

Monthly Tax Update Notes

March 2003

TABLE OF CONTENTS

FINDING YOUR WAY AROUND THESE MONTHLY TAX UPDATE NOTES

PART 1	PART 2	PART 3	PART 4	PART 5	PART 6
Income Tax	GST	FBT	State Taxes	Superannuation, ETP's & Pensions	Other Imposts, Rebates & Offsets
<p>Each of the 6 parts contain these four sections:</p> <p>Section 1 – Politicians, Boards & Statutory Authorities Section 2 – Parliament Section 3 – Courts & Tribunals Section 4 – ATO Releases</p>					

1.	INCOME TAX	1
1.1	POLITICIANS, BOARDS & STATUTORY AUTHORITIES	1
	(1) ATO Compliance Plan.....	1
1.2	AUSTRALIAN PARLIAMENT.....	8
(a)	Acts Which Received Royal Assent	8
(b)	Bills Awaiting Royal Assent	9
	(1) Inspector-General of Taxation Bill 2002	9
(c)	Bills Laid Aside or Removed from Notice Paper 2001	9
(d)	Bills Before Parliament.....	9
	(1) New Business Tax System (Consolidations and Other Measures) Bill (No. 2) 2002... 9	
	(2) Taxation Laws Amendment (A Simpler Business Activity Statement) Bill 2002	9
	(3) Taxation Laws Amendment Bill (No. 6) 2002	9
	(4) New Business Tax System (Venture Capital Deficit Tax) Bill 2002	10
	(5) Taxation Laws Amendment Bill (No. 7) 2002	10
	(6) Taxation Laws Amendment Bill (No. 8) 2002	10
	(7) Taxation Laws Amendment (Structured Settlements) 2002	11
	(8) Taxation Laws Amendment (Venture Capital) Bill 2002 (Cth)	11
	(9) Taxation Laws Amendment Bill (No. 4) 2003	11
(e)	Regulations Promulgated - Income Tax	11
1.3	COURTS & TRIBUNALS	12
(a)	Courts	12
	(1) Hill J finds the tax agent took reasonable care in relation to income adjustments. Did s 82 limit the building depreciation deduction? (MLC Limited v Deputy C of T) ..	12

Table of Contents

(2)	Does "Henderson" apply for the accountant - Dormer? (Dormer v C of T).....	15
(3)	The size of a prize alone does not make it income! (Stone v C of T).....	16
(4)	Trading Stock valuation issues (Energy Resources of Aust Ltd v C of T).....	19
(5)	Vibrational Individuation Programme Inc and Commissioner of Taxation [2003] AATA 158 (13 February 2003).....	20
1.4	ATO RELEASES.....	21
(a)	Rulings & Draft Rulings.....	21
(1)	TR 2000/D17 & TD 2000/D23W.....	21
(b)	Determinations & Draft Determinations.....	21
(1)	Can the first element of the cost base of a CGT include money paid or property given to an entity other than the one from which the asset was acquired? (TD 2003/1).....	21
(2)	Does Division 240 apply to a hire purchase agreement if there is a notional buyer but no notional seller? (TD 2003/D2).....	22
(3)	When can a trustee obtain a deduction for interest expenses incurred to pay distributions to beneficiaries? (TD 2003/D4).....	22
(c)	Class Rulings.....	23
(d)	Product Rulings & Addenda.....	24
(e)	Interpretative Decisions.....	24
(f)	Practice Statements & Taxpayer Alerts.....	24
(1)	Distributions to SMSF through an Interposed Trust (TA 2003/1).....	24
2.	GST.....	26
2.1	POLITICIANS, BOARDS & STATUTORY AUTHORITIES.....	26
2.2	AUSTRALIAN PARLIAMENT.....	26
(a)	Acts Which Received Royal Assent.....	26
(b)	Awaiting Royal Assent.....	26
(c)	Laid Aside or Removed from Notice Paper 2001.....	26
(d)	Before Parliament.....	26
(1)	Taxation Laws Amendment (A Simpler Business Activity Statement) Bill 2002.....	26
(e)	Regulations Promulgated.....	26
(f)	Notice of Bills to be Introduced to Parliament.....	26
2.3	COURTS & TRIBUNALS.....	27
(a)	Courts.....	27
(b)	Tribunals.....	27
2.4	ATO RELEASES.....	27
(a)	Taxation Rulings & Draft Rulings.....	27
(1)	What is "precious metal" for the purposes of GST? [GSTR 2003/D1].....	27
(2)	Supplies that are GST free as professional or trade courses (GSTR 2003/1).....	27
(b)	Determinations & Draft Determinations.....	28
(c)	Interpretative Decisions.....	29
(d)	Practice Statements.....	29
(e)	Fact Sheets.....	29
(f)	Other Publications & Updates.....	29

3.	FBT 30	
3.1	POLITICIANS, BOARDS & STATUTORY AUTHORITIES	30
3.2	AUSTRALIAN PARLIAMENT.....	30
3.3	COURTS & TRIBUNALS	30
3.4	ATO RELEASES.....	30
4.	STATE TAXES	31
4.1	POLITICIANS, BOARDS & STATUTORY AUTHORITIES	31
	(1) Unit Trust Stamp Duty Loophole Closed (Treasurer of Victoria 7 February 2003)	31
4.2	STATE PARLIAMENT	31
(a)	Victoria	31
	(1) Pay-roll Tax (Maternity and Adoption Leave Exemption) Bill 2002 (Vic)	31
(b)	Western Australia.....	31
	(1) Debits Tax Assessment Bill 2001 (No. 84)	31
	(2) Debits Tax Bill 2001 (No. 85)	32
	(3) Land Tax Assessment Bill 2001 (No. 82)	32
	(4) Land Tax Bill 2001 (No. 83).....	32
	(5) Payroll Tax Assessment Bill 2001 (No. 80)	32
	(6) Payroll Tax Bill 2001 (No. 81).....	32
	(7) Stamp Amendment Bill 2001 (No. 86).....	32
	(8) Taxation Administration Bill 2001 (No. 79)	32
	(9) Taxation Administration (Consequential Provisions) Bill 2001 (No. 87)	33
	(10) Unclaimed Money (Superannuation and RSA Providers) Bill 2002 (WA).....	33
(c)	Australian Capital Territory.....	33
	(1) Revenue Legislation Amendment Bill (No. 2) 2002.....	33
	(2) Taxation (Government Business Enterprises) Bill 2002 (ACT).....	33
(d)	South Australia	33
(e)	Tasmania	33
4.3	COURTS & TRIBUNALS	34
(a)	Courts	34
(b)	Tribunals.....	34
4.4	STATE REVENUE OFFICE RELEASES	34
5.	SUPERANNUATION, ETP'S & PENSIONS	35
5.1	POLITICIANS, BOARDS & STATUTORY AUTHORITIES	35
5.2	AUSTRALIAN PARLIAMENT.....	35
(a)	Acts which Received Royal Assent	35
(b)	Awaiting Royal Assent	35
(c)	Laid Aside or Removed from Notice Paper 2001.....	35
(d)	Before Parliament	35
	(1) Superannuation Guarantee (Administration) Amendment Bill 2002	35
	(2) Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 2002	35
	(3) Superannuation (Financial Assistance Funding) Levy Amendment Bill 2002.....	35

