Monthly Tax Update

August 2025

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Monthly Tax Update

August 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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Childcare provider fails to declare total childcare fees charged to parents

Fees charged to parents for childcare are fully assessable to the provider (even if subsidised). And to get an exemption for the full amounts paid to "carers" the amounts must be fully used for that purpose. (In this case, the ATO audited this matter.)

Facts

The three taxpayers were beneficiaries of a family trust that conducted an approved childcare business. It used educators operating from their own homes to provide the childcare services.

Over the years in question, trust as an approved childcare service, was paid some $25m in childcare benefits to assist parents with the cost of childcare – and was required to submit records and reports to the Education Department to obtain these benefits

In 2015 the Education Department cancelled its childcare approval and the ATO also audited the business. It then issued amended assessments to the trust and the three presently entitled beneficiaries for the 2014 to 2016 years – on the basis that there was a failure to declare the total childcare fees charged to parents for the childcare services.

The ATO also only allowed 70% of the amounts the trust paid to the educators as deductions in view of its doubt as to whether child care services had in fact been provided for all the sessions of care reported to the department and which had resulted in the childcare benefits being paid to it. There were also other disputed deductions of some $3.3m which were disallowed

Accordingly, tax assessments were raised against the three beneficiaries totalling some $10m plus substantial penalties against two of these beneficiaries.

Issue and arguments

The central issue was whether childcare fees that parents paid were income of the trust (and therefore also of the presently entitled beneficiaries on distribution).

The taxpayers argued that these amounts were the income of the educators who derived it under an "Everett Assignment" type arrangement with the trust, whereby the educators were entitled to the fees under a contract with parents. They further argued that the only assessable income of the trust was the administrative fees it charged in respect of the "assigned" amounts.

Alternatively, the taxpayer argued that if the childcare fees were income of the trust, then it was entitled to a deduction for 100% of amounts paid by it to the educators per s8-1 of ITAA 1997 – plus the other business expenses denied by the ATO.

Decision

Assessable income

The ART rejected the taxpayers' argument that the childcare fees charged were not the income of the trust but that of the educators.

In particular, the ART found that in terms its reporting obligations to the Department of Education (and the way the trust carried on its business), the parents incurred the liability to the trust for 100% of childcare fees charged to them. That is, the trust was reporting that a recoverable debt had arisen between it and the parent/s which had been "derived by the trust"

In other words:

> *"... the Family Trust was reporting that a recoverable debt had arisen against the parents in question for the total childcare fees charged for the sessions of care provided. It follows that for accrual accounting purposes, the Family Trust (as the operator of the Child Care Service) had by this point 'derived' income arising from a recoverable debt but had not recovered the debt owed to it".* (para 301)

The ART also emphasised that under the relevant childcare/family legislation, there was no provision that allowed the service provider to assign its rights/liabilities. Rather, the relevant legislation required liability to be established between a parent and the childcare service provider for the total childcare fees charged as a pre-condition to payment of the childcare benefits - and this legislation made no provision for that liability to be assigned to a third party.

Deductions

The ART found that the taxpayers had not shown that the Commissioner's decision to reduce deductions by 30% was wrong. In particular, it found that the taxpayer had not shown that the services provided by it (for which the benefits had been paid) were all actually provided by it.

Moreover, the taxpayer had not led evidence to contest the issue (eg, it had not called parents or educators). It also said that its business records had been lost or destroyed.

Nor did the taxpayer show that the denial of $3m of other business deductions was wrong as they had been unable to substantiate that the expenses were incurred.

In short, the taxpayers had failed to discharge its onus of showing that the assessments were excessive in relation to the deductions denied by the ATO.

The ART also noted that while the Commissioner was required to demonstrate the process (or methodology) deployed for reducing deductions by 30%, he was not required to be able to identify the taxpayer's deductions with absolute precision.

Penalties

The ART also ruled that the taxpayers had not demonstrated that the penalties imposed for recklessness were excessive. Nor did it find that any circumstances in the case required the remittance of the penalties in whole or part.

BHMH and FCT (Taxation and business) [2025] ARTA 996, 27 June 2025

No jurisdiction to hear hardship application: No reviewable decision made by ATO

If there is no reviewable decision made by the ATO to which an objection can be made, then a Tribunal does not have the jurisdiction to hear a complaint by the taxpayer in respect of any "dissatisfaction" (either specifically or in terms of "general powers").

