BROWN WRIGHT STEIN

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TAX TRAINING NOTES

Monthly tax training

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About Brown Wright Stein

Brown Wright Stein is a medium-sized commercial law firm based in Sydney. We provide legal advice in the following areas:

- Tax
- Dispute Resolution
- Corporate & Commercial
- Franchising
- Property
- Employment
- Estate Planning
- Elder Law
- Intellectual Property
- Corporate Governance
- Insolvency & Bankruptcy

Our lawyers specialise in working with business owners and their business advisors, such as accountants, financial consultants, property consultants and IT consultants – what we see as our clients' 'business family'. We develop long-term relationships which give our lawyers a deep understanding of our clients' business and personal needs. Over the years we have gained a unique insight into the nature of operating owner-managed businesses and the outcome is that we provide practical commercial solutions to business issues.

At Brown Wright Stein, we believe in excellence in everything we do for our clients. It's this commitment that enables us to develop creative, innovative solutions that lead to positive outcomes.

1 Cases

1.1 Harding – residency

Facts

Mr Harding was born in Australia in 1965 but also holds a British passport.

From 1990 to 2003 Mr Harding lived overseas, where he met his wife and together they had two children. For a majority of the time, Mr Harding lived and worked in Saudi Arabia. For various periods, his family lived with him in Saudi Arabia and for other periods they lived in the UK.

In 2003, the entire family decided to relocate to Australia due to security concerns in the Middle East. This was intended to be a temporary move.

The Hardings built a house in Queensland and moved into it in June 2004. Mr Harding remained in Australia for 3 years. During this period, Mr and Mrs Harding had a third child.

In 2009, Mr Harding received an offer of employment from a UK based company to work in Saudi Arabia. The role offered greater remuneration than he was earning in Australia at that time, in addition to which the income he earned would not be taxed. After confirming that it was possible to live in Bahrain and commute daily to Saudi Arabia, Mr Harding accepted the position in Saudi Arabia. At that time, their middle child, had 2 years of high school remaining. Mr Harding and Mrs Harding had an understanding that Mrs Harding and their youngest son would move to the Middle East after the middle son completed high school in 2011. In July 2009, Mr Harding commenced searching for appropriate accommodation for when his family would move to Bahrain and enrolled his youngest son in the British School in Bahrain for the academic year commencing in 2011.

Mr Harding stated that when he left Australia in 2009, he did so with an intention of living and working in the Middle East permanently, expecting Mrs Harding and their youngest son to join him in 2011. He never expected to live in the Queensland property again and, accordingly, he took all his personal possessions to Bahrain and sold his significant personal possessions in Australia, including his car and boat.

During this period however, Mr Harding continued to use his Australian address, rather than his address in Bahrain, for important correspondence.

Mr Harding maintained joint ownership of the Queensland property, as it was used by his wife and children. Mr Harding returned each year, usually only when his business conditions were suitable for a visit, and stayed at the Queensland property. Mr Harding argued that he only resided there because it was his wife and children's residence.

From 2009 to 2011, Mr Harding rented a two-bedroom apartment in Bahrain expecting his wife and children to visit him from time to time. While it was sufficiently large for Mr Harding's family to reside with him for short periods of time, Mr Harding and Mrs Harding considered the apartment unsuitable for the family to reside in permanently. Mr Harding admitted that had his family resided with him from 2009 to 2011, he would have moved to a larger apartment. In addition to this, when Mrs Harding made trips to Bahrain during this period, the family actively inspected houses to purchase and move into in 2011.

In 2011, prior to the intended move by the rest of the family to Bahrain, Mr Harding and Mrs Harding's marriage broke down and it became clear Mrs Harding would not move to Bahrain. In 2011, Mr Harding made 4 trips back to Australia, where he spent 91 days. It was accepted that many of these trips were attempts by Mr Harding to repair his marriage.

By June 2011, it was understood that the marriage was beyond repair and Mr Harding moved into a 1 bedroom apartment in the same building in Bahrain.

In June 2012, Mr Harding had formed a new relationship with a Ms Gonzalez and they subsequently moved into a 2-bedroom apartment together in the same building.

Mr Harding used the family home for correspondence. He retained a bank account in Australia with statements sent to the family home. Mr Harding maintained his Medicare account, Australian private health insurance, a driver's licence in Queensland and a superannuation account in Australia.

In 2011 Mr Harding purchased an investment property in Australia.

All the apartments in the building in which Mr Harding resided during the years he lived in Bahrain were fully furnished apartments. The only items Mr Harding was required to bring with him were linen and towels. Otherwise, everything else was provided in the apartments, notwithstanding which, Mr Harding did purchase additional household goods, such as cutlery and additional televisions.

In 2013 Mr Harding made two substantial investments in Australia with IOOF Holdings Limited.

In 2014, Mr Harding committed to moving to Oman for work in 2015. Ms Gonzalez was reluctant to move with him and their relationship came to an end.

Following an audit the ATO issued amended assessments to Mr Harding for the financial year ended 30 June 2011 on the basis that he was resident of Australia. Mr Harding objected to the amended assessments. The Commissioner disallowed the objection on the basis that Mr Harding was an Australian resident under both the 'Ordinary Concepts Test' and 'Domicile Test'.

Mr Harding appealed to the Federal Court of Australia. At first instance, Derrington J found that Mr Harding was not a resident under the ordinary concepts test as the objective manifestation of Mr Harding's intention was to permanently cease residing in Australia as:

1. Mr Harding enjoyed and preferred the expatriate lifestyle in the Middle East and only returned to Australia for a few years due to the social and political upheaval in the Middle East, which made living there untenable; and
2. Mr Harding was acutely focused on his work opportunities and seemed to place his work satisfaction ahead of his personal relationships, including the relationships with his family.

Derrington J acknowledged that Mr Harding retained financial connections with Australia, such as bank accounts, an investment property and investments with IOOF, but these were not sufficient to displace the other objective evidence of his intention to depart Australia permanently. The continuing financial association could be explained by the continuing obligations he had to his family, who remained in Australia. Derrington J also noted that where a person makes investments is no longer a significant indication of their residence.

However, Derrington J concluded that Mr Harding remained a resident of Australia under the domicile test. As Mr Harding retained his Australian domicile, in order for him not to be a resident under the domicile test, it was necessary that he had a permanent place of abode overseas. Derrington J considered that Mr Harding did not have a 'permanent place of abode' in Bahrain as the apartments that he rented in Bahrain were fully furnished and temporary accommodation. In the view of Derrington J, the permanent place of abode test requires a person to have accommodation that is not temporary in nature.

Mr Harding appealed to the Full Federal Court of Australia. The Commissioner lodged a notice of contention on the finding that Mr Harding was not a resident under the ordinary concepts test.

Issue

Was Mr Harding a resident of Australia for tax purposes in the 2011 Income Year?

Decision

The Full Federal Court allowed Mr Harding's appeal.

The Full Court held that Derrington J had erred in holding that the permanent place of abode test required a person's dwelling to be permanent. Rather, the Full Court held that the test requires that the person is physically residing permanently in a town or country, not a particular dwelling, that is outside of Australia. As Derrington J

had concluded that Mr Harding was residing in Bahrain permanently, he had a permanent place of abode outside of Australia, notwithstanding that the dwellings that he lived in were temporary in nature.

The Full Court rejected the Commissioner's notice of contention on the ordinary concepts test, accepting Derrington J's analysis that Mr Harding's conduct indicated an intention to depart Australia permanently.

COMMENT - this decision is an important one. Before the Full Court overturned the original precedent, it would be necessary to identify whether a taxpayer's accommodation in a foreign country might be considered to be 'temporary' in nature to determine residency under the domicile test.

Citation *Harding v Commissioner of Taxation* [2019] FCAFC 29 (Logan, Davies and Steward JJ, Queensland)
w http://classic.austlii.edu.au/au/cases/cth/FCAFC/2019/29.html

1.2 Eichmann – active asset for small business CGT concessions

Facts

David Eichmann and his spouse ran a business of building, bricklaying and paving. The business was carried on through the Eichmann Family Trust, of which David and his spouse were beneficiaries.

In 1997, David and his wife acquired their family home and the property adjacent to their family home.

Both properties were acquired after the business had been in operation for many years.

The adjacent property was used as storage for the business. There were occasions when preparatory work was done at the property in a limited capacity but generally the building and bricklaying work was done on work sites.

The adjacent property had two 4x3 metre sheds, as well as a two-metre-high block wall and a gate to secure the property. The sheds and the open space of the property were used for storage of work tools, equipment and materials used in the business. These tools were collected on a daily basis, and in some cases, the property was visited a number of times in a day depending on the tools required for each job.

There was no business signage on the property but there were work vehicles and trailers parked on the property.

The property was sold in 2016.

On 15 December 2016 David applied for a private ruling to determine whether he was entitled to apply the small business CGT concessions on the sale of the property.

The Commissioner issued an unfavourable private ruling. The Commissioner determined that David was not entitled to the small business CGT concessions because the property was not an 'active asset' within the meaning of section 152-40(1)(a) of the ITAA 1997.

The Commissioner contended that to satisfy the active asset test:

- there must be more than a mere incidental use of the land;
- the use must be integral or essential to the business; and
- consideration must be given to the extent those activities could be said to be 'in the course of carrying on a business'.

The Commissioner considered that it was necessary to have regard to the Explanatory Memorandum to interpret the meaning of the phrase 'in the course of carrying on a business'.

David objected to the unfavourable private ruling decision. On 20 July 2017 the objection was disallowed and, on 14 September 2017 David applied to the AAT for review of the objection decision.

Issue

Whether the storing of tools on the property is using the property in the course of carrying on a business?

Decision

The Tribunal held that it was not necessary to have regard to the Explanatory Memorandum as the ordinary meaning of section 152-40(1) of the ITAA 1997 was clear. On the ordinary meaning of section 152-40(1)(a), the storing of the tools on the property satisfied the meaning of 'used in the course of carrying on a business'.

In reaching its decision, the Tribunal held that:

- the use of the property was not trivial or insignificant nor was it incidental to the carrying on of the business;
- the property was not used passively as an investment;
- the property was used by David for the purpose of his business to store material, all of which was used in the business; and
- the storing of the materials and tools on the property contributed to the efficiency of the business.

The Tribunal further commented that the words 'used in the course of carrying on a business did not restrict the concession to activities that are integral or essential to the business. If this was the intention of the legislation, then the provision would have included the words 'integral' and 'essential', but it did not.

COMMENT - it would have been interesting to see if the Tribunal member would have come to a different decision if the property had been used for another purpose or if there were parts of the land that were not used as storage. In *Rus and Commissioner of Taxation* [2018] AATA 1854 (see our July 2018 Tax Training Notes), the Tribunal member looked at the level of use to determine if the land could be seen to be 'used' in the business. It is likely that this point was not considered in the current case as there was no competing use in the facts considered in the private ruling decision.

Citation *Eichmann and Commissioner of Taxation* [2019] AATA 162 (DP Hanger, Brisbane)
w http://classic.austlii.edu.au/au/cases/cth/AATA/2019/162.html

1.3 KKQY – Division 7A, legal fees and penalties

Facts

KKQY was a shareholder of a Company and entered into a series of agreements.

On 1 April 2005 KKQY entered into a loan agreement for the Company to loan $3 million to KKQY (**2005 Loan Agreement**) that did not comply with Division 7A.

On 13 April 2007, KKQY and the Company entered into a Settlement Deed (**2007 Settlement Deed**), under which KKQY agreed to repay the amount advanced under the 2005 Loan Agreement in accordance with the minimum repayment obligations in Division 7A and to execute amended loan documents to ensure the loan was on terms compliant with Division 7A.

On 21 November 2007, the Chief Financial Officer of the Company wrote to KKQY noting that a failure to execute a loan agreement that was compliant with Division 7A would result in adverse tax implications for KKQY. The CFO specified that the amount loaned by the Company (being $2.15 million at that time) would be treated as a deemed dividend to KKQY, in addition to which KKQY would be liable for penalties and interest.

On 23 November 2007, KKQY and the Company entered into a 7-year Loan Agreement that was compliant with Division 7A (**2007 Loan Agreement**). The 2007 Loan Agreement confirmed the loan balance as $2,162,000 on 30 June 2006, and that interest on the loan would accrue in accordance with the minimum repayment obligations in Division 7A.

In August 2009, KKQY and the Company entered into an amendment agreement for the 2007 Agreement (**2009 Loan Agreement**). The amended agreement recorded the balance as $1,437,882 and provided that the amounts

advanced were repayable over 25 years from the date of the original advance. As required for 25-year loans under Division 7A, the 2009 Loan Agreement provided that the loan was to be secured over real property.