Table of Contents

(4)	Superannuation (Government Co-contribution for Low Income Earners) Bill 2002 ...	36
(5)	Superannuation Industry (Supervision) Amendment Bill 2002	36
(6)	Superannuation Legislation Amendment Bill 2002	36
(7)	Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002	36
(8)	Superannuation Legislation Amendment (Family Law) Bill 2002	36
(e)	Regulations Promulgated.....	36
5.3	COURTS & TRIBUNALS	37
(a)	Courts	37
(b)	Tribunals.....	37
5.4	APRA, ASIC & ATO RELEASES	37
(a)	Taxation Rulings & Draft Rulings.....	37
(b)	Determinations & Draft Determinations.....	37
(c)	Interpretative Decisions.....	37
(d)	Practice Statements	37
(e)	Fact Sheets	37
(f)	Other Publications & Updates.....	37
6.	OTHER IMPOSTS, OFFSETS & REBATES	38
6.1	POLITICIANS, BOARDS & STATUTORY AUTHORITIES	38
6.2	AUSTRALIAN PARLIAMENT.....	38
(a)	Acts that Received Royal Assent.....	38
(b)	Awaiting Royal Assent	38
(c)	Laid Aside Or Removed From Notice Paper	38
(d)	Before Parliament	38
(1)	National Residue Survey (Excise) Levy Amendment Bill 2002	38
(2)	Tobacco Excise Windfall Recovery (Assessment) Bill 2002.....	38
(e)	Regulations Promulgated.....	38
6.3	COURTS & TRIBUNALS	38
(a)	Courts	38
(b)	Tribunals.....	39
6.4	ATO RELEASES.....	39
(a)	Taxation Rulings & Draft Rulings.....	39
(b)	Determinations & Draft Determinations.....	39
(c)	Interpretative Decisions.....	39
(d)	Practice Statements	39
(e)	Fact Sheets	39
(f)	Other Publications & Updates.....	39

1. INCOME**TAX****1.1 POLITICIANS, BOARDS & STATUTORY AUTHORITIES****(1) ATO Compliance Plan**

Source (402432) ATO Compliance Plan

URL: <http://www.ato.gov.au/printcontent.asp?doc=/content/corporate/ComPlan1.htm&page=1 - H2>

The following passages are edited extracts from the recently released comprehensive ATO compliance plan.

The ATO is not, and can never be expected to be, resourced to review every transaction or event. Equally, the adoption of the self-assessment system reflects the reality that effective revenue administration is not about collecting every last dollar payable under our revenue laws.

Accordingly, revenue administration is founded on managing risk, leveraging the impact of interventions, and responding quickly to changing circumstances.

The Compliance Model

The Compliance Model is a structured way of helping us to understand the factors that influence different compliance behaviour. This enables us to choose the most appropriate intervention for the circumstances.

Taxation compliance behaviour is influenced by many factors - business, industry, sociological, economic and psychological - all of which influence whether a person chooses to meet their obligations. The model shows a continuum of taxpayer attitudes towards compliance.

The model suggests that the ATO has the ability to influence taxpayer behaviour through the ATO response and interaction.

Introduction

This publication looks at key components of the tax system, including the trends, major compliance risks, and remedies across various elements of the community.

ATO compliance effort for individuals

The ATO compliance effort in relation to individuals is largely directed at:

- ◆ working with tax agents, because they help 75% of individual taxpayers complete their tax returns
- ◆ matching information from financial institutions and other sources to confirm that income has been included and to identify growing risks
- ◆ analysing information provided on tax returns and other reports to identify cases that the ATO may need to check, and
- ◆ reviewing claim information against benchmarks in a cross-section of occupations and industries.

Most of the 300,000 debt cases each year are handled by coming to satisfactory payment arrangements with the individual taxpayers.

Overclaiming work expenses

Work expenses, such as car, travel, uniform, laundry and self-education, amount to 57% of total claims by individuals. Some 6.7 million taxpayers claimed \$8.8 billion in 2001, an increase of nearly 11% on 2000. While some of this is related to goods and services tax (GST), the ATO are working with tax agents and industry representatives to better understand this increase. The ATO have also selected 135,000 taxpayers from different occupations and asked them to confirm these deductions.

Overclaiming rental expenses

In 2001, 1.3 million taxpayers declared rental income of \$12.6 billion and claimed rental deductions of \$13.3 billion. While rental income is up 7% on the previous year, deductions claimed have increased by 15%. The ATO have selected 10,000 taxpayers to provide more details about their claims.

Politicians, Boards & Statutory Authorities***Overclaiming interest and dividend deductions or not including interest and dividends***

Over 100 million transactions from banks, financial institutions, Centrelink, and private health insurance companies are matched to information lodged in around 12 million tax returns. This year, some 230,000 discrepancies worth \$120million will be followed up with taxpayers.

The ATO also shares information with Centrelink, which last year recouped over \$300 million in overpaid benefits.

Not reporting income from capital gains on sale of shares and properties

About 1.4 million taxpayers earn about \$6 billion in net capital gains. This year the ATO will compare 1,100 tax returns with share trading and rental property sales data.

The Micro-Business Segment

Around 2.5 million small businesses have an annual turnover of less than \$2 million. These micro-businesses account for around \$19 billion, or just over 10%, of Commonwealth revenue, and around 60% of the collectable debt managed by the ATO.

Over 80% of micro-businesses have an annual turnover of less than \$200,000. Most are family businesses with few or no employees, and a significant number operate from home. There is a very high turnover of these businesses and their owners.

General ATO Approach to the Micro-Business Segment

Our primary focus is to help and educate this segment about their obligations through their tax agents and industry associations, and by providing them with information directly. A particular focus is on providing education products for new and intending business owners to help them start out on a sound basis.

Around 3,000 field staff conduct an extensive audit program in the small business area. Around one in ten micro-businesses can expect to be contacted as part of the program this year, with a particular focus on GST and income tax matters.

This program will also check employer obligations such as pay as you go withholding, fringe benefits tax and superannuation contributions.

The government provided the ATO with additional funding this year to improve the level of information and help services, and increase the ATO audit capability in this segment.

With a high proportion of the debt managed by the ATO relating to micro-businesses, the ATO considers it is important that it contact these businesses early to ensure unexpected tax debts do not threaten their ongoing viability.

A common error made by micro-business owners is to incorrectly assume they are entitled to an Australian business number (ABN) and can register for GST. This can result in people completing activity statements and claiming GST refunds to which they are not entitled.

People may also assume they are carrying on a business and incorrectly register for an ABN and GST. This may occur where an individual is engaged as a contractor but, due to the nature of their work arrangements, is a common law employee.

The ATO will be checking that these taxpayers understand the new alienation of personal services income rules that limit income splitting and some business deductions.

In other situations, the activities undertaken are not currently profitable and may never become a viable business.

Other common errors include claiming input tax credits for the full amount of a purchase where the goods or services are used partially for private purposes, or failing to exclude private expenses when claiming input tax credits and deductions for expenses.

The Small to Medium Enterprises Segment

There are around 100,000 businesses with an annual turnover between \$2 million and \$100 million. These small to medium enterprises account for around \$16 billion, or 8.5%, of Commonwealth revenue.

Smaller enterprises share many of the characteristics of micro-businesses. They are typically owner-operated and around 85% have an annual turnover of less than \$10 million. This segment represents 19% of collectable debt but only 2.5% of the total number of cases.

This year the ATO expects to contact over 25,000 small to medium enterprises. This will involve field visits and the ATO will also be writing to businesses requesting additional information.

The compliance risks in this segment range from micro-business issues, such as not declaring income, to those of concern in the large business segment, such as transfer pricing and loss utilisation. Non-compliance in this segment is more likely to result from a lack of knowledge of the law or from evasion, rather than from a different interpretation of the law.

ATO Analysis shows that in 2,000 businesses at the larger end of this segment there is an increasing gap between profitability and tax paid. The ATO is paying particular attention to this group, with additional audits and risk analysis.

ATO Compliance Focu in the Small to Medium Enterprises Segment s

The ATO is concerned about inappropriate tax minimisation - for example, by using inflated management fees, excessive royalty payments, and tax-driven financing arrangements. There is also evidence of incorrect claims for tax losses in this segment. This may occur as a result of other income minimisation strategies or where losses are transferred from an entity that is not part of the same wholly-owned group.

Not recording or disguising payments for labour and other supplies

In some cases, payments for labour are disguised by using false invoices for other business expenses or invoices from fictitious labour hire firms. The payer may try to claim a tax deduction or input tax credits for these invoices without complying with pay as you go withholding and other employer obligations. This year the ATO will focus on these aspects of the cash economy in a wide range of industries.

Manipulating insolvency rules

The ATO has found other cases where the price a business quotes for a job cannot return a profit once tax and other on-costs are paid.

