Monthly Tax Update

July 2025

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Monthly Tax Update

July 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,

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Tax Agent's application for stay of two year ban refused

In any application for a stay of a ban accompanying the termination of a tax agent's registration, the "prospects of success" in the substantive matter will be a key factor to be taken into account. But protecting the "public interest" will be even more significant.

Facts

The applicants were an individual tax agent and the company through which he ran his tax agent's business. The Tax Practitioners Borad (TPB) terminated their tax agent registrations and imposed a two year ban for various breaches of the Code of Professional Conduct (the Code) contained in the *Tax Agent Services Act 2009* (TASA). The TPB also formed the view that he had ceased to meet the requirement of being a "fit and proper person" under s20-5(1)(a) of the TASA.

The breaches of the Code included:

- **failing to act honestly and with integrity** – by making false and misleading statements to the Commissioner in his capacity as a tax agent and as trustee for the Lunn Family Trust, and his preparing and lodging 14 income tax returns (ITRs) which included excessive or incorrect deduction claims;
- **failing to comply with taxation laws in conduct of personal affairs** – including failing to properly complete aspects of the Lunn Family Trust's BAS and underreporting net income in the Lunn Family Trust's ITR;
- **failing to ensure tax agent services provided competently** – including matters arising from the lodging of ITRs for several clients, Ms Kakarla and Mr Nemani, and lodging client ITRs with excessive or incorrect WRE deductions claimed; and
- **failing to take care in ascertaining client affairs.**

Taxpayer arguments

The taxpayer sought to stay the operation or implementation of the Reviewable Decision regarding the termination of the registrations and the two year ban.

In the substantive matter he intended to argue issues surrounding the audits carried out by the ATO which identified excessive or incorrect claims; factual matters going to competence, including internal controls introduced to his business; and issues for the business arising from the COVID pandemic and personal issues, including health issues of his partner.

Until the substantive matter was heard, he claimed it was appropriate that a stay be ordered.

Decision

The ART concluded that it was not appropriate to grant a stay of the two year ban after taking into account the following relevant factors:

» **Prospect of success in substantive matter**

The ART said that it was not prepared at this stage to make a finding that the applicants have no prospects of success in their applications for review, but their prospects are not strong enough to weigh in favour of the granting of a stay.

» **Consequences for the applicant of the refusal of a stay**

The ART said that if the reviewable decisions are implemented, there will be resultant financial and other hardship for the applicants and some inconvenience for their clients. However, it also accepted the TPB's claim that the inconvenience to those clients would be *"outweighed by the substantial risk of the Applicants continuing to provide tax agent services to them in view of the Board's findings"*.

In short, the Tribunal found that this factor weighs slightly in favour of the grant of a stay but is outweighed in this case by the other relevant factors, including the public interest.

» **Public interest**

The ART agreed with the TPB's submission that the following aspects of the public interest were in play and supported its position: (a) the need to ensure that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct; (b) the protection of the public and the maintenance of mutual trust between the Board and tax practitioners; and (c) the need to support public trust and confidence in the integrity of the tax profession and the tax system, and the standing of the tax profession in the public's eye.

In short, the ART was persuaded that the public interest factor weighs strongly against the granting of stays in this case.

» **Application for review nugatory if a stay not granted**

The ART concluded that the applicants would suffer some financial loss if the stay was not granted, but this was not a case where their applications for review would be rendered nugatory or pointless if their stay applications were refused.

Lunn and Tax Practitioners Board (Practice and procedure) [2025] ARTA 697 (3 June 2025)

Non-resident: Insufficient connection with Australia – despite family living in Australia

Actual "connection" with Australia will always be a key consideration under any of the residency tests for being a resident of Australia for tax purposes.

Facts

The Applicant was born in Australia and his wife and children resided in the family home in Melbourne throughout the income years in question (ie, 2014 and 2015 years). He held executive positions with entities he controlled that had business interests in China. The dispute with the ATO arose in relation to work income from those businesses while he was located in China.