In November 2010, KKQY and the Company entered into a further amended agreement (**2010 Agreement**) which recorded the outstanding balance of the loan as $1,361,000 and provided for KKQY to make loan repayments of $589,869 in the year ended 30 June 2011 and $428,871 in the year ended 30 June 2012, being the minimum annual repayments for the loan for those years under Division 7A. It appears, although it is not clear from the decision, that the 2010 Agreement converted the loan back to a 7-year loan.

In the income year ended 30 June 2012, KKQY only paid $150,000 of the minimum annual repayment of $428,871 for that year. This resulted in a shortfall of $278,871 (**Repayment Shortfall**).

Legal Fees

In the year ended 30 June 2012, KKQY commenced proceedings in the Supreme Court of New South Wales against the Company and the trustee of a trust of which KKQY was a beneficiary. KKQY sought orders that the trustee should provide accounts and other information, directions that the trustee misconducted themselves or otherwise breached the trust deed for the trust, orders to remove the trustee and appoint a replacement trustee, and orders for taking of accounts of the trust. KKQY incurred legal fees of $193,466 in those proceedings.

On 31 October 2014, KKQY commenced proceedings in the Federal Court related to the Supreme Court proceedings. KKQY sought a voiding of the trust deed of the Trust, an account of profits made by the trustee, the Company and the Company's subsidiaries, a constructive trust in favour of the beneficiaries of the trust, a further accounting of profits and a further constructive trust in favour of the beneficiaries of the trust. KKQY incurred legal fees of $113,897 in those proceedings.

KKQY sought to deduct the legal fees incurred in both the Supreme Court and Federal Court proceedings (**Legal Fees**).

Amended assessments

On 19 December 2017 the Commissioner amended KKQY's assessment for the year ended 30 June 2012 by including the Repayment Shortfall as a deemed dividend under Division 7A and by disallowing the deductions for the legal fees.

The Commissioner also assessed KKQY for a 50% administrative penalty for recklessness as to the operation of tax law.

KKQY objected to the amended assessment and, following the Commissioner's disallowance of the objection, applied to the AAT for a review of the decision.

KKQY contended that, as the loan made in the year ended 30 June 2005 was not made on complying terms under Division 7A, a deemed dividend arose in the year ended 30 June 2005, such that the Repayment Shortfall could not give rise a to further deemed dividend under Division 7A.

The Commissioner contended that the effect of the 2007 Loan Agreement was to bring the 2005 Loan Agreement to an end and advance a new loan. Hence, the fact that the loan made in 2005 was a deemed dividend in that year, did not prevent the Repayment Shortfall being a deemed dividend. The 2007 Loan Agreement recorded a new loan that was a complying loan for the purposes of Division 7A and minimum annual repayments needed to be made.

In terms of the Legal Fees, KXQY contended that they were incurred in proceedings involving a claim for lost income, due to the activities of the trustee in breach of its duties, and the recovery of that lost income. Hence the Legal Fees were deductible.

Issues

1. Whether the Repayment Shortfall was a deemed dividend assessable as KKQY's income;
2. Whether KKQY was entitled to deduct the Legal Fees; and

3. Whether KKQY was correctly assessed in relation to the administrative penalty and whether that penalty should be remitted in whole or part.

Decision

The Deemed dividend

The Tribunal concluded that the Repayment Shortfall was a deemed dividend under Division 7A.

The Tribunal noted that whether the Repayment Shortfall was a deemed dividend depends upon whether the changes to the loan terms in 2007 resulted in a new loan being made or whether it was simply a variation of the existing loan terms.

The Tribunal considered whether the 2005 Loan Agreement was varied or terminated by replacing its terms with a subsequent loan agreement. The Tribunal noted the decision of the High Court in *Commissioner of Taxation v Sara Lee Household and Body Care* (2001) 201 CLR 520 and highlighted that when parties to an existing contract enter into a further contract there is a question whether the second contract merely varies the first contract or, instead, represents an entirely new contract and the first contract is rescinded. As there was no express statement of rescission in the 2007 Loan Agreement, the Tribunal considered that it was necessary to ascertain the intention of the parties when making the 2007 Loan Agreement.

The Tribunal considered that the 2007 Loan Agreement went beyond mere modification to the 2005 Loan Agreement, as it replaced all of the terms of the 2005 Loan Agreement, including the term of the agreement and the rate of interest payable. The Tribunal concluded that these terms were fundamental and go to the root of the loan agreement between KKQY and the Company and it was not possible for both loan agreements to be performed according to their terms. Therefore, the Tribunal found that the implied intention of the parties was to rescind the 2005 Loan Agreement and replace it with the 2007 Loan Agreement.

As a result, the 2007 Loan Agreement was the agreement governing the terms of the loan from the Company to KKQY. The 2007 Loan Agreement provided for an 'amalgamated loan' which complied with Division 7A such that the Repayment Shortfall was deemed to be a dividend.

Deduction of legal fees

To determine whether KKQY was entitled to a deduction for the Legal Fees, the Tribunal considered the nature of the expenditure.

The Tribunal noted that for the Legal Fees to be deductible, the object that was to be achieved in the legal proceedings must be productive of actual or expected income of KKQY.

The Tribunal concluded that the Legal Fees were not incurred in gaining or producing assessable income. Rather, the Legal Fees were an outgoing of a capital nature. The litigation concerned changes to the trust and how it was to be managed, not the operations of the trust that produced income.

Administrative penalty assessment

The Tribunal emphasised that recklessness means that a person knows that there is real risk that the material disclosed in the tax return may be incorrect or the person is grossly indifferent as to whether or not the material is correct. Furthermore, that a reasonable person in the position of the statement-maker would see that there is a real risk. In the present case, KKQY was aware of the need to ensure that the 2005 loan was on terms compliant with Division 7A, as outlined in the Settlement Deed.

Furthermore, from the email from the CFO in November 2007, KKQY was aware of the repayment obligations that arose from the 2007 Loan Agreement terms.

The Tribunal also highlighted that KKQY's lack of explanation regarding the noncompliance with his repayment obligations showed a ‘disregard of, or indifference to, the consequences foreseeable from not disclosing the deemed dividend’.

Therefore, the Tribunal affirmed the Commissioner's decision imposing the penalty.

COMMENT - while there may have been a new contract entered into as a result of the 2007 loan agreement, it does not appear that any funds were advanced in the 2007 year. Presumably the 2007 deemed dividend arose because the transaction resulted in a 'financial accommodation', though this point is not addressed in the judgement.

Citation *KKQY and Commissioner of Taxation* [2019] AATA 204 (DP Britten-Jones, Sydney)
w http://classic.austlii.edu.au/au/cases/cth/AATA/2019/204.html

1.4 Watson – deductibility of expenses

Facts

On 7 February 2009, the Black Saturday bushfires occurred in Victoria. It was alleged that two of the bushfires were caused by the negligence of AusNet Electricity Services Pty Ltd and others.

On 7 August 2012, a class action was commenced on behalf of the victims of the bushfires against AusNet and others in the Supreme Court of Victoria.

Maurice Blackburn were the solicitors for the plaintiff group members, with Andrew Watson being the principal with carriage of the matter.

On 6 February 2015, the parties agreed to settle the proceeding by entering into a Deed of Settlement, subject to approval by the Supreme Court.

The Deed of Settlement provided that the defendants would pay amounts totalling $300 million to a 'Reserve Fund' within 90 days and from this approximately $20 million would be paid for the plaintiffs' legal costs and disbursements (approximately $20 million), with the remainder of the Reserve Fund transferred to an interest-bearing bank account opened by Maurice Blackburn to ultimately distribute to group members.

On 27 May 2015, the Deed of Settlement and an associated Settlement Distribution Scheme were approved by the Supreme Court.

Mr Watson was appointed as the trustee of the Fund and as scheme administrator.

Mr Watson was not required to maximise the return on the remainder of the Reserve Fund, with his sole obligation being to deposit it in an interest-bearing account with an authorised deposit-taking institution. The only discretion Mr Watson had was to choose between different banks and deposit terms.

Mr Watson invested the balance of the Reserve Funds in a series of term deposits and other interest-bearing accounts with a number of large Australian banks. Mr Watson consulted with Maurice Blackburn's in-house finance team in making these decisions.

Throughout the administration, Mr Watson made decisions regarding re-investment of the monies at least once every three months.

As scheme administrator Mr Watson's duties included:

1. ongoing development, implementation and monitoring of internal processes for assessing claims, including the development of IT system requirements and infrastructure and the recruitment, training and supervision of administrator staff;
2. delegating to staff the responsibilities to perform the functions necessary and convenient for the efficient implementation of the scheme;
3. engaging barristers, medical practitioners and processional loss assessors or adjustors to assist in the assessment of claims;
4. managing and administering the Fund, including estimating costs and the process for distribution;

5. liaising with organisations regarding workflow and assessment rates, and taxation of interest accrued on the balance of the Reserve Fund;
6. implementing practices to monitor and estimate the costs of administering the Fund; and
7. investing the balance of the Reserve Fund while the assessment of claims proceeded.

The outgoings incurred by Mr Watson in the course of administering the Fund totalled $4,341,327, which was almost entirely the costs of Maurice Blackburn staff.

On 25 October 2017, Mr Watson lodged an income tax return as trustee of the Fund in which he declared the interest income on the deposited monies but did not claim any deductions for the outgoings incurred.

On 1 November 2017, the Commissioner issued a Notice of Assessment to Mr Watson in accordance with the tax return lodged.

On 20 December 2017, Mr Watson, as trustee of the Fund, objected to the assessment and claimed that he was entitled to deduct the outgoings from the interest income. Mr Watson contended that the outgoings were deductible under section 8-1 of the ITAA 1997 either because they are incurred in the course of gaining or producing assessable income (**First Limb**) or they were necessarily incurred in carrying on a business by him, as trustee of the Fund, for the purpose of gaining or producing assessable income (**Second Limb**). Further, Mr Watson contended that the outgoings were not denied deductibility under the negative limb in section 8-1 as they were not capital in nature (**Capital Limb**).

In relation to the First Limb, Mr Watson relied heavily on the decision of the High Court in *Commissioner of Taxation v Anstis* [2010] HCA 40 in which the taxpayer was held to be entitled to deduct her education expenses against her youth allowance income. Mr Watson argued that *Anstis* and earlier decisions (such as *Commissioner of Taxation v Day* [2008] HCA 53 and *Commissioner of Taxation v Payne* [2001] HCA 3) demonstrated that 'in the course of' does not require a direct connection between the outgoings and the activities that produce the income, noting that in *Day* the High Court had stated that what was productive of a taxpayer's income is 'to be found in all the incidents of his office'.

Mr Watson contended that activities of investing and the activities of distribution were integrated and could not be separated such that the whole of the outgoings were deductible.

In relation to the Second Limb, Mr Watson contended that, consistent with the decision in *Spriggs v Commissioner of Taxation* [2009] HCA 22 it was necessary for him to have a profit-making purpose in order for him to be regarded as carrying on a business. Mr Watson contended that the scale of his activities and the systematic and organised way that they were carried on meant that he should be regarded as carrying on a business in his capacity as trustee of the Fund.

Mr Watson contended that, once it was established that he was carrying on a business, it had to be concluded that the outgoings were necessarily incurred in the carrying of the business as the outgoing arose from the same activities that constituted the business.

Mr Watson contended that the outgoings were not capital in nature as the occasion of the outgoings was the carrying of the business and they were periodical and recurrent.

On 1 March 2018 the Commissioner disallowed Mr Watson's objection in full.

On 28 March 2018 Mr Watson appealed the Commissioner's objection decision to the Federal Court of Australia.

Issue

Whether the outgoings were deductible under section 8-1 of the ITAA 1997.

Decision

First Limb

The Court accepted that in considering whether outgoings are incurred in the course of producing or gaining assessable income an overly narrow view of the directness between the expenses and the income should not be adopted. However, the Court considered that there still needed to be a sufficient connection and referred to the comments of Hill J in *Commissioner of Taxation v Firth* (2002) 120 FCR 450 where his Honour stated as follows:

> *The positive tests require that there be a connection between the loss or outgoing on the one hand and the assessable income or business on the other. The nature of that connection has been expressed in different ways in the cases. It is sometimes said that there must be a 'perceived connection' between the loss or outgoing and the assessable income or business: Commissioner of Taxation (Cth) v Hatchett [1971] HCA 47; (1971) 125 CLR 494 at 499. In other cases it has been said that the expenditure must be 'incidental and relevant' to the operations or activities regularly carried on by the taxpayer for the production of income: Ronpibon Tin NL v Commissioner of Taxation (Cth) [1949] HCA 15; (1949) 78 CLR 47 at 56, Commissioner of Taxation (Cth) v Smith [1981] HCA 10; (1981) 147 CLR 578 at 586.*

The Court considered that there was not a sufficient connection between the outgoings and the activities that gained or produced the interest income, given those activities went well beyond the process of investing the monies in interest bearing accounts. The Court noted that the costs to be deducted included the costs of assessing the entitlements of individual claimants, which clearly related to the distribution of the Fund and not the derivation of interest. Of the many timesheet entries of hundreds included in the Maurice Blackburn fees the Court noted only one or two related to the consideration of investment options and investing the money.