Facts

The taxpayer lodged an application with the ART to be released from particular tax liabilities on the grounds of serious hardship. He also brought an application for stay orders in respect of his liability until his hardship application was heard and decided.

However, no decision had been made by the ATO in respect of the taxpayer's hardship relief request. This was because it was still seeking further information from the taxpayer in respect of an unresolved dispute with the Australian Financial Complaints Authority concerning the Commonwealth Bank of Australia and details of his household expenditure. There was also the issue of business expenses of a related company which had some outstanding lodgments.

The ATO also wrote to Mr Lee and advised that the application for release could not be considered while these matters were unknown as his capacity to pay could not be evaluated.

The taxpayer had also lodged a complaint with the Inspector-General of Taxation (IGOT) and the IGOT replied that they could not find a deficiency in the ATO's consideration of his release application. They also advised the taxpayer that when applying for release on the basis of serious hardship the focus is on the person's current financial situation.

By the time of the taxpayer's application to the ART there had been no hardship decision given by the ATO to give rise to objection rights, no objection lodged, and no objection decision made.

However, the taxpayer had lodged his application with the ART seeking to review what he understood to be a 'deemed' refusal of his Hardship Application in the circumstances**.**

Issues

» Could the ART consider the taxpayer's application? (ie, the jurisdiction issue)

» Could the ART grant the stay application – without it deciding hardship relief issue?

Decision

The Jurisdiction Issue

The ART clear found that it had no jurisdiction to determine the matter as no reviewable decision had been made by the ATO as required by s12 of the *Administrative Review Tribunal Act 2024* (the ART Act).

It also emphasised that the ART, being an administrative decision-making body and a creature of statute, it had no inherent jurisdictional entitlement or general powers of review.

Specifically, the ART pointed to s340-5 of the *Taxation Administration Act 1953* dealing with the *"release from particular liabilities in cases of serious hardship ..."* – and that para (7) provided that: *"If you are dissatisfied with the Commissioner's decision, you may object against the decision in the manner set out in Part IVC"*.

It then said that *"... had the Respondent made a decision in respect of the Applicant's Hardship Application it is clear that s340-5(7) would have enabled the Applicant... to lodge an objection and thereafter to seek review of any adverse decision at the Tribunal"*. However, as no such objection had been lodged or determined and, accordingly, the ART had no jurisdiction to consider the Application.

However, the ART also did have some sympathy for the fact that the taxpayer was left in some degree of uncertainty as to whether his Hardship Application had been implicitly refused by the ATO by virtue of it refusing to entertain his requests for relief. Nevertheless, it stated that the ART has no general power of review under which such a question could be jurisdictionally engaged.

The Stay Request

In relation to the taxpayer's stay request, the ART found that pursuant to s32 of the ART Act the ART's ability to make stay orders is purposed towards *"ensuring the effectiveness of the review"*.

The ART said that it therefore followed that where the application for review has been dismissed on the basis that there is no reviewable decision then any request for stay orders must be similarly dismissed.

Lee and FCT (Practice and procedure) [2025] ARTA 879 (2 July 2025)

FIFO worker stuck in Africa during COVID still an Australian resident

At the height of the COVID epidemic in 2020 and 2021, thousands of Australian citizens were prevented by government regulations from returning to Australia. One of those persons was the Applicant Mr Evans, a FIFO worker at a Botswanan copper mine, who sought to make a virtue out of necessity by arguing that his enforced absence from Australia during this period caused him to cease being an Australian resident. If successful, his very substantial Botswana-sourced earnings arising from his mining employment would not be assessable in Australia.

However, the self-represented Applicant was not successful in this endeavour, the Tribunal holding that he was an Australian resident both under ordinary concepts and the domicile test.

Facts

Mr Evans was born in Australia and holds an Australian passport. He has been doing FIFO work in the mining industry since 2012. During the 2020-21 year of income, he was employed by a Botswana copper miner, Barminco, on a four weeks on/four weeks off roster. Flights between Perth and Botswana were provided by his employer, as were accommodation and meals while rostered on at the mine.

Due to the COVID travel restrictions, he was physically absent from Australia for about 10 months in the 2020–21 income year as he was unable to return home during his off-roster periods.