Specifically, in the 2014 and 2015 income years the ATO treated the Applicant as a resident of Australia for tax purposes and therefore sought to include in his assessable income certain amounts received by the taxpayer by or from his entities operating in China. The ATO also believed that a capital gain arose to the Applicant in relation to a transfer of shares in one of those entities.

The ATO imposed administrative penalties on the Applicant for making false or misleading statements in relation to these items of income, and also assessed amounts of shortfall interest charge.

In terms of the central issue of residency, the taxpayer argued he was not a resident in 2014 and only a part-year resident in 2015. The Commissioner argued he was a resident in both years on the basis that he had an ongoing connection with Australia in that year as evidenced by, for example, his family continuing live there and his regular visits, that he did not change family banking arrangements and the family's Australian private health insurance policy was maintained.

Other issues

Other issues for consideration were:

» whether the Applicant should be assessed on a dividend of $10,000 paid to him by his Australian family company in 2014;

» whether he derived a capital gain in 2015 year in relation to his transferring to his wife shares in one of the family companies that carried on business in China for some $400,000 (with the taxpayer claiming that they had a cost base of $500,000);

» whether he was required to include in his assessable income in the 2014 or 2015 year amounts attributable to income of a related foreign entity operating from Hong Kong under the controlled foreign companies (CFC) rules in Pt X of ITAA 1936; and

» whether administrative penalties had been correctly imposed and, if so, should be remitted.

Decision

Residency

The ART found that on balance, the taxpayer was not a resident for tax purposes in the 2014 income year, but was a resident for the whole of the 2015 income year in terms of both the "ordinary resides" and "domicile" test.

In relation to the 2014 income year, the ART said that:

> *"In addition to his significant physical absence from Australia, he had practically removed many connections with Australia which was consistent with Australia no longer being his home, even though some arrangements remained in place for the benefit of his family who continued to live here"* (para 205)

Ordinarily resides test

In arriving at this conclusion, the ART noted the following in relation to whether he "resided" in Australia under the ordinary meaning of that word:

- the Applicant had established certain patterns in his domestic and professional life in the years leading up to the 2014 year which continued into that year that were relevant to the issue (eg, he lived in China for the majority of the period from 2009 to Jan 2015);
- the Applicant spent only 113 days in Australia during the 2014 year, across 10 separate trips – and was clearly absent from Australia for longer than he was in Australia;
- it was necessary to explore the nature of his presence in Australia and otherwise whether he retained a "continuity of association" with Australia;
- statements made by the Applicant in passenger cards as he travelled between Australia and China are consistent with not intending to reside in Australia during the 2014 year;
- a person's family connections, particularly the maintenance of a person's family unit in Australia will be a significant matter in favour of finding that the person is a resident – but there are authorities which indicate that there may be "unusual" or "exceptional" circumstances where the location of family in Australia is not determinative;
- the Applicant's work history supports his contention that he placed personal priority on his professional life, and weight may be attached to family not being the most significant factor in determining his intention in relation to remaining a resident of Australia;
- the Applicant had taken a number of actions to sever his connections with Australia including: removing his personal belongings to Shanghai; not owning real estate or a car in Australia; and removing his name from the electoral roll.

It was also very relevant, and supported the argument that he was not a resident in 2014, that his business connections with China were very strong in the years in question in that, among other things, he held senior executive positions with the relevant business entities in China, with responsibility for implementation of longer term strategic aims.

On the other hand, the ART said that the fact that the taxpayer maintained a joint bank account and health insurance in Australia did not weigh heavily against him – given his family was still living in Australia. Nor was it relevant that he retained his Victorian driver's licence.

In short, the ART found that he did not have sufficient connection with Australia for the purposes of the ordinarily resides test.

Domicile test

In terms of the "domicile" test, the ART found that the Applicant did not acquire a domicile in China around or after September 2009 and therefore his domicile was in Australia in the 2014 year. However, the ART was satisfied that the Applicant had a permanent place of abode outside Australia, being his place of abode in his Shanghai apartment, in the 2014 year.