The Court referred to the decision of Hill J in *Trustees of the Estate Mortgage Fighting Fund v Commissioner of Taxation* [2000] FCA 981, where his Honour commented, in respect of expenses incurred in soliciting contributions to the fund, as follows (emphasis added in judgement):

> *But that is not the true where the relationship to the soliciting of funds which represent the capital of the trust, even where, to the extent that capital is not expended, it is invested at interest.* ***In my view the outgoings in question both lack the necessary connection with the activities which gained or earned the interest income of the trust (at least in whole) and this is so notwithstanding that without those funds, interest would not have been earned.***

The Court agreed with a submission of the Commissioner that Mr Watson's approach erroneously turned the test into a 'but-for test'. That is, an outgoing is deductible if, but for the outgoing, the income would not have been derived. The Court noted that the deriving of interest was never conditional on the wider activities undertaken by Mr Watson in administering the Fund, aside from holding the remainder in interest-bearing deposits.

Second Limb

The Court observed that it was necessary to separate the activities of Maurice Blackburn and Mr Watson as a partner of that firm in carrying on their own business and the activities that were said to constitute the business of Mr Watson in his capacity as trustee of the Fund.

The Court accepted that the scale of Mr Watson's activities was substantial and that the activities were carried on in a systematic and organised manner. However, the Court did not consider that the fact that it was expected that the interest to be earned over time would exceed the administration costs led to there being a profit-making purpose in the ordinary, commercial sense of that phrase because the other side of the ledger – the costs – are driven by completely separate considerations. The Court commented as follows:

> *In that sense, the Taxpayer was not in a position where he was weighing up the earning or derivation of interest income on one side of the equation with the costs of administering the Fund on the other, and actively either seeking to maximise the income and minimise the costs in the manner that a businessperson might ordinarily do in a typical commercial operation. Rather, in my view, the Taxpayer had different considerations in mind:*

> *(1) in respect of the income, Mr Watson attested to the fact that in investing the Distribution Sum, he considered it his 'principal duty' to 'ensure the security of the funds'; and*
>
> *(2) in respect of the costs, Mr Watson attested to the fact that in administering the SDS he needed to control the costs of the administration but, critically, only to the extent that doing so was consistent with his 'obligations to ensure that the process was fair and appropriately conducted'.*

In light of the absence of a profit-making purpose, as the Court also considered there was no commercial character to the activities, and as Mr Watson was merely administering the Fund in accordance with the terms of the terms of the scheme, he was not carrying on a business in his capacity as trustee of the Fund.

Capital Limb

The Court noted that the three criteria in determining whether costs or expenses are on capital or revenue account were set out by Dixon J in *Sun Newspapers Ltd v Commissioner of Taxation* [1938] HCA 73 as follows:

> *... (a) the character of the advantage sought, and in this its lasting qualities may play a part, (b) the manner in which it is to be used, relied upon or enjoyed, and in this and under the former head recurrence may play its part, and (c) the means adopted to obtain it; that is, by providing a periodical reward or outlay to cover its use or enjoyment for periods commensurate with the payment or by making a final provision or payment so as to secure future use or enjoyment.*

The Court considered that the advantage sought in this case in incurring the outgoings was the permanent distribution of moneys to the group members and that this was capital in nature. The mere fact the outgoings were periodical and recurrent did not alter them as capital given the whole efforts were dedicated to making permanent distributions to group members in discharge of Mr Watson's duties as scheme administrator.

Citation *Watson as trustee for the Murrindindi Bushfire Class Action Settlement Fund v Commissioner of Taxation* [2019] FCA 228 (Middleton J, Melbourne)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA//2019/228.html

1.5 Universal Supermodels – employee/contractor for payroll tax

Facts

Universal Supermodels Pty Ltd operated three adult entertainment venues. Universal held a liquor licence and adult entertainment licence, which required compliance with the Adult Entertainment Code in accordance with the *Liquor Act 1992* (Qld).

Universal engaged both employees and contractors at its clubs. Universal employed receptionists who collected cash, hostesses who worked on the club floor and assisted dancers who sold private lap-dances, team leaders who were duty managers, bar staff and a licensed controller who Universal was required to employ to ensure compliance with Universal's adult entertainment licence. Universal engaged security personnel, cleaners and dancers as contractors, payments to whom were not liable for payroll tax. Employees were provided with a staff pack (which had, for example, a PAYG withholding form), while dancers were provided with a dancers pack (which had, amongst other items, a dancer's protocol (**Protocol**) and an ABN application form).

Universal made it clear that dancers were being engaged as contractors. Dancers were required to have ABNs and if a dancer did not have an ABN, Universal would assist the dancer to set one up. The dancers were not entitled to superannuation or sick leave.

The dancers were not given any instructions on how to perform a private dance or provided with any feedback.

The dancers would advise Universal of their availability at the start of a week and Universal would schedule the dancer's presence at the clubs in accordance with that availability.

The dancers bought a uniform from Universal before dancing. The price of that outfit was usually deducted from subsequent payments to the dancer. Dancers were required to wear their uniform correctly at all times and be well groomed.

The dancers could and often did work at other clubs.

The Protocol specified a rate for lap dances on a time-basis. The rates were not negotiable, though dancers could receive extra money by way of tips.

The Protocol provided for disciplinary action in the form of fines and forfeited pay if the dancer broke Universal's rules or conditions, including dismissal. The Protocol noted requirements for notice before resignation and that dancers did not have the ability to sub-contract or delegate their work.

Universal contended that the Protocol was introduced to assist dancers to understand Universal's compliance obligations. As the Protocol was rarely adhered to by dancers, Universal created the fine system to discourage breaches of compliance requirements.

Several dancers agreed that many of the conditions and requirements outlined in the Protocol were not enforced (for example, a requirement that dancers had to provide 2 weeks' notice before taking extended leave).

Dancers, when not performing, circled the club, looking to sell private dances to potential clients. Once a customer agreed to have a private lap-dance, the dancer would escort the customer to reception, where the customer would pay the club the set fee for the dance.

Dancers received 50% of the money made from performing private lap-dances and would pay Universal 50% of any tips.

The dancer would sign a tax invoice and issue it to Universal on a daily basis for their services. The tax invoice was prepared by employees of Universal.

Where a dancer earned no money in a night, Universal would pay the dancer $50. The dancers considered this payment to be a retainer. Universal contended this was to lift morale.

From 2004 to 2006 the ATO had conducted a review of the adult entertainment industry in the context of GST obligations and concluded that dancers were not employees and should register for an ABN as dancers were carrying on an enterprise. The ATO released a number of Interpretative Decisions in relation to the supply of adult services (in the context of GST) that were consistent with dancers being independent contractors rather than employees. However, in cross examination, Mr Disavia (Universal's accountant) agreed that at the time of the ATO audit, the arrangements were materially different. For example, at that time, Universal considered itself an agent for dancers and referred to dancers as franchisees.

On 5 February 2015 the Chief Commissioner of State Revenue for Queensland issued reassessments for payroll tax for the years ended 30 June 2009 to 30 June 2014 to Universal on the basis that the dancers were employees of Universal whose wages were liable for payroll tax.

In the reassessments, the Commissioner remitted penalty tax from 75% to 20% and remitted unpaid tax interest from 19 August 2014 to 5 February 2015.

On 26 March 2015, Universal objected to the reassessments, arguing that an examination of the substance of the relationship between Universal and the dancers was one of an independent contractor and that the application of the entrepreneurial test suggested that dancers operated their own business, separate to Universal's business. Universal also contended that penalties should be remitted to nil as it had structured the relationship with dancers as independent contractors in accordance with the ATO audit and this demonstrated that it had exercised reasonable care.

On 27 November 2015, the Chief Commissioner disallowed the objection, contending that the Protocol was consistent with Universal exercising authority to control the dancers in what they wore, how they worked and performed their job, and outlined the pay rate for lap dancing. Further, dancers were required to work minimum hours during a shift and did not bear commercial risk in performing at Universal's clubs. These factors were indicative of an employer/employee relationship.

On 22 January 2016, Universal appealed the objection decision to the Supreme Court of Queensland. Prior to doing so, Universal paid all of the primary tax appealing the objection decision, arguing the dancers were independent contractors and that penalties should be remitted to nil.

Universal contended that the substance of the relationship between dancers and Universal, and an application of the entrepreneurial test, showed that the dancers operated their own businesses as contractors. Universal also argued that their control did not extend beyond what was necessary for compliance with the Code and the terms of Universal's adult entertainment licence.

Universal noted that some dancers had substantial goodwill in the form of regular customers which allowed them to earn substantially more money than other dancers, which was indicative of the dancers carrying on their own business.

The Commissioner noted that, on cross examination:

1. One of the dancers, Sandra, agreed that it was the club providing adult entertainment, as the club had the licence, provided the premises, door and bar staff, and controllers, and that the dancer was merely part of the organisation. The Commissioner considered that this was indicative of dancers being Universal's employees.
2. Sandra and another dancer, Cindy, agreed that the dancers did not have a business to sell, for example, dancers could not sell their regular customers to another dancer. The Commissioner considered that this was again indicative of the dancers being Universal employees and that the dancers were not carrying on an independent business.
3. Teraza, a general manager of Universal, agreed that Universal, not the dancers, had the necessary licence. Teraza also agreed that the profitability of Universal's business depended on the dancers, suggesting that the dancers were integrated into Universal's business.

Issues

1. Were the dancers employees of Universal?
2. Should the penalty tax be remitted to nil?

Decision

The Court concluded that the dancers were employees of Universal.

The Court noted that labels adopted by the parties were not determinative of the nature of the relationship. Whilst it was significant that the services the dancers supplied were dependent upon the dancer's unique personal characteristics, that dancers had their own clients, had their own ABNs and that much of a dancer's income is derived from regular customers, these factors did not prevent a conclusion that the dancers were employees.

The Court found the following characteristics and an assessment of the circumstances as a whole supported a conclusion that the dancers were employed by Universal:

1. the dancers could not fix their own remuneration rate, hours and the methods for the provision of their services lacked sufficient personal control for the dancers to be considered independent contractors engaged by Universal.
2. That the dancers undertook their duties in accordance with the Protocol, which set limits that went beyond what was necessary to ensure compliance with Universal's statutory obligations. This included the minimum hours requirement for a shift, restrictions on changing shifts without penalty, restrictions on circumstances under which a dancer can take a break, and restrictions on the types of clothing the dancer may wear. Even if these were not enforced, Universal had the authority to enforce these conditions.
3. That the amount a dancer could receive in providing a lap-dance was not dependent upon the dancer's skill. The rate was set by Universal. The dancer could not negotiate the rate.
4. The Court considered the fact that the fees were paid directly to Universal and that any tips were split 50/50 with Universal to be indicative of the services being provided on behalf of Universal, rather than as part of the dancer's independent business.
5. The money received was retained by Universal until the next night the dancer performed at the club (during which time Universal would provide the dancer with a prepared tax invoice, which set out the

amount owed to the dancer). The Court found it significant that the dancer did not provide a tax invoice to the client.

6. That Universal paid dancers who did not provide any lap-dances were paid $50 was akin to a guaranteed minimum wage for a rostered shift. The dancers did not adopt commercial risk.
7. Dancers could not unilaterally decide to have another dancer perform the rostered shift.

The Court found Universal's position had little support from the outcome of the ATO audit, as the audit (and subsequent interpretative decisions and fact sheets on matters raised in the audit) did not conclude that dancers were not employees of adult venue operators. The ATO audit focused on whether the supply of the dance for GST purposes was made by the dancer or adult venue operator and assessed materially different fact situations. This was not relevant for Universal's contentions in relation to whether the dancers were employees or contractors.

Penalty Tax

The Court concluded there was nothing in the circumstances giving rise to a full remission of penalty tax. The Court noted that the Commissioner had remitted interest and remitted penalty tax to 20%, being less than what was provided for in the Commissioner's guidelines.