While stuck in Botswana, the Applicant rented accommodation from an acquaintance for use during his off-roster times (when he would normally have returned to Australia), opened a local bank account, and signed up for a mobile phone. He began to socialise with locals to a limited extent during his enforced extended stay in Botswana. He claimed this proved that he was making a life for himself in Botswana, and he was no longer a resident of Australia.

At the same time, however, Mr Evans maintained substantial links to Australia, including the joint ownership of a family home in WA, an Australian bank accounts, a number of motor vehicles, private health insurance, and an Australian mobile number. His spouse and children remained in Australia throughout his African absences, he supported his family financially and stayed at the family home when not in Botswana or in quarantine. He returned to Perth as soon as the COVID travel restrictions were lifted.

The taxpayer initially lodged his tax return on the basis that he was an Australian resident. However, he subsequently objected to the assessment, claiming that he should have been treated as a non-resident because he had been forced to remain overseas for the majority of the income year. The Commissioner disallowed his objection, and the taxpayer sought a review of the objection decision by the Tribunal.

ART decision

The ART held that the taxpayer was always an Australian resident under the ordinary concepts test. His extended absence from Australia due to government travel restrictions did not reflect any intention on his part to sever his ties to Australia.

> *"It is readily apparent from a review of Mr Evans travel movements over time that his extended absence from Australia was exclusively attributable to the travel restrictions which were imposed temporarily in response to the Covid-19 pandemic. This weighs against any significance being placed solely on his extended absence from Australia in the Income Year on the issue of residence." [at 58]*

Mr Evans continued to maintain strong ties to Australia and had a pattern of returning whenever he was permitted to do so. His presence in Botswana was seen by the Tribunal as being temporary and related solely to his employment.

The ART also found that the taxpayer had not through his own actions and choice, acquired a domicile of choice in Botswana and abandoned his Australian domicile. There was no evidence of an intention to make Botswana his home indefinitely. The taxpayer also had no permanent place of abode outside Australia as he had not demonstrated an intent to abandon Australia as his home. His living arrangements in Botswana were simply a temporary response to the travel restrictions that were in place.

> *"... the question of whether a person has a permanent place of abode outside Australia goes beyond whether they can demonstrate that they were living, working and socialising in another place, even for an extended period of time. They must demonstrate that they have abandoned their residence in Australia and established a place where they are residing permanently as opposed to a temporary basis, even if not indefinitely." [at 83]*

Evans v Commissioner of Taxation [2025] ARTA 824 (25 June 2025), General Member R Smith

Poker player's luck runs out before the Tribunal

In a fairly predictable Tribunal decision, an apparently skillful and successful poker player also known as Lucky Eddie was unable to demonstrate the source of a number very large deposits in various bank and casino accounts, with the ART upholding the Commissioner's default assessments.

Facts

The Applicant, Mr Tran, came to the Commissioner's attention after failing to lodge income tax returns for 2014, 2015 and 2016 in spite of having large amounts of money flowing through his bank accounts. An audit revealed that he was a serious poker player, mainly participating in games played at Crown and Star casinos. There was also some table and sports betting, but poker was his game of choice and he maintained cage accounts at both casinos.

He claimed that his flair for languages and his ability to read people contributed to his overall success, but insisted he was not conducting a business. He was advised by his accountant that his poker playing activities were in the nature of a hobby, even though his evidence was that poker playing financed his living expenses and enabled him to acquire two properties (for a total of $2.4 million) and build his bankroll up to $5 million over time.

Because he genuinely believed his gambling activities were not subject to tax, he kept no records of his overall wins and losses, relying on his overall level of funds to work out whether or not he was ahead. He said that lot of deposits and withdrawals from his bank and casino accounts were betting drawings and redeposited winnings, although he couldn't be precise.

Another source accounting for unexplained deposits was, according to Mr Tran, the repayment of loans made by him to various gamblers. After participating in poker tournaments with limited success, he switched his focus to very wealthy Asian businessmen who were weaker poker players than those he had been coming up against in the tournaments. When these players lost, he would sometimes lend them money, often by way of chips across the table. This enabled them to keep gambling, which meant that Mr Tran won even more. When the loans were repaid (he experienced very few defaults), he would bank the money.