Further, the ART did not regard the Applicant's place of abode in China as having been "temporary" or "transitory" at that time – and it accepted that in the 2014 year there was a reasonable basis for the Applicant to assume that his established pattern of living in Shanghai would continue. In short, the Applicant had by that time abandoned his residence in Australia and established a home in Shanghai which was not temporary or transitory.

2015 year

However, the ART found that the Applicant's circumstances underwent significant change in the early part of the 2015 year. Among other things, his business agreement was terminated in April 2014, to be replaced by a new agreement which contemplated the Applicant providing a narrower range of services, being to assist with "procuring and completing" the sale of a related business under any contract of sale entered into by 29 May 2014.

Furthermore, the Applicant formally retired from all of his executive and leadership roles with effect from 29 May 2014. Moreover, these events had consequences for both his personal domestic arrangements as well as his ability to remain in China. He also resumed his Australian residence on 1 February 2015 when he officially departed Shanghai.

In short, his changed circumstances affected his intention in relation to where he wished to (or could) live or make his home, as well as other factors which demonstrated ongoing connections to Australia were maintained and becoming more significant.

The ART therefore found that the Applicant resided in Australia for the entirety of the 2015 year and therefore satisfied the "ordinary concepts" test of a resident for that year.

The ART also said that if it had not found that the Applicant was a resident in the 2015 year under the ordinary concepts test, it would have found that the Applicant was a resident of Australia under the domicile/ 183 day test for the entirety of the 2015 year.

Franked dividend from Australian family company

As the ART found that the Applicant was not a resident of Australia in the 2014 year, it found that the $10,000 dividend paid to him by the family Australian resident company would have been liable to withholding tax under subsection 128B(1) of the ITAA 1936 and that as the dividend was fully franked, the dividend should not have been included in his assessable income in the 2014 year under s44(1)(a) of the ITAA 1936 (pursuant to the operation of s128D).

CFC issues

For the purposes of the CFC rules, the ART found that as the taxpayer was not a Part X Australian resident or an Australian entity (as required under the rules) in that year, then the Hong Kong entity was not a CFC at any particular time during the 2014 year.

However, the ART found that the Hong Kong entity was a CFC during the 2015 year, as the taxpayer was a resident of Australia in that year and held all the shares in that entity. Furthermore, the entity had attributable income in that year that should have been included in the taxpayer's assessable income for that year under the CGC rules.

Administrative penalties

As a result of finding that the Applicant was not a resident in the 2014 income year and the related findings (above), the ART said that there was no shortfall in that year and that he could not be said to have made a false or misleading statement in relation to the income for that year.

However, in view of the findings in relation to residency and related matters in the 2015 year, the ART said that the taxpayer had not taken reasonable care and therefore administrative penalties were upheld. Furthermore, it found that it was not appropriate to remit the penalty for that year.

Abotomey v FCT [2025] ARTA 719, 10 June 2025

Luxury cars subject to FBT after all

The Federal Court has overturned a 2024 AAT decision which had held that three brothers who were directors of the corporate trustee of a family trust (and who were also eligible beneficiaries under the trust) were not employees for FBT purposes. And even if they were employees, the Tribunal held that non-cash benefits provided to them in the form of the private use of luxury cars were not benefits paid to them in respect of their employment.

Facts and Tribunal decision

The facts and the basis for the Tribunal decision were set out in our August 2024 Notes, so we won't repeat them here in any detail. If you don't have access to the earlier Notes please contact Member Services.

The family trust carried out a variety of businesses and the brothers oversaw those businesses at a high level. They were not paid for the work they performed but instead received distributions from the family trust and also enjoyed the personal use of some of the 40 luxury and high performance vehicles acquired by the trust. These vehicles included multiples of Bentleys, Rolls Royces, Mercedes, Ferraris, Aston Martins, McLarens and Porsches, which were all selected by the three brothers.

The Tribunal accepted the Applicant's arguments that the brothers performed their work in the business of the trust as owners or beneficiaries under the trust – not as employed managers. Hence the FBT rules did not apply to their non-cash benefits.