The Court noted that, while the ATO audit may have encouraged operators of adult venues to have dancers arrange their affairs in a manner consistent with the dancer being an independent contractor, the method in which the dancer provided services at the time of the ATO audit was materially different to the present facts (for example, the dancers received payments for their services, including all tips).

The Court also noted that there was no basis to conclude the ATO's actions (such as fact sheets issued after the ATO audit) constituted a determination that dancers were carrying on their own independent businesses. The Court considered that reliance on those materials by Universal, at best, constituted carelessness.

COMMENT – the position in this case has impact on other businesses where the owner of premises dictates the terms of the arrangements, such as occurs in medical centres. It also highlights the need to closely examine the relationship carefully when one party is paying another. The outcome in this case could have been different if, rather than the company paying the dancers, the company collected money on the dancer's behalf and deducted its fees from the receipts.

Citation *Universal Supermodels Pty Ltd v Commissioner of State Revenue* [2019] QSC 257 (Boddice J, Brisbane)
w https://www.queenslandjudgments.com.au/case-download/id/320959

1.6 Victoria Power Networks – non-cash business benefits

Facts

Victoria Power Networks Pty Ltd (**VPN**) held a distribution licence under the *Electricity Industry Act 2000* (Vic) and carried on the business of distributing electricity to customers in Victoria.

Under the terms of its electricity distribution licence, VPN was required to connect customers to the electricity network when requested to do so. The work involved the construction and installation of assets necessary for the delivery of electricity from the transmission grid to the customer.

Certain works were required to be carried out by VPN, while other works could be carried out by VPN or the customer, at the customer's option. Depending on the type of connection works involved and the choice made by the customer, either:

1. VPN undertook construction of the connection works; or
2. the customer undertook construction of the connection works. Upon completion of the connection works, the customer was required to transfer the completed works to VPN (the **Transferred Assets**) and VPN paid a rebate to the customer (the **Rebate**).

Under the applicable regulatory regime, in every case a calculation was made by VPN of the incremental cost in relation to a new connection less the incremental revenue in relation to the new connection. The incremental cost and the incremental revenue were both present day values. There were two distinct situations referred to by the parties:

1. where the incremental revenue was greater than the incremental cost, the situation was referred to as an 'economic connection'; and
2. where the incremental revenue was less than the incremental cost, the situation was referred to as an 'uneconomic connection'.

Where VPN undertook the construction works and the connection was 'uneconomic', VPN was entitled to charge the customer an amount equal to the incremental cost less the incremental revenue (the **Customer Cash Contribution**).

Where the customer undertook the construction works and the connection was 'uneconomic', the customer was in effect required to make a contribution equal to the incremental cost less the incremental revenue (the **Customer Contribution**). In such a case, the customer was required to convey the Transferred Assets constructed by it to VPN and VPN paid the customer a Rebate equal to the estimated cost of construction less the Customer Contribution.

The regulatory objective behind the requirement for a customer to either make a Customer Cash Contribution or a Customer Contribution in respect of an uneconomic connection was to ensure that the other customers of VPN were not required to subsidise uneconomic connections.

The following examples illustrate the two possible scenarios where the connection was uneconomic (i.e. the cost of the construction works involved in the connection exceeded the present value of the projected revenues that the Distributor expected to earn from the connection).

Example 1 VPN Constructs Connection		**Example 2 Customer Constructs Connection**	
Estimated Cost of Construction	($100)	Estimated Cost of Construction	($100)
Future Upstream & Opex	($20)	Future Upstream & Opex	($20)
Future Revenues	$80	Future Revenues	$80
Customer Cash Contribution	$40	***Customer Contribution*** (amount of construction costs required to be borne by customer)	$40
Total cost of construction borne by VPN	**$60**	**Rebate paid by VPN**	**$60**

Although in Example 2 the customer incurs $100 to undertake the construction works, the customer is required to convey the Transferred Assets (worth $100) to VPN. However, because the customer is only required to bear the cost of construction that is uneconomic ($120 – $80 = $40), VPN is required to pay a Rebate of $60 to the customer (representing the value of the Transferred Assets worth $100 less the Customer Contribution of $40).

When lodging its tax returns for the years ended 30 June 2008 to 30 June 2011, VPN included the Customer Cash Contributions in its assessable income but did not include the Customer Contribution. VPN also claimed a deduction for the Rebates.

The Commissioner issued amended assessments to VPN for the years ended 30 June 2008 to 30 June 2011 to include amounts in respect of the Transferred Assets in VPN's assessable income. The Commissioner also denied the deductions for the Rebates, but the arm's length value of the Transferred Assets were reduced by the amount of the associated Rebates as recipient's contributions under section 21A of ITAA 1936.

VPN objected to the amended assessments, contending that the Customer Cash Contributions were not ordinary income, but instead were assessable recoupments, and the value of the Transferred Assets were not assessable. VPN submitted that the Customer Cash Contributions were not ordinary income as they were paid only if, and to the extent that, VPN would incur an economic loss and, therefore, were not the product of VPNs income-earning activity. VPN further argued that the Customer Cash Contributions were 'received by way of gift or subsidy to replenish or augment the payee's capital' quoting the High Court in *GP International Pipecoaters Pty Ltd v Federal Commissioner of Taxation* (1990) 170 CLR 124.

On 25 August 2017 the Commissioner disallowed the objections. On 20 October 2017, VPN appealed the objection decisions to the Federal Court of Australia.

The parties agreed that the Transferred Assets constituted a 'non-cash business benefit' for the purposes of section 21A, being 'property or services provided … wholly or partly in respect of a business relationship', and that the Transferred Assets were received on revenue account and therefore represented income derived by VPN.

Section 21A provides that, if a non-cash business benefit (whether or not convertible to cash) is income derived by a taxpayer, the benefit shall be bought to account at its arm's length value reduced by the recipient's contribution (if any). The parties agreed that the recipient's contribution for the purposes of section 21A was equal to the Rebate of $60.

The disagreement between the parties in relation to section 21A concerned the 'arm's length value' of the Transferred Assets as that term is defined in subsection 21A(5), which provides as follows:

> *(5) In this section:*
>
> *arm's length value, in relation to a non-cash business benefit, means:*
>
> *(a) the amount that the recipient could reasonably be expected to have been required to pay to obtain the benefit from the provider under a transaction where the parties to the transaction are dealing with each other at arm's length in relation to the transaction; or*
>
> *(b) if such an amount cannot be practically determined—such amount as the Commissioner considers reasonable.*

VPN contended that the arm's length value of the Transferred Assets was $60, such that the amount included in its assessable income under section 21A was $0.

The Commissioner contended that the arm's length value of the Transferred Assets was $100, such that the amount included in its assessable income under section 21A was $40.

Each party obtained expert evidence that sought to value the Transferred Assets as the lower of:

1. the replacement cost of the Transferred Assets; and
2. the net present value (NPV) of the expected future net cash flows to VPN from ownership of the Transferred Assets.

The experts agreed that the replacement cost of the Transferred Assets was equal to the estimated cost of construction (i.e. $100). VPN's expert stated that, on an NPV of the expected future net cash flows to VPN, the Transferred Assets had a value of $60. The Commissioner's expert stated that the value was $100.

Issues

1. Where VPN undertook the works was the Customer Cash Contribution ($40 in Example 1):
   a. income according to ordinary concepts; or
   b. an 'assessable recoupment' within the meaning of section 20-20 of the ITAA 1997?
2. Where the customer undertook the works:
   a. was the Customer Contribution ($40 in Example 2) income according to ordinary concepts; or
   b. how was the Transferred Asset as a non-cash business benefit under section 21A of the ITAA 1936?

Decision

VPN constructs connection

Moshinsky J held that the Customer Cash Contribution constituted ordinary income of VPN.

Moshinsky J noted that the reference to connections being uneconomic was somewhat misleading as, whilst the particular incremental cost of a particular connection may exceed the incremental revenue from that connection, the regulatory regime provided for Customer Cash Contribution so that other customers were not, in effect, subsidising the connection.

Moshinsky J also noted that the requirement to undertake the 'uneconomic' connections was a condition of VPN's license. New connections resulted in VPN to receiving tariff income from the ongoing connections.

Moshinsky J noted that the Customer Cash Contributions were consideration payable for new connections and were not amounts 'received by way of gift or subsidy to replenish or augment the payee's capital' as submitted by VPN.

Moshinsky J noted that the Customer Cash Contributions were ongoing and recurrent and were a product of the ongoing business activity of connecting new customers. They were remuneration for the services provided and not merely reparation for costs incurred.

Accordingly, Moshinsky J considered that the Customer Cash Contributions were income accordingly to ordinary concepts.

Customer constructs connection

In respect of the Customer Contribution amount in Example 2, Moshinsky J held that such an amount was not ordinary income of VPN because the customer was not under a contractual obligation to pay the amount of the Customer Contribution – it was merely a component in the calculation of the Rebate payable by the Distributor to the customer (i.e. the value of the Transferred Assets conveyed by the Customer to the Distributor less the amount of the Customer Contribution).

Moshinsky J then turned his attention to the application of section 21A of ITAA 1936 to the Transferred Asset. Moshinsky J noted that, unlike the term 'arm's length consideration' utilised elsewhere in the tax law, the definition of 'arm's length value' in section 21A(5) of the ITAA 1936 requires the amount which could reasonably be expected to have been required to pay be determined having regard to the position of the actual recipient and not some notional 'independent party'.

Moshinsky J held that the arm's length value of the Transferred Assets for the purposes of section 21A was equal to their estimated cost of construction ($100). Section 21A provides that, if a non-cash business benefit (whether or not convertible to cash) is income derived by a taxpayer, the benefit shall be bought to account at its arm's length value reduced by the recipient's contribution (if any). As the parties agreed that the recipient's contribution for the purposes of section 21A was equal to the Rebate of $60, the amount included in VPN's assessable income was $40.

Moshinsky J noted that the expert evidence as to the value of the Transferred Assets was that the test for arm's length value under section 21A should be the lower of the replacement cost or the NPV of future cash flow. The test was simply the amount that VPN could reasonably be expected to have been required to pay to obtain the Transferred Assets from the customer under a transaction where the parties to the transaction are dealing with each other at arm's length in relation to the transaction. As the parties were acting at arm's length and had determined that the amount attributed to the Transferred Assets was the cost of construction, that was the arm's length value.

TIP – the benefit to VPN of the cash contributions being an assessable recoupment is that the income could have been spread over the period that deductions were being claimed.

Citation *Victoria Power Networks Pty Limited v Commissioner of Taxation* [2019] FCA 77 (Moshinsky J, Melbourne)

w http://classic.austlii.edu.au/au/cases/cth/FCA/2019/77.html

1.7 Adams Bidco – landholder duty and primary production land

Facts

On 27 June 2013 Adams Bidco Pty Ltd entered into an agreement with Bob Ingham to buy all of the issued shares in Ingham Enterprises Pty Ltd.

Ingham Enterprises owned, directly or indirectly, 80 parcels of land in Australia and 10 in New Zealand. Of these parcels, 57 were agreed to be land which was used for primary production. The 57 parcels represented 89% of Ingham's total land by area and 33% of its total land by value.

In September 2016, the Chief Commissioner of State Revenue assessed Adams Bidco for duty in the sum of $7,967,073, plus penalty tax and interest for the shares that it acquired in Ingham Enterprises. This was on the basis that, at the time that Adams Bidco acquired the shares in Ingham Enterprises, the conditions for concessional duty under section 163D of the *Duties Act 1997* (NSW) were not satisfied.

> *163D Concession for primary producers—continuation of land rich requirement*
>
> *(1) Duty is chargeable under this Chapter in respect of an acquisition of an interest in a primary producer only if, when the acquisition is made, the primary producer is land rich.*
>
> *(2) For the purposes of this section, a primary producer is a landholder whose land holdings in all places, whether within or outside Australia, wholly or predominantly comprise land used for primary production or land that would be considered to be land used for primary production if it were land in New South Wales.*
>
> *(3) A primary producer is land rich if:*
> *(a) it has land holdings in New South Wales with an unencumbered value of $2,000,000 or more, and*
> *(b) its land holdings in all places, whether within or outside Australia, comprise 80% or more of the unencumbered value of all its property.'*

The Chief Commissioner considered that, as the value of the land of Ingham Enterprises that was not used for primary production exceeded the value of its land that was used for primary production, its land holdings did not 'wholly or predominantly comprise land used for primary production'.

Adams Bidco objected to the assessment. Adams Bidco contended that the test under section 163D(2) of the Duties Act should be based on land area of the land holdings, not the relative value of the land holdings.

The Commissioner disallowed the objection.

Adams Bidco appealed to the Supreme Court of New South Wales.