Corroborating evidence

Mr Tran, who was self-represented, produced 42 written testimonial statements and called 26 witnesses, all with the aim of confirming that he was a very skilled poker player who enjoyed a great deal of success. He also did his best to link certain alleged loan repayments to particular deposits.

The problem was that a lot of this material was very general. For example, a casino employee testified that Mr Tran was quite successful overall, but couldn't say exactly how much he won (and neither could Mr Tran himself).

Also, it emerged that Mr Tran had "helped" many of the people giving testimonials, so much so that it looked a lot like they were all using a template devised by him, and attempting to match their alleged loan repayments with Mr Tran's unexplained deposits.

When giving evidence himself, the Tribunal found Mr Tran to be evasive and argumentative, changing the subject or answering a question with a question. Overall, the Tribunal found itself unable to rely on the evidence of either Mr Tran or his many witnesses.

Consideration by Tribunal

Unsurprisingly, and perhaps a little harsh for Mr Tran, the Tribunal found that he probably did win substantial sums from poker games, but he had not established exactly how much. Likewise, some of the unexplained bank and casino cage account deposits may well represent loan repayments, but the evidence was nowhere near reliable enough to overturn the Commissioner's objection decision.

This has left Mr Tran with a tax shortfall amount of $9.2 million over the four income years to 2017, plus a 75% administrative penalty (plus the 20% uplift in the later years), as well as a shortfall interest charge.

On the question of whether Mr Tran was engaged in the business of gambling, The Tribunal decided that, on balance, he was not:

> *"I am satisfied on the evidence that Mr Tran employed strategy and tactics in his poker playing which were designed to enhance his chance of winning large sums of money. In doing so, he was not running a business but using his natural flair with languages to lure wealthy, inexperienced players to play against him and he loaned them money, so they kept playing and lost even more. This tactic may have increased Mr Tran's winnings but does not establish that he was running any sort of business." [at 202]*

That seems to set the bar for running a business of gambling pretty high.

The Tribunal did take the Commissioner to task for failing to conduct himself as a model litigant. As a self-represented litigant, Mr Tran would not have thought to rely on the decisions in *Krew* and *Ma*, where gambling wins were more favourably treated from the taxpayers' perspective. But not much turns on it, as the Tribunal distinguished those two cases and the Commissioner will probably ignore the criticism.

Tran v Commissioner of Taxation [2025] ARTA 1036 (17 July 2025), Senior Member Lye

Engineer denied deductions for off-duty travel expenses

In another case with something of a COVID flavour, an offshore engineer employed by an oil and gas company has had his claim for work-related travel expenses denied. The ART found that the travel expenses, which related to accommodation, meal and incidental expenses incurred between roster rotations, were incurred before commencing his employment duties or after those duties had ceased. The ART also disallowed a depreciation claim in relation to a watch, but did allow the Applicant's minor claims for home office expenses.

Facts

The Applicant is an engineer employed in a full-time specialised technical role by a large oil and gas company since 2017. He worked mainly on an offshore facility off the Western Australian coast, but his duties could sometimes include working from home, attending training, or working from his employer's Perth office.

In accordance with the terms of his employment contract, he was engaged on a 15-week rotating cycle comprising three weeks on, four weeks off, three weeks on, and five weeks off. That might seem appealing, but he was working 12-hour shifts plus handovers on the days he was rostered on. Each on-duty period commenced at the start of work at the offshore facility while each off-duty period commenced on the date of departure from the facility. The taxpayer could also be required to work a further seven training days.

The taxpayer lived in Queensland with his family, and he would normally have returned home during each of the off-duty periods in his roster cycle. During the year ended 30 June 2022, however, the State of WA had strict quarantining rules in place which made returning to Queensland for every off-duty period impractical. Instead, the Applicant's employer asked him to remain in WA or the Northern Territory (which was regarded by WA as low risk for COVID). The Applicant therefore spent 94 days in Perth, Broome or Darwin during the income year, and this is what his claim for travel and accommodation expenses was based on.

Apart from receiving his normal salary, the Applicant was also paid a commuting allowance (for travel between his home and Brisbane Airport), an offshore allowance (for expenses and the inconvenience associated with working offshore) and what was termed a secondment allowance (for COVID-19 related quarantine time).