Appeal

On appeal by the Commissioner to the Federal Court (O'Sullivan J), the court ruled that the appeal involved a mixed question of fact and law, which is sufficient for appeal against the Tribunal's decision to be heard by the Federal Court.

On the question of whether the brothers were employees, the court held that the Tribunal had erred in law in deciding that the references in the FBT Assessment Act (FBTAA) to "employer", "employee" and "employment relationship" were not exhaustive and ultimately rely on common law concepts. Instead, the court held that in determining whether someone is an employee for FBT purposes, it is necessary to consider the relevant provisions of the FBTAA.

Given that none of the brother received a salary, the court considered that s137 FBTAA was of particular importance. Relevantly, it reads as follows:

> ***137 Salary or wages***
>
> *(1) For the purpose only of ascertaining whether a person is an employee or an employer within the meaning of this Act, where:*
>
> *(a) a benefit is provided by a person (in this subsection referred to as the **first person**) to, or to an associate of, another person (in this subsection referred to as the **second person**);*
>
> *(b) but for this subsection, the benefit would not be regarded as having been provided in respect of the employment of the second person; and*
>
> *(c) either of the following conditions is satisfied:*

(i) if the benefit were provided by the first person by way of a cash payment to the second person, the payment would constitute salary or wages paid by the first person to the second person;

(ii) ...

a definition in subsection 136(1) applies as if the benefit were salary or wages paid to the second person by:

(d) in a case to which subparagraph (c)(i) applies—the first person;

The court observed:

> *"Section 137(1) of the FBTAA operates as a statutory deeming provision that assists in determining whether a person should be treated as an employee. It does so by applying a hypothetical test: if the benefit had instead been paid in the form of a cash payment, would it constitute a salary or wages for the purposes of s 12-35 or s 12-40 of Schedule 1 to the Taxation Administration Act 1953?" at [86]*

Having found that the brothers were employees for the sole purpose of the FBTAA, the court distinguished a decision in a similar case (*Knowles* case) and held that on the basis of the facts as found by the AAT, the only conclusion open to it was that the non-cash benefits conferred on each of the brothers were provided "in respect of the employment of an employee" for the purposes of the FBTAA.

FC of T v SEPL Pty Ltd ATF SFT Trust [2025] FCA 582 (5 June 2025)

ATO succeeds on appeal in resisting FOI claim

Disclosure of part of advice over which an exemption from FOI for legal professional privilege is sought – but to which the exception applies for waiver of this claim because of disclosure – does not give rise to a waiver of all that advice for the purposes of the exception.

Facts

The taxpayer was subject to an ATO audit. The ATO subsequently issued a position paper setting out its position in relation to its finding that the transfer pricing provisions applied to the supply of alumina the taxpayer made to Bahrain over a ten year period (1989 to 2009).

The taxpayer subsequently made an FOI request for access to documents that related to the position paper and its creation.

The ATO refused access to various documents on, among other grounds, that they were subject to legal professional privilege (LPP) and that they were therefore exempt from release under s42 of the *Freedom of Information Act 1982* (FOI Act)

The taxpayer then applied for a review of this decision.

In *Alcoa of Australia Ltd v FCT* [2024] AATA 423, the AAT varied the decision and ordered the release of the documents. While it agreed with the ATO that the dominant purpose of the various documents and communications sought by the taxpayer was to obtain or give legal advice, it nevertheless found that the exception applied for the waiver of LPP.

According to the AAT this was because of the ATO's disclosure to the taxpayer of the draft and final reports (ie, the substance or "gist" of its advice) was inconsistent with the maintenance of confidentiality over all the drafts of expert's reports. It also said the fairness principle dictated that the privilege be waived in these circumstances.

The ATO appealed to the Federal Court from the decision.

Decision

The Federal Court allowed the ATO's appeal on the basis that the AAT did not properly apply the correct legal principles, finding:

» the AAT had wrongly taken the view that disclosure of the substance or "gist" of any advice results in a waiver for LPP over the whole of the advice; and

» the AAT's view that fairness dictated that privilege over all the drafts of the expert's report had been waived misunderstood how the principle of unfairness operated in relation to the exception for waiver of LPP.