At first instance, Pembroke J allowed the appeal of Adams Bidco. Pembroke J adopted a different approach to either of the parties. Pembroke J held that the test required an evaluative judgment and that, in determining whether Ingham Enterprises is a primary producer, regard should not be had solely to its land holdings. Pembroke J was satisfied that Ingham Enterprises was a primary producer.

The Chief Commissioner appealed to the NSW Court of Appeal.

Issue

Was Ingham Enterprises a primary producer at the time that Adams Bidco acquired the shares from Bob Ingham?

Decision

The Court of Appeal allowed the appeal. The Court of Appeal disagreed with the approach adopted by Pembroke J.

All three judges of the Court of Appeal considered that:

1. both land area and value were relevant to determining whether a landholder's land holdings wholly or predominantly comprise land used for primary production; and
2. the 'wholly or predominantly' test requires more than just that the primary production land must outweigh the non-primary production land.

White J considered that the value of the relative lands was a more significant factor than the areas of the lands.

Emmett J noted that a significant portion of the activities of Ingham Enterprises were from secondary production (processing of foodstuffs) and not primary production.

TRAP – while usually the landholder rules require an assessment of the land tax value of the land concerned and testing that against the $2,000,000 threshold in NSW, where the interest in land is not an estate in fee simple, or where the primary production concession is being used, it is the market value of the land that is assessed against the threshold.

Citation *Chief Commissioner of State Revenue v Adams Bidco Pty Ltd* [2019] NSWCA 34 (Leeming JA, White JA and Emmett AJA, Sydney)
http://classic.austlii.edu.au/au/cases/nsw/NSWCA/2019/34.html

1.8 Fyna Projects – successive garnishee notices

Facts

Pladmira Pty Ltd had a tax-related liability of a running balance account deficit of $777,643 as at 20 June 2017.

On 20 June 2017, the Commissioner issued a notice under section 260-5 of Schedule 1 of the *Taxation Administration Act 1953* (Cth), commonly known as garnishee notices, to Fyna Projects Pty Ltd in respect of Pladmira's tax-related liability (**Fyna Garnishee Notice**). The Fyna Garnishee Notice required Fyna to pay to the Commissioner any amounts owing by Fyna to Pladmira.

After the Fyna Garnishee Notice was issued, Fyna made payments to Pladmira totalling $455,100 and did not pay the amount to the Commissioner as required by the Fyna Garnishee Notice.

On the basis that the failure to comply with the Fyna Garnishee Notice caused Fyna to have a 'tax-related liability' within the meaning of section 255-1 of Schedule 1 of the TAA and therefore a 'debt' for the purpose of section 260-5(1) of Schedule 1 of the TAA, the Commissioner issued notices under section 260-5(2) to third parties who owed or might later owe money to Fyna, on the basis that Fyna was a 'debtor' to the Commissioner (**Subsequent Garnishee Notices**).

Section 255-1(1) of Schedule 1 of the TAA provides:

> '*A tax-related liability is a pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable).*'

Section 255-5(1) of Schedule 1 of the TAA provides:

> '*(1) An amount of a tax-related liability that is due and payable:*
>
> *(a) is a debt due to the Commonwealth; and*
>
> *(b) is payable to the Commissioner.*'

Fyna applied to the Federal Court of Australia for a review of the decisions of the Commissioner to issue the Subsequent Garnishee Notices under s 260-5(2) and sought orders setting the notices aside.

There were a number of grounds on which Fyna sought review of the decision to issue the Subsequent Garnishee Notices but the key ground was that Fyna's breach of the Fyna Notice did not give rise to a 'tax-related liability'

within the meaning of section 255-1(1) as there was no 'debt' as required by section 260-5(1) of Schedule 1 of the TAA that could support notices being issued to entities that owed or might later owe money to the Fyna as 'debtor' to the Commonwealth.

Fyna contended that this was the case as a liability arising under the Fyna Garnishee Notice was a liability to pay to 'the Commissioner', not to the Commonwealth, but section 255-1 of Schedule 1 of the TAA defined a tax-related liability as a pecuniary liability to 'the Commonwealth', and not to the Commissioner.

Issues

Whether Fyna's failure to comply with the Fyna Garnishee Notice gave rise to a 'tax-related liability' such that the Subsequent Garnishee Notices could lawfully be issued to entities that owed or might later owe money to Fyna.

Decision

Thawley J set aside the Subsequent Garnishee Notices on the basis that the failure to comply with the Fyna Garnishee Notice did not give rise to a tax-related liability within the meaning of section 255-1(1) of Schedule 1 of the TAA.

Thawley J did not accept Fyna's submission based on the use of the term 'Commissioner' as opposed to 'Commonwealth'.

Thawley J, having regard to the history of section 260-5 of Schedule 1 of the TAA, considered that Fyna's breach of the Fyna Garnishee Notice issued pursuant to section 260-5 of Schedule 1 of the TAA did not give rise to a 'tax-related liability' within the meaning of section 255-5(1) of Schedule 1 of the TAA.

Thawley J commented that the word 'directly' in the definition of 'tax-related liability' narrowed the scope of the phrase 'pecuniary liability to the Commonwealth arising directly under a taxation law' under section 255-1 of Schedule 1 of the TAA. Thawley J considered a liability arising from a breach of section 260-5 was not an obligation captured under that phrase in the same way as liabilities for tax, interest and penalties. This conclusion was supported by the statutory language and context.

Citation *Fyna Projects Pty Ltd v Deputy Commissioner of Taxation* [2018] FCA 2041 (Thawley J, Melbourne)
w http://classic.austlii.edu.au/au/cases/cth/FCA/2018/2041.html

1.9 McFadden – land tax principal place of residence exemption

Facts

In 1996 Vicki McFadden and Richard Woods married. Prior to their marriage, Vicki and Richard signed a pre-marital agreement to govern their financial relationship during their marriage and should it breakdown. The Agreement included the following clauses:

> 6. *The parties agree that any real property purchased by them after the date of this agreement and during the relationship as their matrimonial home shall be owned as tenants in common in proportion to their financial contributions. The parties also agree that until they purchase a property as their matrimonial home they will reside in [Vicki's] property at 35B Shellcove Road, Neutral Bay and the provision of this property for their joint use shall be a contribution to their shared lifestyle referred to in clause 19 of this agreement.*
>
> 7. *The parties agree that should they purchase any other real property jointly during their relationship such real property shall be owned by them as tenants in common in proportion to their financial contributions to the said real property unless otherwise agreed between the parties.*

Immediately after their marriage, Vicki and Richard lived in the property on Shellcove Road that Vicki had owned before their marriage.

In 1998 Vicki and Richard acquired a property at 16 Castra Place, Double Bay as their intended marital home.

In 1999 Vicki acquired a unit on the first floor of a two-storey building at 18 Castra Place, Double Bay that was one of two strata lots in a strata plan (**Lot 2**). Between April and August 1999 Vicki and Richard undertook renovations of Lot 2 and it became their residence when the renovations were completed in August 1999. Richard acted as project manager for the renovations and made a small number of financial contributions towards the renovations.

Following renovations being undertaken on 16 Castra Place, Vicki and Richard moved into that property in September 2001.

Between September 2001 and January 2014, Lot 2 was leased to tenants.

In 2013 Vicki and Richard acquired the other unit in the building on 18 Castra Place (**Lot 1**) as tenants in common in equal shares.

From 2013 Vicki and Richard undertook works on the building on 18 Castra Place, including building a third floor, which formed part of the Lot 2 when constructed. The building works had the effect of combining Lot 1 and Lot 2 into a single residence. Lot 2 was no longer capable of occupation as a single residence.

Since December 2014 Vicki and Richard occupied Lot 2 and Lot 1 as their matrimonial home, having moved out of 16 Castra Place at that time.

The Chief Commissioner assessed Vicki on Lot 2 for the 2016 and 2017 land tax year on the basis that the land comprising Lot and Lot 2 was not entitled to the principal place of residence exemption. The Chief Commissioner considered that this was the correct application of clause 14 of Schedule 1A of the *Land Tax Management Act 1956* (NSW) (**LTMA**) which provides as follows:

> ***14 Application of exemption to residence comprised of 2 or more lots in a strata plan***
>
> *(1) The principal place of residence exemption does not extend to land that is comprised of 2 or more strata lots, and that is used and occupied by the owner of the lots (or by one of them) as a principal place of residence, unless:*
>
> *(a) the strata lots (excluding any ancillary lot) have adjoining walls or floors, and*
> ***(b) the strata lots are in the same ownership**, and*
> *(c) the strata lots comprise a single residence (excluding any additional residential occupancy that may be disregarded under clause 4).*
>
> *(1A) Strata lots are in the same ownership if:*
>
> *(a) the lots are owned by the same person or, if any of the lots are jointly owned, the lots are all jointly owned by the same persons, or*
> *(b) each lot is beneficially owned by the same person or, **if any of the lots have more than one beneficial owner, each lot is beneficially owned by the same persons** (subject to clause 11).*
>
> *(2) For the purposes of this clause, 2 or more strata lots are not to be regarded as comprising a single residence unless there is internal access between all the strata lots (other than any ancillary lot), such as internal connecting doors or internal staircases.*
>
> (Emphasis added)

The Chief Commissioner contended that, as Vicki and Richard did not jointly own Lot 2, the land that was comprised of Lot 1 and Lot 2, being separate strata lots, could not be entitled to the principal place of residence exemption under clause 14 of Schedule 1A of the LTMA.

Vicki objected to the assessments contending that clause 14 was satisfied as she held Lot 2 in trust for her and Richard either because:

1. there was a common intention between Vicki and Richard, as evidenced by clause 6 of their pre-marital agreement, that each of them would have a beneficial interest in any property acquired by one of them for

use as matrimonial property and Richard acted to his detriment on the common intention by making financial contributions to the property; or

2. that clause 6 of the pre-marital agreement created an express trust under which Richard had a beneficial interest in Lot 2.

The Chief Commissioner disallowed Vicki's objection.

Vicky appealed the objection decision to the NSW Civil and Administrative Tribunal.

Issue

Did Richard have a beneficial interest in Lot 2 such that the principal place of residence exemption could extend across both Lot 1 and Lot 2?

Decision

The Tribunal observed that the drafting of the pre-marital agreement was less than ideal in various respects in that it used certain terms imprecisely. For example, the agreement referred to the parties holding assets 'jointly' and it was not clear whether this was limited to holding an asset as joint tenants or extended to assets held as tenants in common. Importantly, clause 6 refers to property 'purchased by them' and it was unclear whether this meant that clause 6 only applied to property of which both spouses were registered proprietors or whether it applied to property acquired by either of them.

Common intention trust

The Tribunal noted that under the law, a common intention trust can arise where it would be unconscientious for the legal owner of property to deny another party's rights, where the parties agreed, or it was their common intention, that the other party should have an interest in the property and the other party acted to their detriment in accordance with the agreement or common intention.

The Tribunal noted, referring to the decision of White J in *Shepherd v Doolan* [2005] NSWSC 42, as follows:

1. it is not necessary that the parties' intention is to a specific share of the property. An intention to have some form of proprietary interest is sufficient;
2. the intention may be manifested in a number of ways. There could be an agreement, an express statement or it could be inferred by conduct;
3. that in *Green v Green* (1989) 17 NSWLR 343 Gleeson CJ commented that:

> *'... once it has been shown that there was a common intention that the claimant should have an interest in the house, any act done by her to her detriment relating to the joint lives of the parties is, in my judgment, sufficient detriment to qualify. The acts do not have to be inherently referable to the house .... ' ...'.*

4. the extent of the person's beneficial interest will be that which the parties agreed upon or intended, if that can be established; and
5. the beneficial interest can change over time.

The Tribunal held, applying the above principles, that even if clause 6 of the pre-marital agreement was deficient as a contractual provision, it was sufficient, with other clauses, to evidence that Vicki and Richard had a common intention as to how their matrimonial home would be treated as between them.

The Tribunal considered that Richard had acted in accordance with the common intention to his detriment through the personal services and financial contributions he provided.

Accordingly, the Tribunal set aside the Chief Commissioner's decision.

Citation *McFadden v Chief Commissioner of State Revenue* [2019] NSWCATOD 4 (SM Boxall, Sydney)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATOD/2019/4.html

1.10 Nifuno – duty and transfers between superannuation funds

Facts

Stephen Forbes is the sole member of the Skanda Constructions Pty Ltd Employee Superannuation Fund, a complying SMSF that was established over 20 years ago. The trustee of the superannuation fund is Nifuno Pty Ltd.

The superannuation fund had a number of assets, including a property in Leichhardt in New South Wales.