The ATO will continue to focus on the use of company structures to evade tax - such as 'phoenix' companies, where directors accumulate unpaid pay as you go withholding and other debts, abandon the company and its debts, and then carry on business through a newly formed company.

The Large Business Segment

Typically, the segment is characterised by large corporations with complex structures, operating in competitive environments. It is supported by Australia's well-developed financial market, and delivers services globally. Cost-effectiveness, including tax-effectiveness, is an integral part of the competitive environment.

The complexity of the business world is increasingly difficult for tax administrators. Structural changes -such as mergers and takeovers, increased integration of overseas and domestic markets, new hybrid financial instruments and attendant capital restructuring - tend to obscure transactions and increase compliance risks.

The General ATO Approach

While large corporations generally use both in-house and external professionals for tax advice, there is an increasing tendency for them not to seek rulings on the tax implications of complex business transactions. This puts a premium on coverage and risk assessment in the segment. The ATO acknowledges the need to improve the timeliness of its advice, and is increasing efforts to be more responsive.

The compliance of this segment in relation to both lodgment and payment of agreed liabilities is generally very high. However, because of the complexity of the issues and the consequent challenging of decisions by litigation, the level of disputed debt is also very high.

The major risks presently in this sector are associated with income tax. However, across the board, the ATO has concerns about the treatment of non-standard transactions, for example, the sale of assets for GST and capital gains tax purposes, and the adequacy of accounting and system controls for tax purposes.

Losses

While many losses are, of course, genuine, others have been created by circumventing the loss provisions - through loss duplication, artificial loss creation and loss trafficking.

The ATO is being particularly vigilant in the transition to the consolidation regime, as some large taxpayers may seek to re-organise their business activities to use previously 'trapped' losses or to inappropriately recoup prior year losses.

GST

The ATO is increasing its audit focus in this market substantially this year because of the potential revenue at risk will be examining:

Politicians, Boards & Statutory Authorities

- ◆ inadequate accounting and system controls, leading to incorrect activity statement calculations and GST liability
- ◆ the treatment of non-standard transactions
- ◆ transactions that involve non-monetary consideration
- ◆ financial supplies, including apportionment between input taxed supplies and other supplies that may lead to overclaiming of input tax credits
- ◆ incorrect classification, leading to GST not being charged or understating of GST liability, and
- ◆ the accuracy and integrity of refunds being claimed.

The ATO General Approach

There are some highly targeted audits and checks to address specific risks, which include:

- ◆ individuals obtaining tax 'benefits' from closely held charitable trusts
- ◆ charities engaging in commercial operations, with profits potentially affecting their exempt status
- ◆ public funds and sub-trust arrangements not complying with public fund integrity requirements, putting gift deductible status at risk
- ◆ creating tax shortfalls for medical practitioners within hospital billing arrangements
- ◆ universities engaging in unusual structuring and funding arrangements that potentially affect their exempt status
- ◆ receiving a benefit from funds after claiming a deductible gift where individuals or entities have a close association with the funds, and
- ◆ organisations claiming incorrect imputation credits.

The ATO is of the view that the vast majority of agents want comfort and certainty for their clients by ensuring they meet their obligations under the law.

The ATO uses intelligence from compliance activities to ensure that a particular tax agent is not encouraging or facilitating taxpayer non-compliance. The ATO also monitor tax agents for compliance with their own tax obligations, including lodgment of income tax returns and activity statements, and payment of tax debts.

Where there is evidence that a tax agent is encouraging or facilitating non-compliance or they have poor performance in their own tax compliance, the ATO refer the evidence to a tax agents' board. The board investigates and determines whether the tax agent can continue to be registered as a 'fit and proper person'.

International

International issues now affect all segments -from giant corporations to backpackers.

For individuals, the lack of awareness of obligations, the transitory nature of many interactions and the tax-free threshold available only to Australian individuals are all factors that affect compliance.

Paying interest overseas, particularly within corporate groups, has increased dramatically in the past few years and is trending significantly higher than interest payments into Australia.

General ATO Approach

Key ATO programs are:

- ◆ working with Treasury to ensure Australia's treaty program is appropriate to government policy and business needs
- ◆ ensuring Australian views are reflected in international tax forums on issues like tax havens, bank secrecy, e-commerce, treaty interpretations and transfer pricing (or value-shifting to minimise tax)
- ◆ focusing on transfer pricing through a comprehensive program of rulings, education, risk assessment, audit and advance pricing agreements
- ◆ working with other tax administrations to improve exchange of information and to better align the ATO approaches to global compliance
- ◆ providing rulings, advice and assistance to taxpayers – the ATO will continue the extensive international public rulings program and develop a web presence for international issues

- ◆ undertaking research and risk identification and analysis, including record and data matching, to identify and quantify patterns and trends in populations and markets, and
- ◆ working with small to medium enterprises and their advisers to improve their understanding of tax knowledge. ATO information indicates that 10% of these enterprises have international dealings.

ATO Compliance Focus - Tax havens

Transactions involving tax havens have increased 200% in the last six years. The internet is making it easier to market tax haven 'products', such as foreign life policies and offshore credit/debit cards, which can be used to gain easy access to money hidden in tax havens.

The ATO is combating the use of tax havens by:

- ◆ analysing intelligence, including AUSTRAC data, to identify the use of tax havens and their promoters
- ◆ contributing to OECD work to reduce abuse of tax havens, particularly in our region, and
- ◆ cooperating with other tax administrations, law enforcement agencies and tax haven administrations to prosecute abusive transactions.

Business tax reform measures

These include thin capitalisation, debt and equity definitions, and consolidation of groups for tax purposes.

The ATO will analyse income tax return and thin capitalisation schedule data to identify and examine appropriate cases. This will ensure taxpayers understand and adhere to the new thin capitalisation legislation (particularly the arm's length test, and debt and equity definitions).

Aggressive Tax Planning

The scale and nature of aggressive tax planning continues to be a significant risk to the tax system, and remains a key priority for the ATO.

Much aggressive tax planning is structured around financing arrangements designed to create or inflate tax deductions. Some aggressive arrangements seek to exploit concessions in the tax law designed to encourage certain types of investments

General ATO Approach to aggressive tax planning

The ATO will look closely at:

- ◆ contrived and artificial arrangements
- ◆ financial arrangements with little or no underlying business activity or purpose
- ◆ the level of tax benefit claimed in realising an economic return
- ◆ an abnormally low level of economic risk faced by a taxpayer
- ◆ the contrived transfer of a tax benefit
- ◆ limited or non-recourse financing associated with a round-robin flow of funds
- ◆ limited cash outlays associated with loans that capitalise debt
- ◆ winding up or leaving an arrangement before net income is generated
- ◆ excessive valuations of assets resulting in inflated deduction claims
- ◆ use of tax-exempt entities, especially charities, to wash income, and
- ◆ transactions that involve tax havens.

The ATO is currently examining over 100 tax planning arrangements.

Some financing products or arrangements are widely marketed; others are more tailored to the circumstances of particular taxpayers. The more tailored arrangements are a greater risk to Commonwealth revenue and are the subject of closer examination by the ATO

Offshore tax planning arrangements are an increasing risk. There is evidence of increased movement of funds to tax havens, including by individuals and small to medium enterprises.

Politicians, Boards & Statutory Authorities

Capital gains tax planning is often associated with a business event - such as a restructure, merger, acquisition or disposal of a business or asset - seemingly designed to avoid or minimise tax.

Keeping in touch with what is being offered in the market is important to prevent problems escalating quickly. Monitoring and acting on the activities of promoters gives us insights into emerging developments.

The ATO are looking closely at promoters' own tax affairs, their associates, the schemes promoted, the taxpayers who participate in the schemes, and possible criminal offences. The ATO strategies include:

- ◆ using the Commissioner's access powers, including unannounced visits
- ◆ requiring early lodgment and expanded tax returns for higher risk promoters
- ◆ streamlining lodgment and debt enforcement practices, and
- ◆ cooperating with the Australian Federal Police and the Commonwealth Director of Public Prosecutions on possible criminal prosecutions.