In particular, the Court said that that the disclosure of the gist of advice will be relevantly inconsistent with the maintenance of privilege over the whole of the advice only where the holder of the privilege seeks to make use of the gist of the advice and the opposing party may be misled by an inaccurate perception of the nature of the advice received. However, its said that this was not the case here.

The Court also said that he disclosure of conclusions or the gist of advice without disclosure of the reasoning will only be unfair where, for example, the conclusions are relied upon to strengthen or as a support for a position adopted by the party to bolster the party's bargaining power or to gain some forensic advantage related to litigation. However, it again said that this was not the case here.

FCT v Alcoa of Australia Ltd [2025] FCA 651, 19 June 2025.

Edited Private Binding Ruling: CGT – disposal of property

Can you disregard any capital gain or loss from the disposal of your 50% ownership interest in the property?

Facts

Your parents owned their pre-CGT matrimonial home as joint tenants.

Under ***a pre-CGT*** court order one of your parents transferred their 50% interest in the property to your other parent, to be held on trust for you until you attained majority. (A caveat was later lodged to protect your interest under the trust deed.)

Your other parent re-married and remained living at the property.

From 19YY to mid-19YY you and your family also lived at the property.

In 20YY ***(ie post-CGT***), the 50% ownership interest in the property held on trust for you by your parent was transferred to you as a joint tenant – and the title of the property was updated to show the property was held as tenants in common.

In 20YY (ie, post-CGT) your parent passed away.

In 20YY (ie, post-CGT) the property was sold.

Issue

The answer is "yes".

CGT event A1 happens if you dispose of a CGT asset you have an ownership interest in. However, a capital gain or loss is disregarded if you acquired the asset before 20 September 1985.

A 50% ownership interest in the property was transferred to your parent to be held on trust for you by court order before 1985.

You were the beneficial owner from before 1985 (and the legal and beneficial owner from 20XX) ***and the interest is a pre-CGT asset***, therefore the capital gain on disposal is disregarded.

Comment

CGT event A1 is only triggered if there is a change in the ***beneficial*** ownership of an asset:

> *104-10 (2) You **dispose of** a * CGT asset if a change of ownership occurs from you to another entity, whether because of some act or event or by operation of law. However, a change of ownership does not occur if you stop being the legal owner of the asset but continue to be its beneficial owner.*
>
> *Note: A change in the trustee of a trust does not constitute a change in the entity that is the trustee of the trust (see subsection 960 - 100(2)). This means that CGT event A1 will not happen merely because of a change in the trustee.*

The post-CGT transfer of the 50% interest in the property from the trust to the taxpayer in his own name did not, on the facts, result in any change in the beneficial ownership of the property.

The taxpayer was always beneficially entitled to this 50% interest under the pre-CGT trust arrangement which was established by a pre-CGT court order. Therefore he had a beneficial pre-CGT interest in the property at that time.

The effect of the post CGT transfer of the 50% interest in the property held by the trust only resulted in a ***legal*** change in ownership of the property and not a ***beneficial*** one (as required for CGT event A1 to apply – and which otherwise would have converted it to a post-CGT asset).

Therefore, the exemption in CGT event A1 for pre-CGT assets applied to the later sale of this 50% interest as it always remained a pre-CGT asset.

Edited Private Binding Ruling: Rental property – deductions

Can you deduct expenses incurred to undertake repairs to damaged and deteriorated parts of your rental property under section 25-10 of the *Income Tax Assessment Act 1997* (ITAA 1997)?

Facts

In MM 20XX, you purchased a commercial property.

The property becomes income-producing shortly after purchase.

The roof of the property had no issues at the time of purchase.

The roof was made up of metal sheets with some perspex sheets (approximately 350 square meters). The perspex sheets are placed along certain sections of the roof to provide natural light.

Over time, extensive rust corrosion developed on the metal sheets, while the perspex sheets became brittle and cracked due to UV exposure. This resulted in significant leaks across multiple locations on the roof. Additionally, the gutters and downpipes were heavily corroded, rendering them ineffective at channeling water.