In 2016, in response to the introduction of the $1.6m transfer balance cap for retirement phase accounts for superannuation funds, the Stephen Forbes Pension Fund was established with Nifuno as trustee. The intention was that the second superannuation fund would be solely for Stephen's pension (retirement phase) benefits.

In accordance with this strategy, the property was transferred to the second superannuation fund by Nifuno by executing a deed transferring the property from itself as trustee for the first superannuation fund to itself as trustee of the second superannuation fund.

The Chief Commissioner assessed the transfer on the basis that it was subject to duty at the ad valorem rate.

Nifuno objected to the assessment contending that only $500 duty was payable in accordance with section 61 of the Duties Act. That section relevantly provides as follows:

> *(1) This section applies to a relevant transfer that occurs in connection with a person:*
>
> *(a) ceasing to be a member of, or otherwise ceasing to be entitled to benefits in respect of, a superannuation fund that is a complying superannuation fund or was a complying superannuation fund within the period of 12 months before the transfer was made, and*
>
> *(b) becoming a member of, or otherwise becoming entitled to benefits in respect of, another superannuation fund that is also a complying superannuation fund or will, in the opinion of the trustees of both funds concerned, be a complying superannuation fund within 12 months after the transfer is made.*
>
> (*1A) For the purposes of this section each of the following is a relevant transfer:*
>
> *(a) a transfer of or an agreement to transfer, dutiable property from a trustee of a superannuation fund, or a custodian of the trustee, to the trustee of another superannuation fund, or to a custodian of the trustee of another superannuation fund*
>
> *....*
>
> *(2) the duty chargeable on a relevant transfer to which this section applies is ad valorem duty in accordance with this Chapter or $500.00, whichever is the lesser.'* (underlining added)

Nifuno also contended that the transfer was exempt under section 65(10) of the Duties Act. Section 65(10) provides as follows:

> *(10) Instruments relating to superannuation No duty is chargeable under this Chapter on:*
> *(a) an instrument referred to in section 60 (1) (a), (b) or (c) that is first executed on or after 1 July 2001, or*
> *(b) a dutiable transaction effected by such an instrument, if the Chief Commissioner is satisfied that the primary purpose for which the transaction was effected was to comply with legal requirements relating to complying superannuation funds, complying approved deposit funds, pooled superannuation trusts or eligible rollover funds.*

The Chief Commissioner disallowed Stephen's objection, noting that section 61(1) of the Duties Act did not apply as Stephen remained a member of the first superannuation fund and, therefore, Stephen did not cease to be a member of, or otherwise cease to be entitled to benefits in respect of, that fund.

Stephen appealed to the NSW Civil and Administrative Tribunal contending that section 61(1) of the Duties Act did not require that he lose entitlement to all benefits in the first superannuation fund.

Issues

1. Was the transfer subject to concessional duty under section 61(1) of the Duties Act?
2. Was the transfer exempt from duty under section 65(10) of the Duties Act?

Decision

The Tribunal noted that the question, in effect, was whether the words '*or otherwise ceasing to be entitled to benefits in respect of*' were meant to be analogous to cessation of membership of the fund such that it should be read as 'ceasing to be entitled to **all** benefits'.

The Tribunal considered that it was not clear from the text itself whether it had to be the case that the members ceased to be entitled to all benefits or whether it was sufficient that the member ceased to be entitled to some benefits. For this reason, the Tribunal considered it was appropriate to look at the context of the provision, including the purpose of its enactment.

The Tribunal noted that both parties had relied upon the Second Reading Speech that led to section 61(1) of the Duties Act being enacted in support of their respective positions. The Tribunal considered that the Second Reading Speech supported a broad approach as it referred to harmonising the duty position with available income tax rollovers that apply to transfers between complying superannuation funds and the Second Reading Speech also noted that the concession would be available for 'transactions of this nature'.

The Tribunal set aside the assessment, and also noted that it did not support the proposition that the transfer would be exempt under section 65(10).

Citation *Nifuno Pty Ltd atf Stephen Forbes Pension Fund v Chief Commissioner of State Revenue* [2019] NSWCATOD 3 (SM Hamilton, Sydney)
w http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATOD/2019/3.html

1.11 South Wharf Towers – discretion to exempt foreign purchaser duty

Facts

In April 2016 an Australian registered company South Wharf Towers Pty Limited purchased a property in Docklands, Victoria for $60 million (**Docklands Property**). All of the shares in South Wharf Towers were owned by a Hong Kong registered company, Mid-Universe Developments Limited.

At the time of purchase, the relevant approvals were in place for South Wharf Towers to develop the Docklands Property into a residential apartment complex with approximately 950 apartments across two towers. Purchaser duty of $3.3 million was assessed on the transfer of the Docklands Property and was paid by South Wharf Towers, however in September 2016 the Commissioner issued a notice of re-assessment. The notice imposed foreign purchaser additional duty of 3% on the transfer, being an additional amount of $1.8 million as a result of a land-related interest in residential property being transferred to a foreign purchaser.

Under section 3 of the Duties Act:

1. 'residential property' is defined to include land in Victoria on which a foreign purchaser intends to affix a building that is designed and constructed solely or primarily for residential purchase and may lawfully be used as a place of residence.
2. 'foreign purchaser' is defined to include a foreign corporation, which in turn was defined as a corporation incorporated outside Australia or a corporation in which another foreign corporation had a controlling interest.

Section 3E of the Duties Act allows the Victorian Treasurer to exempt a person that would otherwise have a controlling interest in a foreign corporation, so that the acquisition of dutiable property by the foreign corporation is not subject foreign purchaser additional duty.

South Wharf Towers contended that the Docklands Property was not residential property at the time that it acquired its interest and, in any event, that the discretion to exempt the transaction under section 3E of the Duties Act should have been granted.

South Wharf Towers argued that the definition of residential property in the Act was taken from the definition of 'principal place of residence' in the Land Tax Act and, as such, the definition only contemplated individual homes. Furthermore, South Wharf Towers suggested that the definition did not intend for the tax to be imposed at the wholesale level. This is because if the tax was absorbed by the developer, it would have no impact on housing affordability in Victoria.

The Commissioner submitted that the definition of residential property does not state that the building must be used in its entirety as a single place of residence rather, it was enough that the proposed residential towers may lawfully be used as a place of residence by as many people as the planning laws permit.

Issues

1. Whether South Wharf Towers acquired 'residential property'.
2. Whether the Tribunal should exercise the discretion provided under section 3E of the Duties Act to treat Mid-Universe Developments as not having a controlling interest in South Wharf Towers.

Decision

Residential Property

The Tribunal preferred the Commissioner's interpretation of the definition as it reflected the plain and ordinary meaning of the words used in the definition. The Tribunal noted that if South Wharf Towers' interpretation was accepted, then it would mean that a foreign individual could purchase a run-down property with the intention of knocking it down, subdividing and building two houses for each of her children. This would be inconsistent with the purpose of the Act.

Controlling Interest Exemption

The Tribunal considered the provisions of section 3E of the Act and the corresponding Treasurer's Guidelines to determine whether the discretion should be exercised. In determining whether the discretion should have been exercised the Tribunal had regard to the following factors:

- The nature and degree of ownership and control;
- The practical influence the person exerts to influence the corporation's financial policies;
- Any practise or behaviour of the person affecting the corporation's financial or operating policies;
- Any other relevant circumstances where the Treasurer's Guidelines identified 6 broad categories of relevant circumstances:
    - Impact on the economy
    - Competition
    - Impact on the community
    - Satisfaction of Foreign Investment Review Board (**FIRB**) requirements
    - Character of the controlling interest
    - Independence of management

The Tribunal weighed each of the 9 preceding factors and found that there were more factors in favour of South Wharf Towers overall, and also more factors in favour of South Wharf Towers with a higher weighting. Accordingly, the Tribunal concluded that the exercise of the discretion was consistent with the purpose and policy of the Act.

Citation *South Wharf Towers Pty Limited v Commissioner of State Revenue* (Review and Regulation) [2019] VCAT 64 (Member Tang, Melbourne)
w http://classic.austlii.edu.au/au/cases/vic/VCAT/2019/64.html

2 Legislation

2.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Income Tax Rates Amendment (Working Holiday Maker Reform) 2016	12/10	17/10	7/11		
Superannuation (Objective) 2016	9/11	22/11	23/11		
Treasury Laws Amendment (Black Economy Taskforce Measures No. 2) 2018	20/9	17/10	18/10	15/11	29/11
Treasury Laws Amendment (2017 Enterprise Incentives No. 1) Bill 2017	30/3/17	22/6/17	22/6/17	05/12/18	1/3/19
Treasury Laws Amendment (Enterprise Tax Plan No. 2) 2017	11/5	8/2	12/2		
Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) 2017	14/9	23/10	13/11		
Treasury Laws Amendment (2019 Measures No. 1) Bill 2019	13/2				
Treasury Laws Amendment (2018 Measures No. 2) 2018	8/2	25/6	26/6		
Treasury Laws Amendment (2018 Measures No. 4) 2018	28/3	25/6	25/6	5/12	
Treasury Laws Amendment (2018 Measures No. 5) Bill 2018	20/9	17/10	18/10		
Treasury Laws Amendment (2018 Superannuation Measures No. 1) 2018	24/5	19/6	25/6		
Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019	13/2				
Treasury Laws Amendment (Increasing the Instant Asset Write-Off for Small Business Entities) Bill 2019	13/2				
Treasury Laws Amendment (Putting Members' Interests First) Bill 2019	20/2				
Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) 2018	8/2	1/3	19/3		
Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019	13/2				

2.2 2019 Measures No. 1 Bill

On 13 February 2019 Government introduced a Bill that includes measures to:

- increase the member limit for a SMSF from 4 to 6 from 1 July 2019;
- make changes to the first home super saver scheme to change the time that contracts to purchase or construct a new home can be entered into under the scheme; and
- change the notification rules in relation to the GST to be remitted to the ATO on the supply of residential premises so that instead of notifying the purchaser of the supplier, the notification will be of the entity liable to remit GST (who could be another member of the GST group). This change will occur from Royal Assent to the bill.

In relation to the first home super, the Bill will bring forward the time that an individual can enter into a contract to purchase or construct their first home under the scheme. Presently the law requires that a person wait until

amounts have been released from their superannuation fund before they enter into a contract to purchase or construct a home. The amendment to the law will allow a person to enter into a contract to purchase or construct a home and obtain a release of their first home super amount as long as they apply for and receive a First Home Super Saver Determination, and they have made a valid request for release within 14 days of entering into the contract.

The amendments will apply from the day the Bill receives Royal Assent but will have retrospective effect to 1 July 2018.

The EM gives the following example.

Amee contributes $5,000 in personal voluntary contributions to her superannuation fund over the course of a year. She applies for and receives a First Home Super Saver determination. Amee signs a contract to purchase her first home and three days later requests a release under the First Home Super Saver scheme.

Previously, Amee would have been required to recontribute any amount released under the First Home Super Saver scheme to her superannuation fund to avoid paying First Home Super Saver tax. This is because Amee signed a contract before the First Home Super Saver amount was released to her. However, under these amendments Amee would not be required to recontribute these amounts or pay the First Home Super Saver tax. This is because she has satisfied the requirements as she signed the contract within 14 days of requesting a valid release authority.

Amee requests a First Home Super Saver release authority within 14 days of signing the contract, and her superannuation fund complies with the release request. Amee then uses the amount released in the settlement of her home.

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https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr6278%22

2.3 Combating Illegal Phoenixing Bill

The Bill crafted to combat Phoenixing activity was introduced by Government on 13 February 2019. The Bill includes a broad range of measures including:

- introducing new criminal offences and civil penalty provisions for company officers that fail to prevent a company from making creditor-defeating dispositions and for other persons that facilitate a company making a creditor-defeating disposition;
- allowing liquidators to apply for a court order in relation to a voidable creditor-defeating disposition;
- enabling ASIC to make orders to recover, for the benefit of a company's creditors, company property disposed of or benefits received under a voidable creditor-defeating disposition;
- preventing directors from improperly backdating resignations or ceasing to be a director when this would leave a company with no directors;
- enabling the Commissioner of Taxation to collect estimates of anticipated GST liabilities and make company directors personally liable for their company's GST liabilities in certain circumstances; and
- authorising the Commissioner to retain tax refunds where a taxpayer has failed to lodge a return or provide other information that may affect the amount of a refund.

A creditor-defeating disposition will be defined to be a disposition of company property for less than its market value (or the best price reasonably obtainable) that has the effect of preventing, hindering or significantly delaying the property becoming available to meet the demands of the company's creditors in winding-up. The concept will also extend to the company creating a right or other interest in property in favour of another person in certain circumstances.