The Applicant lodged his income tax return for the year ending 30 June 2022 claiming various work-related expenses, including:

» travel expenses of $30,897 relating to accommodation, meals and incidental expenses incurred while staying in Perth, Darwin and Broome between rotations (relying on the substantiation exception in s900-50 ITAA1997), and being based on the Commissioner's reasonable expenditure caps for the year

» other work-related expenses of $6,068, relating to depreciation of an Omega watch (which the taxpayer claimed had special features that were necessary in order to perform his work duties) and a tool chest used for storing equipment and study materials, and

» a minor amount for self-education and home office expenses.

On subsequently conducting an audit, the Commissioner decided that the travel expenses were private in nature as they related to travel to and from designated departure points. The claims for self-education expenses were also denied, while the other work-related expenses were reduced. A notice of amended assessment was issued accordingly.

The taxpayer objected to the amended assessment on the basis that, although he was an offshore worker, his contract contemplated that he could also work from other locations as required, while WA's COVID restrictions had necessitated that he remain in Western Australia and work remotely. After the Commissioner mostly disallowed his objection, the taxpayer sought a review of the objection decision by the Tribunal.

Tribunal decision

On the travel expenses, and the COVID restrictions notwithstanding, the Tribunal held they were not incurred in gaining or producing the Applicant's assessable income and were in any event of a private or domestic nature. He was not actually at work until he was at his place of work on the offshore facility. The travel he undertook occurred during off-duty periods and was either before the commencement of his duties or happened after his duties had ceased.

Moreover, the Applicant was not entitled to rely on the s900-50 substantiation exception since none of the allowances he was paid were intended to cover accommodation, food, or incidental costs. The Tribunal also observed that he had not demonstrated the $30,897 claimed had actually been incurred (unlike the truck driver in *Shaw's case*).

The ART did accept the Applicant's evidence that his home office was used exclusively for work, including studying as part of his professional development as an engineer. The home office expenses were therefore incurred in gaining or producing the taxpayer's assessable income and were allowed in full by the Tribunal.

In relation to the depreciation claims, the Tribunal noted that the Omega watch was acquired six years prior to the taxpayer commencing his current employment and considered the fact that it had a chronograph feature was insufficient to show the necessary nexus to any income-producing activities. In relation to the tool chest, there was no evidence linking it to the Applicant's income-producing activities either. The Tribunal therefore rejected the Applicant's depreciation claims for both the Omega watch and the tool chest.

CBRX v Commissioner of Taxation [2025] ARTA 768 (16 June 2025), General Member R Smith

Cavalier attitude to record keeping comes at a huge cost

In case echoing that of Mr and Mrs McPartland reported earlier this year, a Townsville businessman has been unsuccessful in overturning default assessments raised by the Commissioner on the basis that cheque and cash withdrawals made from a company controlled by the Applicant, Mr Dalby, represented his assessable income.

Facts

Mr Dalby was a bit of a jack of all trades – his businesses included the construction and rental of student accommodation, the delivery of workplace machinery training and trading in scrap gold. One thing he freely admitted he was not was any sort of keeper of business records, which ended up costing him dearly.

The Commissioner undertook an audit of his affairs in 2018 after he reported cumulative tax losses of $126,000 over the 2014, 2015 and 2016 income years. It turned out the Applicant was unable to produce any business records to substantiate those losses. His returns were prepared by a registered tax agent, and it is not clear how that person satisfied themselves that everything was above board.

What the audit did turn up was a series of cash and cheque withdrawals from Mango Reef, a company controlled solely by Mr Dalby, totaling $4.4 million over the three years. The Applicant explained those withdrawals were all used in a scrap gold business run through Mango Reef, but was unable to provide any invoices or other documentary evidence to support his claim.

The Commissioner issued amended assessments including all of the Mango Reef withdrawals as Mr Dalby's assessable income, plus $195,500 in net CGT gains on the disposal of three properties (which was not disputed at the hearing). Including 50% penalties for recklessness, his lack of business records has cost the Applicant some $3.1 million to date.

After the Commissioner disallowed his objections against the amended assessments, Mr Dalby sought a review by the ART.