In MM 20XX, a significant rain event worsened the roof corrosion, leading to major leaks that required immediate attention. Consequently, the managing agent promptly arranged for a contractor to inspect the roof.

In MM 20XX, a contractor inspected the roof and guttering and determined that the corrosion was extensive enough to necessitate the replacement of all roof sheeting and guttering to prevent further leaks. The work began promptly, with all metal and perspex sheets replaced using identical roofing products and maintaining the same layout as before. There were no modifications to the metal beams or the supporting structure of the roof. The guttering was also replaced with identical products and layout as previously used.

In MM 20XX, the installation of the roof and gutter were completed. The total cost of the work was $XX (inclusive of GST).

Issue

Yes. Section 25-10 of the ITAA 1997 permits an immediate deduction for expenditure you incur to repair premises or plant which you hold or use for the sole purpose of producing assessable income, unless the outlay is capital expenditure which is prevented from being deductible as a repair by subsection 25-10(3) of the ITAA 1997.

Comment

Another (vexed) question of what a deductible repair is – involving the following key issues:

1. Restoration of part of the whole (deductible) or the entirety (not deductible)

The ATO takes the view in TR 97/23 *Deduction for Repairs* (at paras 36-42) that it will depend on the precise fact and circumstances (and judgment) but that property is more likely to be a part of an asset rather than an entirety if it is an integral part of some larger item of plant or the property is physically, commercially and functionally an inseparable part of something else. On the other hand, it takes the view that property is more likely to be an entirety if, among other things, it is separately identifiable as a principal item of capital equipment.

Here, the conclusion was reached that the "replacement of all roof sheeting and guttering" was a repair to a part of the whole, not a replacement of the entirety.

2. Different materials used resulting in new "function"

Where significant enhancements are made or different materials are used, then generally the work effected will be less likely to be a deductible repair. This is because it is more likely the work does more than restore the property to its original efficiency of function.

However, in this case the matter was easy as "identical roofing products" were used and the work involved "maintaining the same layout as before"

But importantly note the ATO takes the view in TR 97/23 *Deduction for Repairs* (at para 54) that if:

> *(a) the work done to property involves:*
>
> *(i) a degree of technological advancement that results in only a minor and incidental improvement to the property; or*
>
> *(ii) an enhancement arising from the use of more modern materials and component parts (often where original materials and parts are no longer available) that adds in only a minor and incidental way to the overall efficiency of function of the property; and*
>
> *(b) the work done does not change the property's character;*
>
> *..then, this does not in itself preclude the expenditure from being characterised as repair expenditure deductible under section 25-10.*

Finally note that TR 97/23 *Deduction for Repairs* is a very comprehensive and useful tool to use in any difficult repair deduction matter.

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Alicia Wesley
Wedrat Chartered Accountants

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Martin E. Holgye
Weber Bowman Pty Ltd. Chartered Accountants

Status of Tax & Superannuation Matters @ 26 June 2025

(This table is not intended to be comprehensive.)

Parliament opens on 22 July 2025.

Status of Tax & Superannuation Matters @ 26 June 2025	
Legislation	
Awaiting the legislative program of the new Parliament, which is not expected to sit until July 2025.	
Scheduled Parliamentary sitting days	
Awaiting government announcements	
Appeals	
Aitken v C of T [2025] FCA 372 (17 April 2025)	The taxpayer has appealed against the decision of the Federal Court about his $10 million investment in the managed forestry investment scheme.
Morton v C of T [2025] FCA 336 (11 April 2025)	The Commissioner has appealed against a Federal Court decision that proceeds from the subdivision and sale of rezoned farmland were not assessable income.
Hall v FCT [2025] ARTA 600 – deduction for occupancy and work travel expenses	The Commissioner has appealed to the Full Federal Court from the decision in *Hall v FCT* [2025] ARTA 600. In that case, the ART allowed deductions incurred by the taxpayer during the COVID -19 period for (i) a portion of home rental expenses referable to the use of a home office; and (ii) car expenses for travel from his home (ie his home office) to his employer's workplace and back ie, between two places of work.