The financial services market is highly competitive and drives the development of innovative and so-called 'tax-effective' financial solutions.

To identify and address the more tailored tax planning arrangements, the ATO are looking to work with the finance industry and accounting and legal firms to identify the latest tax planning products or arrangements, and to give an early view of their tax consequences.

Debt and Lodgment

Reporting the correct information and paying on time are fundamental to successful tax administration.

Each year we process forms and payments for 15 million individual and business taxpayers. At any one time, there are more than 1 million debt cases, equivalent to 6% of clients lodging income tax returns.

Recently, the ATO have seen a 250% increase in the volume of debt transactions, mainly due to the more frequent interaction with the tax system for most clients. For many small businesses that previously had annual obligations, the new tax system introduced quarterly obligations. These higher volumes mean debt is established earlier and, consequently, more debt is collected.

Our General Approach

The ATO aim to make early contact with clients to encourage payment and lodgment. The ATO approach takes account of taxpayers' lodgment and payment histories, the cost-effectiveness of the ATO actions, and opportunities to influence behaviour. This leads to an escalating process of intervention for debt and lodgment.

According to compliance profile and risk priority, during 2002-03, the ATO will:

- ◆ contact all clients by letter, 28 days after they are due to lodge information or make a payment
- ◆ follow-up by phone where clients do not respond to written requests
- ◆ visit clients who do not respond to alternate strategies, and
- ◆ prosecute for non-lodgment, and undertake legal action for payment where appropriate, and where other solutions have been exhausted.

Many taxpayers are facing severe hardship as the drought affects farmers and rural communities. The mass marketed tax schemes of the mid-1990s left large tax debts for many unsophisticated investors. The ATO approach in these cases is much more sympathetic and accommodating; depending on individual circumstances, the ATO can waive interest and delay collection, while still encouraging lodgment.

The Cash Economy

The new tax system has significantly enhanced the ATO ability to detect those people who avoid their tax responsibilities. Businesses must now have an ABN to deal with other businesses - or have 48.5% of any payments made to them withheld.

Since the start of the new tax system in July 2000, around \$70 million has been withheld from payments to businesses not quoting their ABN. Some 30% of amounts withheld are not being claimed back.

While these changes significantly address the issues in business-to-business transactions, the ATO faces a different challenge in dealing with cash transactions between businesses and consumers. The ATO are looking to engage the

community and industry associations to improve compliance in this area. This year the Cash Economy Task Force will recommend further strategies to address this problem.

Compliance Focus

The cash economy takes many forms, from employees moonlighting to larger scale practices -such as businesses 'skimming the till', disguising transactions and creating false invoices, or operating wholly outside the tax system.

While the cash economy has an obvious impact on tax collections, it is also felt at a more grass roots level, with businesses that are doing the right thing disadvantaged by those avoiding their tax obligations.

To identify those in the cash economy, the ATO uses a range of strategies. For example, ABN registrations are cross-checked with income tax lodgments; GST turnover and input tax credits are compared to income and expenses; and financial ratios obtained from activity statements and tax returns are compared across similar types of businesses.

The ATO also acts on information provided by the community and other government agencies. Of particular value are the reports of significant and suspicious cash transactions and overseas money transfers provided by AUSTRAC under the Financial Transactions Reports Act. The ATO also undertake random checks to assess the level of risk across different areas.

The ATO is expanding its cash economy strategies as part of the 2002-03 compliance program:

- ◆ over 85,000 businesses whose financial performance is markedly different from their industry peers will be contacted as part of the ATO investigations into undeclared income
- ◆ around 20,000 businesses can expect a visit from one of 600 officers specialising in detecting omitted income and businesses operating outside the tax system, and
- ◆ a further 2,400 field officers will identify cash economy issues as part of their general compliance reviews.

High-risk industries now being closely scrutinised include building and construction; road freight services; taxis; cafes, restaurants and takeaway food outlets; hairdressing and beauty salons; cleaning services; clothing and textiles; pubs, clubs and taverns; and the security industry.

Other industries set to face tighter scrutiny include second-hand car dealers; the fishing industry; liquor retailing; gold bullion; antique dealers; art dealers; and the tourism industry.

Evasion and Fraud

Some people in the community take decisions to deliberately not comply with the tax law. They may, for example, refuse to provide access to the ATO officers, fail to provide information when required to do so, disguise transactions or destroy documents, use false registrations, or simply refuse to lodge tax returns or meet other obligations.

These kinds of matters are handled by auditors who specialise in dealing with uncooperative taxpayers and their advisers. They work closely with law enforcement agencies in this work, including the Australian Federal Police and the National Crime Authority.

Last year these auditors conducted 594 tax audits that resulted in amended tax assessments and penalties of around \$90 million.

In cases where there is evidence of fraud or other illegal activity, another team of specialised investigators establishes whether it is appropriate to refer the matter to the Director of Public Prosecutions.

General Approach

A dedicated group of 275 investigators is working on these serious matters. Over the coming year the ATO plans to increase this group to 300. Their work involves:

- ◆ undertaking comprehensive audits to identify fraud activity
- ◆ analysing intelligence from income tax returns, activity statements and other taxpayer returns, as well as analysing significant cash transactions and international movement of funds
- ◆ working with other law enforcement agencies to share intelligence and target illegal activity
- ◆ undertaking risk assessments
- ◆ investigating fraud in cases where there is evidence of fraud, and
- ◆ referring cases to the Director of Public Prosecutions.

Goods and Services Tax

A third of GST-registered businesses have an annual turnover of less than \$50,000 and 93% have a turnover of less than \$1 million. Just 1% have a turnover of more than \$20 million.

Audits

In 2001-02 the ATO audit program targeted 9% of GST-registered businesses and resulted in \$363 million additional GST being paid.

This year the ATO will increase the number of GST compliance staff by around 350, and will focus more on medium and large businesses. Around one in ten businesses will be subject to some form of audit.

Compliance Focus

At the extreme, frauds are sometimes attempted through the use of false documentation or bogus business registrations.

During 2001-02 the ATO delayed for review more than 67,000 refunds worth \$17 billion, disallowing claims of \$101 million as a result.

There were five prosecutions for fraud, with a further 38 cases referred to the Director of Public Prosecutions or other law enforcement agencies.

The cash economy

Non-disclosure of cash transactions is a major issue, and the ATO has specialist investigation teams to deal with all GST and income tax implications of this behaviour.

Inadequate accounting and system controls in large businesses

Large businesses generally have tailored and sophisticated accounting systems to manage their GST obligations. Most accounting systems do not automatically account for non-standard transactions, such as property sales.

The ATO is addressing these risks with increased audits of medium and large businesses.

Sales of business assets

GST is payable on the sale of any business assets, even if they were acquired before GST was introduced in July 2000. Many businesses fail to account for tax on these sales because they are outside the normal scope of business trading.

Recipient created invoices

In some circumstances the recipient of a supply, or an intermediary, may generate tax invoices on behalf of the actual supplier. There is a major risk that businesses could manipulate this process to generate false input tax credits for themselves. Taxpayers operating under this arrangement are monitored closely and audits are conducted on a regular basis.

Property and business services industry

Businesses involved in property and business services are included in our cash economy compliance program because of the prevalence of cash transactions in that industry.

1.2 AUSTRALIAN PARLIAMENT

Source: *Australian Parliament House Website (402365)*

<http://www.aph.gov.au>

These legislation notes were prepared by Marcus Duckett of Hall & Wilcox Lawyers. Telephone: 9603 3555.

(a) Acts Which Received Royal Assent

Nil

(b) Bills Awaiting Royal Assent**(1) Inspector-General of Taxation Bill 2002**

Introduced into the House and second reading speech 19 September 2002 and record second reading speech 17 October 2002

The Bill intends to establish a statutory office to review tax administration and to report to the Government with recommendations for improving tax administration for the benefit of all taxpayers. It provides for the appointment of an independent Inspector-General of Taxation by the Governor-General for a fixed term of up to five years, with explicit and strictly limited conditions for dismissal from office of the incumbent.