Consideration by Tribunal

During the course of the hearing the self-represented Applicant kept attacking the Commissioner's basis for raising the default assessments, arguing that the withdrawals were, in fact, used in Mango Reef's scrap gold business. However, he failed to lead any evidence about what his actual taxable income was in the years in question, in spite of being encouraged by the Tribunal to do so.

In any event, the Tribunal found his claim that he regularly traveled to Asia carrying bags of scrap gold rather improbable, and did not accept that the withdrawals were all used to fund Mango Reef's scrap gold business. While the Tribunal thought there might have been some truth in the Applicant's claims, the admitted absence of any corroborating evidence left the Tribunal with no alternative but to uphold the Commissioner's objection decisions:

> *"Ultimately, I have concluded that Mr Dalby has exhibited an entirely cavalier attitude to his*

> *taxation affairs. The failure to keep proper business records, issue tax invoices for work he has done, keep receipts for the expenses he has incurred in earning his income, or provide any analysis of his income and expenses in any of the income years, and his failure to obtain advice on capital gains tax prior to filing his income tax returns, along with his failure to check the documents which he filed with the Tribunal, suggest he does not regard that the taxation laws apply to him, and that he need not take his taxation obligations seriously."* at [41]

The 50% administrative penalties were also upheld, there being no basis for general remission and the Tribunal's feeling that Mr Dalby had strayed close to the 75% threshold for the intentional disregard of the taxation laws.

Comment

Time and again, taxpayers (and sometimes their representatives) focus unduly on picking apart the Commissioner's basis for raising a default assessment. Case law clearly establishes that is not enough in itself to overturn the assessment – taxpayers also need to positively show what their actual taxable income was. For this they will need reliable business records, which were spectacularly lacking in this case.

Dalby v C of T [2025] ARTA 1060 (21 July 2025) Deputy President Thompson SC

ATO Decision Impact Statement: Deduction for loss on home

It is possible to obtain a tax deduction for a loss made on the sale of home (a rarity in the current environment) where the home is acquired for a profit-making purpose that is carried out in a business-like operation and/or as a commercial transaction per the *Myer Emporium* principle.

Facts

» The Applicant lived in a large water-front matrimonial home. In July 2015 she entered into a contract to purchase an apartment (Foreshore) that was under development in a complex near her matrimonial home – and was expected to be completed in June 2019.

» After being advised that construction of Foreshore would be late, she acquired a similar off-the-plan apartment to be built earlier in the same development (Dune Walk).

» In May 2018, when construction of Dune Walk was completed, she sold her matrimonial home to fund the purchase and moved into it. She resided there for some two years.

» The Applicant considered, due to the attractiveness of the new development, that she could make a profit on the acquisition and resale of Dune.

» In July 2020, when construction of Foreshore was completed, she sold Dune Walk, incurred a loss on the sale, and moved into Foreshore. Note: She needed to sell Dune Walk as she required the proceeds of sale to complete the purchase of Foreshore.

» The Applicant objected to the assessment for the year ended 30 June 2020, claiming she had an allowable deduction for the loss (of $265,936) on the sale of Dune Walk.

Issues/Arguments

1 The Applicant contended that Dune Walk was held on revenue account given that she acquired it for a profit-making purpose in a business operation or commercial transaction. She relied upon the principles in *Myer Emporium Ltd* [1987] HCA 18.

2 The Commissioner submitted that the loss was of a capital or private/domestic nature such that a deduction was prevented by s8-1(2)(b).

3 The Commissioner did not agree with the Applicant's contention that the loss was 'incurred' in the 2020 income year when the contract for the sale of the Dune Walk apartment became unconditional but upon the completion of the conveyance.

Tribunal's findings

Issue 1

The Applicant's purposes for acquiring Dune Walk to live in it was secondary to her more significant profit-making purpose. The Applicant also satisfied the requirement that the acquisition and sale of the apartment was of a 'commercial transaction' – ie the acquisition and sale of the apartment was the sort of thing a business person would do (*Greig v FCT*).

Issue 2

The loss was found not to be private or domestic in nature, having regard to the High Court's decision in *FCT v Anstis*. It had not lost its connection with her profit-making intention. The profit-making purpose was more significant than her intention to live in the apartment.

Issue 3

While the loss was not 'incurred' until the settlement was completed, the ATO was required to assess the loss as having been incurred in 2020 on entering the contract of sale because it was bound to do so by a statement in TR 97/7 on which the Applicant had relied.

