relevant legislative provisions

» *Income Tax Assessment Act 1997* section 152-105

» *Income Tax Assessment Act 1997* section 118-565

Reasons for decision

All legislative references are to the *Income Tax Assessment Act 1997* unless otherwise specified.

In order to apply the 15 year exemption under subsection 152-B, amongst other requirements, subparagraph 152-105(d)(i) requires that the CGT event that gave rise to the capital gain is in connection with your retirement.

The scope of the ruling will be limited to this aspect.

In connection with your retirement

Whether a CGT event happens in connection with an individual's retirement depends on the particular circumstances of each case. There would need to be the very least a significant reduction in the number of hours worked or a significant change in the nature of their present activities to be regarded as retirement.

In your case, it was a requirement of the business sale that you become an employee of the business sold for a transitional period with a significant reduction in the number of hours worked.

In order to obtain the best sale price for your business, you agreed to this requirement. The funds from the sale of the business will be used to fund your retirement.

After the transitional period, you will retire fully from the work force and your working hours will be nil.

We consider that the CGT event that gave rise to the capital gain, that is, the sale of the business as a sole trader, was connected with your retirement for the purposes of subparagraph 152-105(d)(i). Accordingly, you will be able to apply the 15 year exemption if all other conditions are met, such as those contained within section 152-10.

Comment

This is a case where it is easy to say that the CGT event was in "connection with the taxpayer's retirement". The fact that the taxpayer became an employee in the business for a transitional period, with a significant reduction in working hours indicates that retirement from the business is a real fact – as it is clear that after the transitional period, the taxpayer will retire fully from the work force. The case may not be clear if staying on in the business is for an unstated period and/or where there is no significant reduction in working hours.

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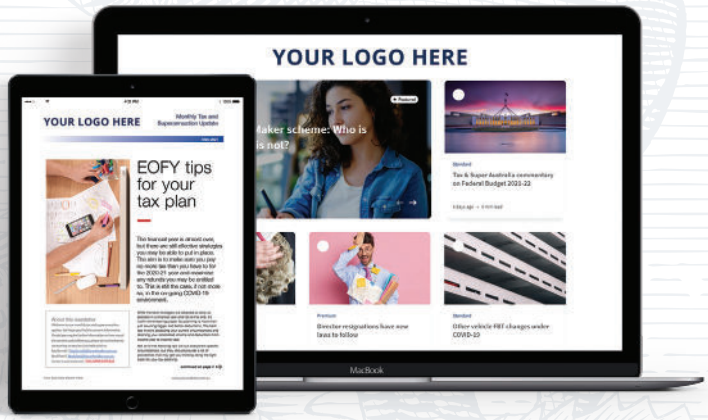

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Status of Tax & Superannuation Matters @ 24 April 2025

(This table is not intended to be comprehensive.)

Status of Tax & Superannuation Matters @ 24 April 2025	
Legislation	
Awaiting the legislative program of the new Parliament	
Scheduled Parliamentary sitting days	
Awaiting government announcements	
Appeals	
Shaw v C of T [2025] ARTA 224 (19 March 2025)	The Commissioner has appealed against the truck driver's successful review of his meal allowance claims by the ART.