The Bill provides the Inspector-General with a broad range of powers to obtain comprehensive information on the administration of the tax laws. The Inspector-General will be able to invite submissions from the public or from particular groups of taxpayers or tax professionals, and may receive submissions in confidence. The Inspector-General will also be able to hold meetings with taxpayers, tax professionals or their representatives.

The Bill also endows the Inspector-General with investigative powers -- including the power to compel disclosure of documents and examine witnesses -- so that the Inspector-General is not reliant on voluntary disclosure of information required to complete a review.

The Bill does not impose any obligations on taxpayers and thus has no compliance costs for individuals or businesses. The compulsive investigative powers of the Inspector-General do not extend to taxpayers, since the Inspector-General will be reviewing systemic tax administration issues and not the tax affairs of individuals or groups.

(c) Bills Laid Aside or Removed from Notice Paper 2001

Nil

(d) Bills Before Parliament**(1) New Business Tax System (Consolidations and Other Measures) Bill (No. 2) 2002**

Introduced to the House and second reading speech on 12 December 2002.

This Bill proposes to make amendments to ensure the proper operation of the new consolidation regime established by the New Business Tax System (Consolidation) Act (No. 1) 2002 No. 68 (Cth), the New Business Tax System (Consolidation, Value Shifting, Demergers and Other Measures) Act 2002 No. 90 (Cth), and the New Business Tax System (Consolidation and Other Measures) Act (No. 1) 2002 No. 117 (Cth).

The Bill also proposes a number of technical and consequential amendments, in particular, amendments in relation to the "simplified imputation system" in certain areas of venture capital franking, cum-dividend sales and securities lending arrangements.

(2) Taxation Laws Amendment (A Simpler Business Activity Statement) Bill 2002

Introduced to the House on 11 March 2002 as a private member's Bill by Bob McMullan.

The Bill seeks to provide a simpler method of calculating Goods and Services Tax payments for small business.

(3) Taxation Laws Amendment Bill (No. 6) 2002

Introduced to the House and second reading speech 19 September 2002, passed second reading speech, committee and third reading speech 12 December 2002.

This Bill proposes to amend the interest withholding tax provisions of the *Income Tax Assessment Act 1936* to:

- ◆ exclude certain associates from the associates prohibitions contained in section 128F;

- ◆ restore the concessional treatment under section 128F to certain securities by exempting from interest withholding tax gains deemed to be interest under section 128AA; and
- ◆ exempt from interest withholding tax interest derived by a non-resident on nostro accounts held by Authorised Deposit Taking Institutions.

This Bill also seeks to amend the CGT provisions of the *Income Tax Assessment Act 1997* to provide a CGT exemption for payments received by Australian residents under the German Forced Labour Compensation Program.

Finally, this Bill will amend the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* so that, from 1 January 2003, friendly societies will be allowed a deduction for investment income paid or credited to recipients of special purpose investment products (income bonds, scholarship plans and funeral policies) where that income has been included in the assessable income of the friendly society. It also clarifies the taxation treatment of distributions paid from these products.

(4) New Business Tax System (Venture Capital Deficit Tax) Bill 2002

Introduced to the House and second reading speech on 12 December 2002.

This Bill proposes to introduce the venture capital deficit tax, a tax intended to be levied in respect of venture capital sub-account deficits of pooled development funds. The Bill is intended to operate in conjunction with the New Business Tax System (Consolidation and Other Measures) Bill (No. 2) 2002 (Cth), which is expected to account for the process by which the venture capital deficit tax will be levied.

(5) Taxation Laws Amendment Bill (No. 7) 2002

Introduced to the House and second reading speech 23 October 2002.

The measures contained in this Bill are directed at people who would normally be considered to be resident of Australia for tax purposes, but who qualify under the temporary resident exemption.

- ◆ Temporary residents will generally be first-time tax residents of Australia who are in Australia on temporary entry visas. However, also included are people in Australia on temporary entry visas who have not been a tax resident of Australia for at least the previous 10 years.
- ◆ Presently, a person who is a resident of Australia is taxable on income and gains from all sources whether they are Australian or not. This measure provides a tax exemption for all ordinary and statutory income from a foreign source, net capital gains generally without the necessary connection to Australia and for interest withholding tax obligations associated with overseas liabilities. The exemption applies to the individuals who are considered to be temporary residents, for a maximum period of 4 years. The exemption will not, however, apply to remuneration received for or associated with employment, or for services performed while a resident of Australia.
- ◆ In addition, this Bill removes the 4 year limitation on the Foreign Investment Fund exemption for all people considered to be exempt visitors for the purposes of the Foreign Investment Fund legislation.

(6) Taxation Laws Amendment Bill (No. 8) 2002

Introduced to the House and second reading speech 5 December 2002.

The Bill proposes a number of reforms, including proposals to:

- ◆ include more organisations to be the subject of a tax deductible gift of \$2 or more;
- ◆ recognise capital gains or losses that arise while shares that are part of an employee share scheme are held in trust and where the employee elects to be taxed at the time they acquire the shares or the rights to the shares;
- ◆ ensure that the 12-month minimum qualifying period for the capital gains tax 50% discount for such shares begins from the time the trustee acquires the shares;
- ◆ enable co-operative companies to either frank distributions to shareholders or, alternatively, to claim the existing deduction for distributions of assessable income to shareholders.
- ◆ rectify an anomaly in the RBL provisions so that a reversionary pension benefit paid on the death of the original recipient will receive the same proportion of concessional taxation rebate as applied to the original pension.

- ◆ enable expenditures associated with closing down a former Petroleum Resource Rent Tax (PRRT) project facility (which is still used under an infrastructure licence) to be deductible against the project receipts;
- ◆ reform certain aspects of the PRRT relating to receipts and deductions;
- ◆ ensure that generally no taxation consequences will arise for any person under any Commonwealth taxation laws as a result of the corporate conversion of AGL or from its registration under the *Corporations Act 2001*; and
- ◆ make minor, technical amendments to provisions relating to capital gains tax, fringe benefits tax, gift deductions and other taxation provisions.

(7) Taxation Laws Amendment (Structured Settlements) 2002

Introduced to the House and second reading speech 6 June 2002 and introduced to Senate 25 September 2002.

The *Taxation Law Amendment (Structured Settlements) Bill 2002* will amend the *Income Tax Assessment Act 1997* to encourage the use of structured settlements for personal injury compensation, by providing an income tax exemption for annuities and deferred lump sums paid as compensation for seriously injured persons under structured settlements.

The income tax exemption will be available in relation to such payments if the necessary eligibility criteria are met. The eligibility criteria are designed to remove the disincentives in the tax system in relation to structured settlements and to ensure that the interests of the injured persons are protected, for instance, by providing prudential regulation of the annuities and preventing the insured party from commuting an annuity.

Structured settlements involve periodic payments for life or over a substantial period.

(8) Taxation Laws Amendment (Venture Capital) Bill 2002 (Cth)

Introduced into the House and second reading speech 14 November 2002

The Bill is designed to facilitate non-resident investment in the Australian venture capital industry by providing incentives for increased investment. The Bill has been introduced in conjunction with the *Venture Capital Bill 2002*. The Bills intend to extend the current tax exemption provided to certain foreign pension funds on profits from the disposal of investments in eligible venture capital businesses, to:

- ◆ all tax-exempt non-residents from Canada, France, Germany, Japan, the United Kingdom or the United States of America;
- ◆ non-resident venture capital funds of funds established and managed in Canada, France, Germany, Japan, the United Kingdom or the United States of America; and
- ◆ taxable non-residents, which are resident in Canada, Finland, France, Germany, Italy, Japan, the Netherlands (excluding the Netherlands Antilles), New Zealand, Norway, Sweden, Taiwan, the United Kingdom or the United States of America, holding less than 10% of the equity in a venture capital limited partnership.

The Bill also:

- ◆ provides venture capital limited partnerships, Australian venture capital fund of funds and venture capital management partnerships with flow-through taxation treatment. This provides Australia with worlds best practice investment vehicles for venture capital; and
- ◆ taxes the venture capital managers share of gains made by a VCLP or an AFOF on the sale of eligible venture capital investments (the carried interest) as a capital gain.