ATO view of decision

Both the facts of the case, and the result, were 'unusual'.

The AAT's conclusion in respect to Issue 1 was open on the particular facts of this case and was an available application of the *Myer Emporium* principles.

However, a profit-making purpose alone is insufficient to engage *Myer Emporium* principle. The decision applies the approach in *Greig v FCT [2020] FCAFC 25* which remains the most authoritative explanation of the concept of a 'business operation or commercial transaction' within the meaning of the principle established in *Myer Emporium*.

The application of the principles in *Myer Emporium* always turns on the facts of the particular case, and that the unusual factual findings in this case will limit its application.

In circumstances where the principles in *Myer Emporium* do not apply, the Commissioner will continue to apply the CGT rules to gains and losses on the sale of real property including a person's main residence.

The Commissioner reads the AAT's commentary regarding the non-operation of s8-1(2)(b) as having been informed by its finding that the Applicant's most significant reason for acquiring and selling the Dune Walk apartment was her profit-making purpose.

Regarding Issue 3, the existing authority supports the conclusion that the Applicant did not 'incur' the loss until the contract of sale of the Dune Walk apartment had completed. The Commissioner takes a different view to the AAT as to the interpretation of TR 97/7, and has subsequently updated TR 97/7 to remove any perceived ambiguity or uncertainty.

IFPA COMMENT

1 Maybe the ATO should ***rejoice – and embrace the decision***. Few people make losses on homes these days! It would therefore allow it to tax the profits as ordinary income made by taxpayers who, for example, acquire a property and do a knockdown rebuild in a business-like manner with a profit making intention, but who then sell it soon after and treat it as their CGT exempt main residence (by way of using the CGT building concession in s118-150). But good luck with that!

2 In terms of the "business-like or commercial manner" requirement, in the *Greig* case the Court said undertaking an activity in a business-like manner merely involves "the sort of thing a businessperson would do" – without much further practical elaboration!!

***Bowerman and FCT* [2023] AATA 3547**

Edited Private Ruling: Residency and working holiday makers

Facts

You were born in Country A and are a citizen of Country A. You are also a naturalised citizen of Country B where you lived for a number of years preceding your arrival in Australia.

You arrived in Australia from Country B on a Working Holiday Maker subclass 417 visa (WHM visa). You were renting a property in Country B prior to coming to Australia, and do not own any property or vehicles or have any household effects outside of Australia.

You moved to Australia to live with your partner who is an Australian citizen. When you arrived in Australia you commenced living with your partner. You rent a property with your partner under a residential tenancy agreement. You applied to register your relationship with the relevant state government authority within three months of arriving in Australia.

You are employed in Australia in a professional role which you have held continuously for most of the ruling period. You applied for a Partner visa subclass 820 (Partner visa) within 12 months of arriving in Australia. Your WHM visa remained in effect until your Partner visa was granted.

Since arriving in Australia, you have become a member of several social and sporting clubs.

You have acquired and disposed of foreign shares from through a share broker in Country B. You intend to reside permanently in Australia.

Issues

Issue 1: Resident of Australia?

You are a resident of Australia for from 1 December 2023, for following reasons:

» You are a resident of Australia according to the ["ordinarily"] resides test (but you do not meet the domicile test because your domicile is not in Australia).

» You meet the 183 day test because you were in Australia for 183 days or more during the 2023-2024 and 2024-2025 income year/s, and the Commissioner is not satisfied that ***both***: (a) your usual place of abode is outside Australia, ***and*** (b) you do not intend to take up residence in Australia. ***[IFPA emphasis added]***

Issue 2: Taxation of working holiday taxable income

Background

Section 3A of the *Income Tax Rates Act 1986* subjects working holiday makers (WHM) to special rates of tax (which replaced resident and non-resident taxation rates for WHMs). It applies a 15% flat rate of tax for WHMs on all income earned below the $45,001 threshold.

However, as a result of the High Court decision in *Addy v FCT* [2021] HCA 34, some WHMs may be taxed on the same basis as an resident Australian national, rather than the WHM taxation schedule if: the WHM holds of a Working Holiday or Work and Holiday visa; is a resident of Australia for tax purposes

for the whole or part of the income year; and is from countries which has a non-discrimination article (NDA) in its tax treaty with Australia (eg, Germany, Japan, UK). WHMs from countries other than those listed are unaffected by the *Addy* decision, and the WHM provisions of s 3A of the ITRA 1986 will apply regardless of their residency status.