The director penalty provisions around GST effectively mirror the provisions in relation to PAYGW with similar 'lockdown' rules.

The retention of refunds provision is best illustrated with the example from the EM.

Fred is the sole shareholder and director of Super Express Deliveries Pty Ltd, which carries on a business as a courier. It lodges its BAS for the quarter ending 30 June 2019. The lodgement triggers an assessment of the entity's GST liability for the quarter, which reveals the entity is entitled to a credit of $200,000.

At the time, Super Express Deliveries Pty Ltd does not have any outstanding tax debts and would ordinarily be entitled to have the credit paid out as a refund. However, Super Express Deliveries Pty Ltd has not lodged its income tax return for the 2017-18 income year.

The Commissioner reviews the affairs of the Super Express Deliveries Pty Ltd and Fred. The Commissioner identifies that, over the past five years, Fred has owned and operated three other courier companies, each of which has entered into liquidation owing significant debts to its employees, the Commissioner and other creditors. The Commissioner learns ASIC is investigating Fred for engaging in illegal phoenix activity.

The Commissioner exercises his discretion to retain the $200,000 refund until Super Express Deliveries Pty Ltd lodges its outstanding income tax return.

On learning that the refund will not be paid, Fred lodges the outstanding income tax return on behalf of Super Express Deliveries Pty Ltd. The return results in the company being taken to have received an assessment and the crystallisation of a liability of $150,000.

The Commissioner applies the $200,000 credit against the income tax liability, reducing it to nil. The Commissioner pays a refund of $50,000 to Super Express Deliveries Pty Ltd.

The Commissioner continues to explore other avenues to recover the unpaid tax liabilities from Fred's other companies.

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https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr6267%22

2.4 Company losses – similar business test

On 1 March 2019 the Treasury Laws Amendment (2017 Enterprise Incentives No. 1) Bill 2017, containing the provisions introducing the similar business test to supplement the same business test for access company losses, received Royal Assent.

Similar business test

Generally, a company satisfies the similar business test if the business it carries on throughout the income year in which it seeks to utilise a loss is a similar business to the business it carried on at the time immediately before the change of ownership or control that caused it to fail the continuity of ownership test.

In working out whether a company is carrying on a similar business, it is necessary to consider the following non-exhaustive factors:

- the extent to which the assets (including goodwill) that are used in the current business to generate assessable income were also used in the company's former business to generate assessable income;
- the extent to which the activities and operations from which the current business generates assessable income were also the activities and operations from which the former business generated assessable income;
- the identity of the current business and the identity of the former business;
- the extent to which any changes to the former business resulted from the development or commercialisation of assets, products, processes, services, or marketing or organisational methods, of the former business.

The similar business test does not include a new transaction test, and as with the same business test, changes made to a business prior to failing the continuity of ownership test to pass the test will mean the test is failed.

When does similar business test apply from?

The similar business test will apply to any losses from 1 July 2015.

COMMENT - the ATO previously issued Law Companion Ruling LCR 2017/D6 (see our August 2017 tax training notes) outlining its views on the operation of the similar business test. A concern with this guidance is that the ATO states that "[t]he similar business test operates in a way that is comparable to the same business test, but removes the negative limbs which apply as part of that test." This statement could be taken as suggesting that the only difference between the same business test and the similar business test is that the similar business test does not contain the new transactions test and the new business tests that operate as negative limbs for the same business test.

w https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr5850%22

2.5 Increasing the Instant Asset Write-Off for Small Business Entities Bill

On 13 February 2019 Government introduced a Bill to extend the time period for the small business instant asset write off to 30 June 2020. This extends the period of the measure by 12 months.

The cost of an asset able to be written off will also increase from 29 January 2019 if the Bill passes. Under current law an asset costing less than $20,000 can be immediately written off. This threshold will increase to $25,000.

w https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr6282%22

2.6 Putting Members' Interests First Bill

On 20 February 2019 Government introduced a Bill to prevent superannuation fund trustees from providing insurance on an opt out basis to new members who are under 25 years old, and to members who hold products with balances below $6000, amongst other amendments.

The amendments apply to members who are under 25 years old and who start to hold a choice or MySuper product on or after 1 October 2019.

The transitional measures provided that a person who is under 25 years old and who began to hold a MySuper product or choice product before 1 October 2019 will not be impacted unless on 1 July 2019 the product had either been inactive for 16 months or the balance of the product had not been more than $6,000 since that date.

The measure will however apply to members who hold a product on 1 October 2019 which has not had a balance of $6,000 or more since 1 July 2019.

Obligations will be placed on trustees to notify members who have insurance arrangements in place before 1 October 2019 and who might be affected by the new measure to provide these members with an opportunity to elect for their insurance to continue.

w https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr6307%22

2.7 Registries Modernisation and Other Measures Bill

The Bill introducing the concept of a director identification number (**DIN**), amongst other changes, was introduced on 13 February 2019. The DIN is part of the measures being introduced to combat Phoenixing activity.

A director of a body corporate registered under the *Corporations Act 2001* or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* will be required to apply for a DIN before becoming a director unless otherwise provided for under transitional arrangements.

Existing directors, when the measures commence, will have until a time prescribed in a legislative instrument to apply for a DIN. Additionally, a director appointed within 12 months of the new regime's commencement will have an additional 28 days to apply for a DIN.

The changes will not commence until a date set by proclamation so that the regime does not commence until supporting administrative arrangements are in place.

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https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr6271%22

3 Private Binding Rulings

3.1 Active asset test – short term accommodation business

Facts

The taxpayer purchased a property which consisted of two units: Unit 1 and Unit 2. For the entire time of ownership, both units were on a single title.

Unit 1 was a registered rooming house. Prior to this it was a residential rental property.

Unit 2 was a residential rental property.

Unit 1 had the following features:

- the operations of the premises for Unit 1 was registered with the relevant authorities as a rooming house;
- the premise was fully furnished (apart from linen) with all utility bills paid by the taxpayer;
- no meals were provided to the residents;
- each resident could stay on a daily basis or longer (some up to a year);
- each room had its own individual keys;
- a carpark was provided for each room;
- residents had access to the common areas (being the lounge, kitchen, bathrooms) but did not have control over those areas;
- there was no written lease agreement between the residents and the taxpayer.

The following were conducted in respect of Unit 1:

- the taxpayer advertised for prospective residents in local newspapers and the rooming house register. A real estate agent was not used;
- there was no resident caretaker or supervisor on the premises;
- the taxpayer provided fortnightly cleaning and gardening;
- the taxpayer had a profit making intention;
- the taxpayer maintained a guest ledger and a cash book to record income and expenses;
- the taxpayer spent an estimated time of five hours per week managing the premises. This included maintenance, collecting rent, checking residents in, maintaining financials and paying the utility bills.

The taxpayer reported the income from Unit 1 as rental income in the taxpayer's tax return.

The whole property has since been sold, which triggered a CGT event for the taxpayer.

In order for the taxpayer to apply the small business CGT concessions, the taxpayer had to satisfy the active asset test. That is, relevantly, the property must have been used or held ready for use in a business carried on by the taxpayer for the lesser of 7.5 years or half the time it was owned by the taxpayer. The property would not be active for any period for which its main use was to derive rent.

Issues

1. Does the property satisfy the active asset test?
2. Is the property excluded from being an active asset as it was an asset whose main was to derive rent?

Decision

<u>Was the property an active asset?</u>

The Commissioner ruled that the property was not an active asset as the taxpayer was not carrying on a business.

The Commissioner considered that factors relevant to the question of whether an activity is a business for tax purposes are:

- whether the activity has a significant commercial purpose or character;
- whether there is more than just an intention to engage in business;
- whether the taxpayer has a purpose of profit as well as a prospect of profit from the activity;
- whether there is regularity and repetition of the activity;
- whether the activity is of the same kind and carried on in a similar manner to that of ordinary trade in that line of business;
- whether the activity is planned, organised and carried on in a businesslike manner such that it is described as making a profit; and
- the size and scale and permanency of the activity.

In these circumstances, the Commissioner noted that:

- whilst the taxpayer had regularity and repetition in its activities with a profit making intention the activities conducted by the taxpayer did not show the size or scale necessary to be characterised as carrying on a business;
- a business would expect a significantly higher return then what the taxpayer was making. The rate of return was no more than what a well organised investor would be making;
- there was no business plan or any evidence of business-like behaviour.

The Commissioner also considered that the activities of the taxpayer fell short of the test in *Commissioner v McDonald* (1987) 18 ATR 957. *McDonald* provided that, for a letting business to be carried on, there must be more than just the receiving of payments – there should be services that are seen in hotels and motels, which was not seen in these circumstances.

Was the main use of the property to derive rent?

Whilst it was not necessary to consider it, due to the conclusion that the property was not being used in connection with a business, the Commissioner concluded that Unit 1 was being used to derive rent. The Commissioner accepted that premises used in the business of providing accommodation can be active assets depending upon the circumstances.

The Commissioner noted that key consideration will be whether an occupant of the premises is a lessee, which will largely turn upon whether the occupant has a right of exclusive occupation, the level of control retained by the owner and the extent of any services provided by the owner such as room cleaning, provision of meals, supply of linen and shared amenities.

In this case, the Commissioner considered that insufficient additional services were provided by the owner and that nature of the arrangement was such that occupants had a reasonable expectation of exclusive occupation.

COMMENT – even if the Commissioner had considered that Unit 1 had been used in a business and that the main use of Unit 1 was not to derive rent, it would have been necessary to compare the use of Unit 1 with the use of Unit 2, the main use of which was clearly to derive rent, in ascertaining what was the main use of the property.

ATO reference *Private Binding Ruling Authorisation Number: 1051439043823*
w https://www.ato.gov.au/law/view/document?docid=EV/1051439043823

3.2 Personal services income

Facts

An individual is a qualified professional (presumably a radiologist) providing services through Company A, which is controlled by individual A as director.

The sole shareholder of Company A is Company A Nominees Pty Ltd as the trustee for a family trust, of which individual A is a beneficiary.

The individual is currently engaged in assisting a principal.

The individual intends to provide services to Company B of interpreting scans. The individual intends to use its own tools of a computer as well as Company B's computer. The software required to interpret the scans will be provided by Company B.

The contract for services includes the following terms:

- the individual is responsible for ensuring that examination descriptions entered into the software system accurately reflect the services provided;
- the individual is engaged to provide consultancy services for a number of committed sessions as rostered by Company B;
- Company B will provide any necessary equipment and software;
- the individual is required to have its own professional indemnity insurance; and
- the individual will be paid a service fee of X% of fees charged.

Issues

1. Is the income personal services income?
2. Is company A considered to be conducting a personal services business?

Decision

Personal services income

The Commissioner determined as the services provided by the individual on behalf of Company A are services that require the skill and expertise of the individual, the income of Company A is personal services income.

Personal services business

The Commissioner applied the results test and determined that:

- the fee under the contract was a percentage of the billings, and that the payment was contingent on the individual completing examination descriptions into an information system. The work was for producing a result, meeting the first element of the results test.
- the contract between Company A and Company B states that Company B will provide equipment and necessary software and will maintain such equipment and software at their expense. This did not meet the second element of the results test.
- the contract requires the individual to provide professional indemnity insurance and that the individual was required to provide a certificate of insurance on an annual basis. This met the third element of the results test.

As not all of elements of the results test were satisfied, Company A was not considered to be conducting a personal services business.

ATO reference *ATO Private ruling Authorisation Number: 1051453132518*
w https://www.ato.gov.au/law/view/document?docid=EV/1051453132518

3.3 Redeemable preference shares

Facts

Two individuals are shareholders of an Australian resident company, each holding one ordinary share.

The company earns income from investments and does not have any dividend policy or pattern in relation to the frequency or quantum of past dividend payments.

As part of estate planning, and to reduce the risk of a family maintenance claim, the two individuals wished to distribute a significant amount of the existing retained profits in the company to two companies, one controlled by the two individuals (Company A), and the another company controlled by one of their children (Company B).

To achieve this, the company intends to:

1. issue one A-class redeemable preference share in the company to Company A, and issue one B-class redeemable preference share in the company to Company B;
2. both classes of redeemable preference shares will be issued at fair market value, and will have the same terms, being:
   (a) they will carry rights to dividends, amount to be determined by resolution of the company's directors at any time;
   (b) they will not carry any rights to vote or to capital on a winding up of the company;
   (c) they are redeemable by the company at any time for nil consideration; and
   (d) if not redeemed earlier, they are automatically redeemed at the third anniversary of their date of issue for nil consideration.
3. following the issue of the redeemable preference shares, the company will resolve to declare dividends on the A-class share to Company A, and the B-class share to Company B;
4. an amount equal to the dividends will be advanced by Company A and Company B to the company.