(9) Taxation Laws Amendment Bill (No. 4) 2003

Introduced to the House 13 February 2003

(e) Regulations Promulgated - Income Tax

Nil

1.3 COURTS & TRIBUNALS

(a) Courts

(1) Hill J finds the tax agent took reasonable care in relation to income adjustments. Did s 82 limit the building depreciation deduction? (MLC Limited v Deputy C of T)

Source: (385682) [2002] FCA 1491 (29 November 2002) Hill J.

http://www.austlii.edu.au/au/cases/cth/federal_ct/2002/1491.html

Issue

Did the tax agent take reasonable care in not including certain adjustments of cost?

Does section 82 operate so that the taxpayer is not entitled to deduct from the proceeds of sale of a building, the amounts that comprise qualifying expenditure under s 1247HD

Background

s 124ZH of Division 10D permitted the taxpayer to claim a percentage (2.5% to 4% depending on the year of income in question) of "qualifying expenditure" (eg building cost or cost of extensions, alterations or improvements to buildings that were used to produce rental income).

s 82(1) Where in respect of any amount, a deduction would but for this section be allowable under more than one provision of this Act, and whether it would be so allowable from the assessable income of the same or different years, the deduction shall be allowable only under that provision which in the opinion of the Commissioner is most appropriate.

Where the profit arising from the sale of any property is included in the assessable income of any person, ... and any expenditure incurred by him in connexion with that property has been allowed or is allowable as a deduction under this Act or has been allowed or is allowable as a deduction in assessments under the previous Act, that expenditure shall not be deducted in ascertaining the amount of the profit or loss."

Facts

The taxpayer:

- ◆ owned four buildings, having built 3 of them and purchased the other.
- ◆ had expended money on all the buildings that comprised qualifying expenditure.

In calculating the profit on the sale of the buildings the taxpayer did not exclude from account the deduction previously claimed under section 124ZH of Division 10D in respect of the qualifying expenditure.

Decision in relation to Penalty

Hill J found in favour of the taxpayer on the substantive question (see below).

- (40) In case the matter should proceed further I would set out shortly my views on the penalty on the assumption that the assessment was correct in taking into account the building allowance amounts in computing the profits on sale of items where the building allowance was allowed to the relevant applicant ...
- (42) It is submitted by the Commissioner that there has been a failure on the part of the applicants or their tax agent to take reasonable care by failing to include in the returns the adjustment of cost required if s 82(2), contrary to my view, applied.
- (43) The relevant facts I would find to be as follows. First, it must be said that the returns of the applicant companies were prepared under the supervision of a well-known firm of which specialised in income tax and had wide experience in income tax matters. Secondly, the person concerned with the preparation of the returns for the income years in question, Mr Mills, then a director of Greenwood & Freehills Pty Limited, with considerable tax experience including many years working for or advising life insurance companies, had formed a view that s 82(2) did not require the adjustment which the Commissioner now submits it did. It may

be inferred that others in Greenwood & Freehills took a similar view. Indeed in correspondence with the ATO it is asserted, and I have no reason to disbelieve the assertion, that the view Mr Mills took was the view in the industry generally. At the time Mr Mills formed his view, the decision in the Australia & New Zealand Banking Group had been handed down. However, as I have already noted, what was there said was dicta and in any event it is clear that the question of the application of s 82(2) in respect of depreciation was left undecided. I do not think that the applicants would have been entitled to rely upon the dicta in that case to any substantial extent.

- (44) In 1994 Mr Mills became concerned, as a result of amendments to s 160ZK(1A) (which had the result that the Building Allowance would be taken into account in computing capital gains) whether s 82(2) might in some way require the building allowance to be taken into account in the case of life companies which had claimed the building allowance and subsequently sold the relevant asset. He instructed Mr Taylor, then a senior tax manager with Greenwood Challoner and the person who at the time had the day to day responsibility for the tax affairs of the applicants, some time in early 1994 to call Mr Reich, an officer of the Australian Taxation Office, in the section of the ATO dealing with life insurance companies. Mr Taylor, as requested phoned Mr Reich and asked him whether there was a need for a clawback in calculating the gain made on disposal of buildings where Division 10D deductions had been claimed. Mr Reich replied that he did not see on what basis such an adjustment would be required.
- (46) The conversation (between the tax agent and the ATO and which the tax agent relied upon) took place at a time when there was no published ruling or determination dealing with the question of the meaning of s 82(2) or its application to the building allowance.
- (48) It was only on 3 June 1998 (after the relevant returns were lodged) that a taxation determination (TD 98/D5) on the subject was issued for public comment was followed by a final determination -TD1999/1 published on 24 March 1999. The draft and final determination set out publicly ...
- (50) In the statement of reasons which accompanied notification of the disallowance of the applicants' objections the Commissioner said, inter alia:
- "The exercise of 'reasonable care' would have required the taxpayer to have made attempts to seek the ATO's view about whether subsection 82(2) applied to exclude deductions claimed under section 124ZH when calculating the assessable profits and deductible losses on the disposal of the buildings. Furthermore, it would have required that the taxpayer to have informed the ATO that it disagreed with the view in TD 1999/1."*
- (51) It may be said that it is hard to see how the applicants or their agent could have taken into account in preparing the returns lodged in 1996 and 1997 the views expressed in TD 1991/1 when those view did not appear publicly for some years after the returns were lodged.
- (52) It is not appropriate in this case to endeavour to set out what would constitute reasonable care in all circumstances. For much will depend upon the facts of a particular case. Some assistance may be obtained, however, from the decision of the full Court of this Court in North Ryde RSL Community Club Ltd v Federal Commissioner of Taxation 2002 ATC 4293. ... It was held (on the appeal) that there was no basis for a finding that the club had failed to exercise reasonable care. In particular failure to seek a binding private ruling from the Commissioner was not in the circumstances failure to exercise reasonable care.
- (53) In my view the present is also a case where on the facts it cannot be said that there was a failure to exercise reasonable care. Indeed, the present case is stronger than the facts in the North Ryde RSL Community Club case. Here, the taxpayer through its accountants had made an enquiry and been told that the view it took, a view taken in good faith and highly arguable, was correct. The view was one held generally in the insurance industry. It is true that it could have sought a binding ruling from the Commissioner, but clearly failure to seek a ruling will not in every case be equated with failure to exercise reasonable care. A taxpayer who relies upon expert advice as here where the advice is held generally in the industry and does not conflict with any statement made by the Commissioner and indeed is confirmed by enquiry of the ATO is not required to obtain a ruling to guard against an allegation that the taxpayer has not exercised due care.

Decision in relation to s 82

- (12) (Under s 124ZG) it was not necessary that the taxpayer who claimed the deduction be the person who outlaid the money to construct the building or make extensions to it ..."
- (17) Next, it should be noted that if the building was destroyed an immediate deduction for the balance of the assumed 25 years of life of the building would become available to the owner of the building at the time of destruction ...

- (18) Finally it may be said that unlike other amortisation deductions...no clawback or balancing charge will normally arise when the taxpayer disposes of the income producing property. ... So long as the profit on sale was not assessable income to that taxpayer the taxpayer would not be required to bring into income any part of the building allowance which had been allowed during the 5 years of ownership by the taxpayer, even if the profit might be said to have recouped the taxpayer any depreciation which the allowance in effect recognised.
- (19) The question for decision is whether this result is altered by s 82(2) in a case where the profit on sale made by the taxpayer was assessable income to the taxpayer. For completeness it may be noted again that the provisions of the 1936 Act dealing with the building allowance were replaced by comparable provisions of the 1997 Act.

The costs incurred in building acquiring and improving the buildings where “qualifying costs” under Division 10D.