Application to your situation

You are a citizen of Country A and Country B. Both of these countries do not have a non-discrimination article (NDA) in their tax treaty with Australia, therefore; the *Addy* decision will not apply to you. As the *Addy* decision is not applicable in your case, the provisions of section 3A of the ITRA 1986 will apply to you and any working holiday taxable income you earn will be taxed at the ***[above***] rates published in section 1 of Part III of Schedule 7 of the ITRA 1986.

Issue 3: Taxation of foreign-sourced capital gains and losses

Subsection 6-10(4) provides that for individuals who are residents of Australia, all worldwide sources of statutory income are assessable in Australia. Section 10-5 of the ITAA 1997 confirms that this applies to capital gains. Section 855-45 of the ITAA 1997 provides that when a foreign resident becomes an Australian resident, the CGT provisions contained in Part 3-1 and Part 3-3 of the ITAA 1997 apply to CGT assets from that point in time at as if the owner had acquired the assets at the time they became an Australian resident. This applies to any CGT asset which is not: taxable Australian property, or an asset which was acquired prior to 20 September 1985.

As section 3A of the ITRA 1986 imposes WHM taxation rates only on Australian-sourced income, foreign sourced capital gains and losses will be assessed and taxed under the Australian resident taxation rates contained in section 1 of Part I of Schedule 7 of the ITRA 1986. Section 4 of Part I of Schedule 7 of the ITRA 1986 sets out the method used to calculate the rates of taxation applicable to resident individuals who have both WHM income and non-WHM income:

Application to your situation

You are a resident of Australia for taxation purposes and have disposed of foreign shares through a foreign share broker during the ruling period. Section 855-45 applies such that the CGT provisions contained in Parts 3-1 and 3-3 of the ITAA 1997 will apply to your foreign shares as if you had acquired them when you became an Australian resident. As any net capital gain from foreign-source CGT assets is not WHM income it will be taxed at the rates applicable to Australian residents in accordance with Section 4 of Part I of Schedule 7 of the ITRA 1986.

IFPA COMMENT

1 In determining residency it is first necessary to consider the "ordinarily resides" test per common law principles, as s 6 of the ITAA 1936 states: "... a resident of Australia means: (a) a person, other than a company, who *resides* in Australia and *includes*..." In this case the taxpayer was found to be a resident under both the "ordinarily" resides test and the 183 day test – albeit, there was no need to go past the ordinarily resides test.

2 A working holiday maker (WHM) will only be exempt from the 15% flat rate tax on their WHM income (per the High Court in *Addy*) if he/she:

- holds of a Working Holiday or Work and Holiday visa; and
- is a resident of Australia for tax purposes for any part of the income year; and
- is from countries which has a non-discrimination article (NDA) in its tax treaty with Australia

3 A resident of Australia for tax purposes is liable for Australian CGT on a world-wide basis ie for CGT events happening to relevant assets located both in Australia and outside Australia. And in the case whether the resident is also a WHM, the ITRA 1986 sets out the special method used to calculate the rates of taxation applicable to resident individuals who have both WHM income and non-WHM income.

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Martin E. Holgye
Weber Bowman Pty Ltd. Chartered Accountants

Status of Tax & Superannuation Matters @ 28 July 2025

(This table is not intended to be comprehensive.)

Status of Tax & Superannuation Matters @ 28 July 2025	
Legislation	
No tax bills have yet been introduced in the first fortnight of the 48th Parliament..	It seems likely the Div 296 superannuation legislation will be tabled during the week of sittings at the end of August 2025.
Scheduled Parliamentary sitting days	
Both houses are scheduled to sit from 25th to 28th August 2025	
Appeals	
Commissioner of Taxation v Bendel [2025] FCAFC 15	On 12 June 2025 the High Court granted the Commissioner special leave to appeal against the Full Federal Court's unanimous decision that a UPE is not a loan for Division 7 purposes. It should not be inferred from this that the High Court is necessarily leaning the Commissioner's way in this matter – only that it is a very significant case with far-reaching consequences.