None of the relevant entities to the proposed transaction have accumulated tax losses.

The individuals and all relevant family members of the individuals are Australian residents for tax purposes.

Issues

Amongst the issues covered by the ruling included whether:

1. Are the proposed redeemable preference shares equity interests under subdivision 974-C of the ITAA 1997?
2. Will the proposed transaction give rise to a direct value shift under Division 725 of the ITAA 1997? If so, will CGT event K8 under section 104-250 of the ITAA 1997 occur?
3. Will the proposed transaction be considered:
   (a) a dividend stripping operation under section 207-155 of the ITAA 1997; or
   (b) a scheme for the stripping of company profits within the meaning of subsection 177E(1) of the ITAA 1936?
4. Will section 177EA apply?
5. Will Part IVA apply to the proposed transaction?

Decision

<u>Equity Interests</u>

The ATO ruled that the redeemable preference shares are an equity interest.

The ATO noted that an interest will be an equity interest if it satisfies the equity test and does not pass the debt test.

In this case, a share is an interest in a company as a member or stockholder of that company, and satisfies the basic test for an equity interest.

The redeemable preference shares do not pass the debt test, as the company will not have an ‘effectively non-contingent obligation’ to pay dividends to the holder of the redeemable preference shares, nor will the company be obliged to pay the holders any consideration when the redeemable preference shares are redeemed.

<u>Direct value shift</u>

The ATO ruled that the proposed transaction will not give rise to a direct value shift.

The ATO considered a direct value shift occurs when:

1. there is a decrease in the market value of one or more equity or loan interests in a target entity; and
2. the decrease is reasonably attributable to one or more things done under the scheme, and occurs at or after the time when the thing, or the first of those things is done; and
3. either or both of subsections (2) and (3) of section 725-145 are satisfied:
   (a) under section 725-145(2), one or more equity or loan interests in a target entity must be issued at a discount. The decrease in the interest must occur at or after the time of the issue and be reasonably attributable to it.
   (b) under section 725-145(3), there must be an increase in the market value of one or more equity or loan interests in the target entity. The increase must be reasonably attributable to the decrease in the other interest.

The ATO noted that section 725-145(2) will not be satisfied but it was less clear whether section 725-145(3) would be satisfied.

However, the ATO noted that it is not necessary to resolve whether section 725-145(3) is satisfied as section 725-90 applied to a transaction meaning that a direct value shift will have no consequences. Section 725-90 applies where:

1. one or more things referred to in paragraph 725-145(1)(b) brought about a state of affairs, but for which the direct value shift would not have happened; and
2. as at the time referred to in that paragraph, it is more likely than not that, because of the scheme, that state of affairs will cease to exist within 4 years after that time.

As the redeemable preference shares must be redeemed within 4 years of issue, the ATO concluded that the arrangement satisfies the requirements of section 725-90.

COMMENT – the ATO do not appear to have taken account that the reversal rules do not apply where the circumstances resulting in the value shift have not ceased to exist when a CGT event happens to a down or up interest, as would occur on the redemption here.

Dividend stripping

The ATO ruled that the proposed transaction will not be considered to be a dividend stripping operation under section 207-155 of the ITAA 1997, or a scheme for the stripping of company profits within the meaning of paragraph 177E(1) of the ITAA 1936.

The ATO noted that, while a dividend stripping operation is not a defined term and has no precise legal meaning, the characteristics of a dividend stripping scheme can be found in *Taxation Determination* TD 2014/1:

1. the vendor shareholders [receive] a capital sum for the shares in an amount the same as or very close to the dividends paid to the purchasers …., and
2. the scheme [is] carefully planned, with all the parties acting in concert, for the predominant if not the sole purpose of the vendor shareholders, in particular, avoiding tax on a distribution of dividends from the company.

The ATO considered that in the case of *Commissioner of Taxation v Consolidated Press Holdings Ltd* [2001] HCA 32, a core factor to determine the existence of a dividend stripping scheme is that the scheme is designed to enable a shareholder to be paid or receive the profits of the company, or an equivalent amount, in a tax-free or substantially tax-free manner.

As the circumstance of the proposed transaction is consistent with an overriding purpose of achieving the individuals' estate planning objectives, being to shift the accumulated value of the company to one of their children, the ATO considered that there would be no scheme by way of or in the nature of dividend stripping.

Anti-avoidance provisions under section 177EA

The ATO ruled that section 177EA will not apply to any distribution of fully franked dividends to the holders of the proposed redeemable preference shares.

The following conditions must be present for section 177EA to apply:

1. there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity;
2. either:
   (a) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or
   (b) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and
3. the distribution was, or is expected to be, a franked distribution;
4. except for section 177EA, the person would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and
5. having regard to the relevant circumstances of the scheme, it would be concluded that the scheme was for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant that person to obtain an imputation benefit.

The ATO considered that the first four conditions in subsection 177EA(3) of ITAA 1936 will be met.

However, as the redeemable preference shares will be issued for estate planning purposes, and will not be carried out for more than incidental purpose of enabling a taxpayer to obtain an imputation benefit, section 177EA will not apply to any fully franked distribution.

Part IVA

The ATO ruled that Part IVA will not apply to the proposed transaction.

For the reasons outlined above, ATO concluded that a dominant purpose of tax avoidance is not present and, therefore, the proposed transaction is not one to which Part IVA applies.

ATO reference *Private Binding Ruling Authorisation Number: 1051432228153*
w https://www.ato.gov.au/law/view/document?docid=EV/1051432228153

4 ATO and other materials

4.1 NSW payroll tax administration review completed

The review of the administration of payroll tax in New South Wales has been completed. Twelve recommendations were made as part of the review and all of the recommendations have been accepted by the NSW government.

A key issue identified in the review was a lack of awareness by employers of their compliance obligations and an insufficient emphasis and support on education by Revenue NSW.

The recommendations included the following:

1. that a greater emphasis in the regulatory model be placed on early engagement, education and support throughout a business' interaction with Revenue NSW;

2. that consideration be given to the feasibility of providing a 50 per cent reduction in any penalties owed, at the Commissioner's discretion, for businesses that register for the first time and lodge their payroll tax return within three months of receiving communication from Revenue NSW of their potential obligations;

3. amending legislation to enable Revenue NSW to implement a tiered compliance model that provides for less frequent payment calculation and/or lodgement of payroll tax returns by businesses;

4. that clarification be provided on which grouping arrangements are captured under the grouping provisions and which contractor arrangements are captured under payroll tax definitions. Treasury has indicated that it will engage with the other States and Territories to consider amendments to the harmonised legislation but that in the short-term Revenue NSW is to issue further guidance material;

5. Revenue NSW should focus audit processes equally on making the experience easy for the client and balancing evidentiary requirements by:

    a. providing clarity and rationale for the audit and linking the rationale to the particular part of the legislation that has triggered the audit;

    b. requesting evidence based on the rationale provided and explaining how the evidence the business supplies will support its case; and

    c. include advice in the education and training packages (as in Recommendation 1) on how to avoid an audit (i.e. how to ensure your business is operating as a best practice compliant business) as well as what to expect when undergoing an audit.

6. Revenue NSW should investigate streamlining the requirements for de-grouping applications; and

7. an appropriate independent body should investigate better aligning the different definitions of employee and contractor with those of other relevant government entities.

w https://www.treasury.nsw.gov.au/sites/default/files/2018-11/NSW%20PC%20to%20Treasurer%20-%20Review%20of%20payroll%20tax%20administration.pdf
https://www.treasury.nsw.gov.au/sites/default/files/2018-11/NSW%20Government%20Response%20-%20Review%20of%20Payroll%20Tax%20Administration.pdf

4.2 MLI enters into force

On 1 January 2019, The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (**MLI**) entered into force for Australia.

The MLI is a multilateral treaty that enables participating jurisdictions to swiftly modify their tax treaties to implement measures addressing multinational tax avoidance or the effective resolution of tax disputes.

The MLI takes effect for Australia's bilateral tax treaties with France, New Zealand, Japan, Poland, the Slovak Republic and the United Kingdom for:

1. withholding taxes on income derived on or after 1 January 2019;
2. all other taxes, for income years beginning on or after 1 July 2019; and
3. dispute resolution, after the MLI enters into force for each of the matching jurisdictions.

w https://www.ato.gov.au/Business/Large-business/In-detail/Business-bulletins/Articles/Release-of-the-first-MLI-synthesised-texts/

4.3 Labor proposal – AML and counter terrorism financing laws

On 25 February 2019, ABC news reported that Shadow Treasurer Chris Bowen has pledged to extend anti-money laundering and counter terrorism financing laws to professionals including real estate agents, solicitors and accountants.

The ABC report noted that Australia has long been seen as a target for 'hot money' because real estate agents, solicitors and accountants do not have to report suspicious transactions.

A spokesperson from the Department of Home Affairs noted the Government was committed to strengthening anti-money laundering laws, but also ensuring the changes do not place undue burden on industry.

w https://www.abc.net.au/news/2019-02-25/money-laundering-laws-chris-bowen-dirty-money/10846552

4.4 Lodgment Deferral Tips

The ATO has published lodgment deferral tips on their website. The ATO notes that lodgment deferrals may be requested when an agent experiences exceptional or unforeseen circumstances that could affect their ability to lodge by a due date on behalf of clients.

To ensure deferral requests are processed without delay, the ATO notes that agents need to:

- select the appropriate deferral type (agent assessed, ATO assess, new or re-engaged clients with overdue returns);
- complete the online application form and attach it to a secure message via Online services.

The ATO asks that, once lodged, agents do not send further requests for the same client within the 28-day processing period.

Where a taxpayer is experiencing difficulties in lodging due to circumstances beyond the taxpayer's control, the ATO can provide longer term support.

w https://www.ato.gov.au/Tax-professionals/Newsroom/Lodgment-and-payment/Lodgment-deferral-tips/

4.5 New small business benchmarks are available on the ATO app

The ATO has updated its small business benchmarks with data from the financial year ended 30 June 2017. Clients' benchmarks can be calculated using the Business performance check tool in the ATO app.

If clients are outside the average benchmark range, the ATO recommends that tax agents:

- check that the records provided to them are complete and accurate; and
- ensure that the business industry code (BIC) still represents the client's main type of work.

w https://www.ato.gov.au/Tax-professionals/Newsroom/Income-tax/New-small-business-benchmarks-are-available-on-the-ATO-app/

4.6 Tips for completing FHSS release authorities

In 2018, the ATO published First Home Super Saver Scheme (FHSS) Guidance Note, GN 2018/1 to help funds and members understand how the FHSS applies.

Based on the first 6 months of the operation of the FHHS, the ATO has now published a number of tips when completing FHSS release authorities, which include to:

- use the correct Payment Reference Number (PRN), as this enables members to receive their FHSS money quickly;
- ensure the member ID matches the details on the member's FHSS release authority statement (RAS);
- check out the ATO's frequently updated web content; and
- complete and return the FHSS RAS form (NAT 74981) for every release authority, regardless of whether the fund is able to release any money under FHSS.

The ATO notes that superannuation fund trustees do not need to match voluntary contributions made by their members to be able to release money from their account.

If there are insufficient funds to release, the trustees are only required to pay the lesser of the amount stated in the release authority, or the total amount of the super lump sums that could be paid at the time from the member's super interests (known as the maximum available release amount).

w https://www.ato.gov.au/Super/APRA-regulated-funds/In-detail/News/Handy-tips-for-completing-FHSS-release-authorities/

4.7 ATO advice under development – CGT issues

The ATO is developing advice and guidance on the following CGT issues.

Back-to-back CGT roll-overs

The ATO has announced that it is working on a Draft Taxation Determination on sequential planned transactions where a CGT roll-over is claimed for each transaction and the first roll-over contains a 'nothing else' condition. An example of a nothing-else condition is under sub-division 122-A (rollover from individual or trustee to a wholly owned company) which provides that the rollover applies if the individual or trustee receives shares in the transferee company and nothing else.

The Draft Tax Determined is expected to be released in May 2019.

Unit Trust – CGT events E5 to E8

The ATO has announced that it is preparing a Draft Taxation Determination that will set out the ATO's view on:

1. what is a 'unit trust' for CGT events E5 to E8; and
2. the implications of the meaning of 'unit trust' for other CGT events (in particular E4 and C2).

w https://www.ato.gov.au/general/ato-advice-and-guidance/advice-under-development-program/advice-under-development---capital-gains-tax-issues/