- (21) The purpose of subsection (1) is quite plain. Section 51(1) of the 1936 Act was the general deduction section for what may be referred to compendiously as working expenses. However, there were many provisions of the Act which confer upon taxpayers specific deductions. A clear purpose of the first subsection of s 82 was to ensure both that more than one deduction was not to be available for the one lot of expenditure and also that the deduction which was to be conferred was to be available only under the section that was the most appropriate section. Generally it might be said that if a deduction were available under both a general section such as s 51(1) and a specific section the more appropriate section under which the deduction should be conferred would be the specific section. Two deductions were not allowed.
- (22) The second subsection is presumably designed to achieve a somewhat similar result where expenditure of the taxpayer is on the one hand an allowable deduction but on the other hand would, but for the subsection be taken into account in the calculation of profit or loss (that is to say by being deducted from the sale proceeds in computing net profit.)
- (23) There is no reason to suggest (and it is not suggested here) that s 82(2) was limited in its operation to cases where a profit arising from the resale of property acquired for resale at a profit was to be included in assessable income (see s 26(a) of the 1936 Act). There is no reason why it would not apply as well to a profit of an insurance company or bank, which profit was, as a result of the operations of insurance companies or banks properly to be seen as income in accordance with the ordinary concepts or usages of mankind. Nor is there any reason to suggest that the kinds of outgoings which were allowable deductions should be restricted to interest, rent and taxes.
- (24) As I have already noted amendments have been made from time to time to s 82. These amendments... were to exclude a particular category of expenditure from the application of subsection (2).
- (25) It may well be the case that the legislature was of the view that s 82 had no application to a deduction under s 124ZH so that no amendment to s 82 was necessary to remove that expenditure from s 82 of the Act. In other words, I think that the history of amendments to s 82 ultimately tells nothing as to the interpretation of s 82 so far as its application to the present circumstances is concerned.
- (31) It is now clear, if it ever was in dispute, that the task of construction is not one simply of taking each word used in a statute and applying the dictionary meaning of that word to arrive at a conclusion. The task is not as mechanical as that...
- (33) The mischief which s 82(2) was designed to overcome is clear enough. The subsection, as I have already illustrated, complements s 82(1). The first subsection ensures that a taxpayer does not get more than one deduction where the same amount is allowable under different sections. The second subsection is designed to achieve the same result in a case where instead of a deduction being available under two sections there is a deduction available under one section and a need arises to compute a profit or loss by virtue of another section. Thus subsection (2) was enacted to ensure that a taxpayer, entitled to a deduction for expenditure which he or she incurred, should not in essence obtain a second deduction for that expenditure by taking that expenditure into account on the cost side of the equation in computing a profit (or loss) where that profit would be brought into assessable income.
- (34) The legislative purpose of the building allowance is also obvious. It is to give a deduction for what in essence is amortisation on a fixed percentage basis for expenditure on the construction of or in certain cases extensions to buildings used to produce assessable income and thereby encourage the construction (or extension) of new commercial buildings. The amortisation, while calculated by reference to the expenditure incurred, is not given only to the person who expended the money. The criterion relevant to the deduction is not that the taxpayer has expended the money, although clearly someone must have. The criterion for the allowance is use of the building as non-residential premises for the purpose of gaining assessable income.

- (35) The incentive which the building allowance is intended to provide would obviously be cut down if the deduction is clawed back when the building is sold, for while the allowance would still be given there would be only a timing advantage. Express provisions permit a clawback (generally referred to as a balancing charge) in other circumstances (examples in both the 1936 Act and 1997 Act cited).
- (36) When the interaction of s 124ZH and s 82(2) is examined it seems to me that the proper interpretation of s 82(2) is that the effective double deduction that is prevented by the subsection is one where the criterion for the deduction is expenditure by the taxpayer in respect of property that is subsequently turned by the taxpayer to account. The sub-section is not concerned with the case where the criterion of deductibility is not expenditure incurred by a taxpayer at all, but rather the criterion of deductibility is use by the taxpayer of non-residential property to produce assessable income, irrespective of who the person was who initially incurred the expenditure. In other words the question of who incurred the expenditure is an adventitious circumstance in the scheme of the building allowance. And this is so, notwithstanding that some person must have incurred the expenditure in circumstances such that it becomes "qualifying expenditure". Once the interaction of the sections is interpreted in this way the obviously anomalous consequences implicit in the interpretation put forward by the Commissioner disappear. Different results will not then follow depending upon whether the taxpayer who realises the property was the person who built the building or extended it and who incurred expenditure which was qualifying expenditure or was a subsequent purchaser of the building who did not himself or herself incur the qualifying expenditure but used the building to gain assessable income. And, with respect to the submission of senior counsel for the Commissioner, it can not be said that the language of s 82(2) is so clear, so intractable, that this interpretation, which gives effect to the legislative policy of both s 124ZH and s 82(2) is simply not open.

Editor

This decision should encourage senior practitioners to give advice without having to always resort to the assurance of an ATO ruling with all the difficulties that involves. Hill J makes it clear that the courts will not easily find that an experienced practitioner acted without reasonable care of the practitioner gives advice that doesn't conflict with a statement made by the Commissioner and that does reflect opinions held generally in an industry acted without reasonable care.

(2) Does "Henderson" apply for the accountant - Dormer? (Dormer v C of T)

Source: (385630) Dormer v C of T FCAFC 385 (29 November 2002) Wilcox, Spender and Cooper JJ

<http://www.austlii.edu.au/au/cases/cth/FCAFC/2002/385.html>

What is the issue?

Was Dormer the accountant correct in declining to return as income amounts billed at the conclusion of the 1997 year (when he returned his income on a cash basis) and received during the 1998 and 1999 years when the newly established partnership of which he became a member returned its income on an accruals basis.

Facts

The facts in this matter were not in contention. Prior to and the year ending 30 June 1997:

- ◆ Dormer carried on an accounting business as a sole trader, trading as John Dormer and Associates ("JDA").
- ◆ Dormer returned the business income of John Dormer and Associates on a cash basis.

By an agreement dated 18 April 1997 (the Sale Agreement), Dormer agreed to sell one third JDA to each of:

- ◆ Terence John Grainger (Grainger);
- ◆ Anthony William Hampden Platt (Platt).

By clause 1 of the Sale Agreement, the sale was to take effect from 1 July 1997.

Under the terms of the Sale Agreement, all clients of JDA were billed their work in progress as at 30 June 1997 and became debtors of JDA (Clause 4 of the Sale Agreement).

The debtors of JDA were not sold under the Sale Agreement so that Dormer retained those debtors (Clause 4 of the Sale Agreement).

Dormer, Grainger and Platt entered an agreement dated 18 April 1997, headed "Joint Venture Agreement" (the Agreement).

For the year ended 30 June 1998:

- ◆ Dormer returned his share of income from Dormer Grainger and Platt (the "new firm") on an accruals or earnings basis.
- ◆ Dormer did not return any of the fees totalling \$76,045.00 received from debtors of JDA as income in either of the 1998 or 1999 years.

Following a limited audit of the taxation affairs of the Applicant, on 11 October 2000:

- ◆ the Commissioner issued an amended assessment for the year ended 30 June 1998 including the payments totalling \$76,045 from debtors of JDA in Dormer's assessable income for the 1998 year.
- ◆ the Commissioner issued an amended assessment for the year ended 30 June 1999 including payments totalling \$4,695 from debtors of JDA in Dormer's assessable income for the 1998 year.

Decision of Full Federal Court

We agree with the substance of Gyles J's reasoning. However, we have difficulty with his Honour's comment, in para 22 of his reasons, that "the accountancy practice as such did continue". With respect, having regard to the terms of the Sale Agreement, it seems more accurate to say that a new practice, operated by the three partners, immediately replaced the old practice carried on by the appellant alone. It seems the new practice was carried on in the same premises as the old practice and used the same staff, with the exception that two employees of the old practice, Messrs Grainger and Platt, became partners in the new practice. No doubt the partners in the new practice hoped to obtain the benefit of such goodwill as attached to the old practice; presumably, that is why Messrs Grainger and Platt each paid the appellant \$145,000 for the opportunity of going into partnership with him. However, as a matter of law, it seems to us, the old "one-man practice" was replaced by a new partnership practice.

Despite the comment to which we have referred, Gyles J said, in para 23: "... the partnership is properly seen as a new venture which derives income which has no relationship with work done in the previous accounting period". That is obviously correct. Clause 4 of the Sale Agreement provided that debtors of the old practice "will not be transferred or sold and will be retained by Dormer". Even work in progress, as at 30 June 1997, was to be billed to clients by the old practice and "then become a debtor" of that practice: see cl 5 of the Sale Agreement. The only connection between the debtors of the old practice, including for work in progress at 30 June 1997, and the new practice was that the new practice was to act as debt collector for the old.

The statement made by Barwick CJ in Henderson about there being no warrant "for combining the results of more than one year in order to obtain the assessable income for a particular year of tax" strikes us as curious. It might have been thought, on the facts of Henderson, that the results of one year comprised both the cash received in that year in respect of income earned in earlier years (and not yet subjected to tax) and the income earned in the later year, upon which tax was being computed on an earnings basis. However, the correctness of Henderson is not an issue for us. We are bound by the decision. If it is in point, we must apply it to this case. The question, for us, is whether the approach adopted in that case applies to this case, as the appellant asserts and the respondent disputes.

We agree with Gyles J that the Henderson approach does not apply to this case. It was critical to Henderson that the receipts in issue were derived from the conduct of the same business (the accountancy partnership) as was then operating on an accrued earnings basis. That was not the situation in the present case. The business carried on by the appellant as from 1 July 1997 (the accountancy partnership with Messrs Grainger and Platt) was a different business from that undertaken by the appellant, as a sole trader, before that day. It is true that both businesses were accountancy practices and that the later business used the same premises and, substantially, the same employees as the first; but that is immaterial if the businesses were, in law, different businesses.

(3) The size of a prize alone does not make it income! (Stone v C of T)

Source: (385627) Stone v C of T [2002] FCA 1492 (29 November 2002)

www.austlii.edu.au/au/cases/cth/federal_ct/2002/1492.html

Issue

Were amounts received by an elite athlete as prize money, government grants, function attendance fees and sponsorship moneys assessable income.

Facts

The taxpayer, Constable Joanna Stone, (Ms Stone) is:

- ◆ In addition to being employed as a Senior Constable with the Queensland Police Service, probably Australia's leading javelin thrower.
- ◆ For the year of income ending 30 June 1999 returned as her assessable income the sum of \$39,832, being her salary as a police officer.
- ◆ Noted in the return that she had received other amounts, "the sporting receipts" which she listed, in respect of her sporting activities and which totalled \$136,448.
- ◆ Claimed that these amounts were not assessable income.
- ◆ No claim for any deductions relating to the sporting receipts.

The Commissioner treated the additional receipts as assessable income.

On objection the Commissioner accepted that she was entitled to deductions of \$19,739 and issued an amended assessment accordingly.

At the commencement of the hearing senior counsel for Ms Stone conceded that the sponsorship amounts were income but that the remaining amounts were not as she did not carry on any business activity, that none of the amounts were a reward for services and that none of the amounts were such that they were relied upon by her to meet her daily expenditure such that they might have the character of income.

Decision - Was the taxpayer carrying on a business?

Some athletes, particularly those in popular sports, appear regularly on our television screens promoting products often having no relationship at all with the sport they engage in and are reputed to be paid for this promotion and for personal or sporting appearances amounts that are well into seven figures. These athletes may easily be recognised as professional athletes and the amounts they receive may easily be seen to be income in the ordinary sense of that term.

Other athletes, particularly those in less popular sports may receive little in the way of prize money and little or nothing in the way of promotional or sponsorship receipts or fees for personal appearances.

Where the difficulty in the present case lies is where this line is to be drawn. Clearly the facts of each case will be determinative...it will be necessary to look not merely at the facts as they existed in the year of income but also at the facts as they existed both before, as well as after the year of income. While it is clear that the proceeds of the business carried on by a professional athlete will be income, amounts derived by non professional athletes may, if they satisfy other tests, still be income.

It is obvious that if Ms Stone was carrying on a business in addition to her Police duties then the proceeds of that business, including amounts that might be termed an ordinary incident of it would be income in ordinary concepts.

In the present case, the business, if there is a business, might be colloquially spoken of as the business of a professional athlete. While it is convenient to use the term "professional" as opposed to "amateur" to indicate a distinction between a person who is carrying on a business and one who is not, it must be said that in the distinction which is made in sporting circles may not be the same as the business/non business distinction in tax law. Hence I would emphasise that in using the term "professional" I intend no more than that the word "professional" denote an athlete who is carrying on an activity which is a business and "amateur" an athlete who is doing no more than engaging in a hobby, no matter how strenuous, or is otherwise not engaging in a business activity.

Whether a person is carrying on a business depends upon a number of factors. No single factor will be determinative in a particular case. Rather it will be a combination of factors which will lead to the conclusion that a person is in fact carrying on a business. These factors have sometimes been referred to in the English cases as the "badges of trade", where the concept of "trade" is, by statutory definition, used in the broader sense of "business", cf *Inland Revenue Commissioner v Livingston* (1927) 11 TC 538 at 542....

So, it will be relevant, although not determinative, to note whether the activity is carried on in a business-like way, and in accordance with ordinary commercial principles: *Livingston supra*. It will be relevant if there is system in the activity: *Newton v Pyke* (1908) 25 TLR 127 and *Evans v Federal Commissioner of Taxation* (1989) 89 ATC 4,540 at 4,555. Repetition and continuity play a part in the process of characterisation: *Hope v Bathurst City Council* (1980) 144 CLR 1 at 9, although repetition may come from the closely associated phrase "carrying on" rather than from the word "business" itself: per Mason J in *Hope* at 8.

Although it has been said that it is the extent of the activity (I would prefer to say the nature and extent of the activity) and not the state of mind or intention of a taxpayer which determines whether the taxpayer carries on a business: *Inglis v Federal Commissioner of Taxation* (1980) 80 ATC 4,001, that is not to say that the state of mind is irrelevant. Two different taxpayers may carry on the same activity (for example, carpentry) and both may sell the product of their activity on just the one occasion, yet the one may be carrying on a business and the other merely selling the product of a hobby. What must differentiate the two cases is the purpose for which the activity is carried on. Generally, as the extracts cited above illustrate, the profit motive is important in leading to the conclusion that the activity undertaken is a business.

That is particularly the case here. As the evidence shows it is necessary for an athlete at an elite level to compete against competitors of the same ability level or above both to improve the athlete's skills or indeed to maintain these. Some, although not all competitions at an elite level confer prizes upon those who attain first, second or third place. However, some athletes at that level may clearly be seen to be undertaking a business, while others will be pursuing their sport for its own sake. The question whether the athlete is carrying on a business will not be resolved in these cases by considering the activity he or she engages in, but rather by a consideration of the motive or purpose for doing so. That motive may often, however, be gleaned from the activities which the athlete undertakes. It must also be said that the mere fact that the athlete wins prizes of a large amount can likewise not be determinative of the issue. The size of a prize alone does not mean that it is income.

An athlete who pursues his or her sport as a full time and money-making activity is clearly carrying on a business. But, as Ferguson's case says and common sense requires, a person may have more than one activity. Where the person carries on two activities one alone may be a business and the other an employment, both may be businesses or neither may be businesses.

The present case is on the borderline. I have no doubt that Ms Stone engaged in the sport of javelin throwing from an early age because of her enthusiasm for the sport and because of her desire to excel in it and to win medals, particularly in the Commonwealth Games and the Olympic Games.

The question however, is whether Ms Stone turned her undoubted talent to the pursuit of money in the way that one would expect a professional athlete would. Certainly in the year of income she received sponsorship of money and benefits having a value of \$26,203 which it is conceded (correctly) is income, whether or not she was carrying on a business, because the amounts in question can be seen to be a reward for the service of promoting the goods or name of the sponsor. The evidence as to how these sponsorships came about is somewhat unsatisfactory.

Ms Stone had, during the period from 1997 to 1998, and until it was cancelled after nine months had expired, a management agreement with a Mr Hynes which provided that he was to be paid by way of a percentage of the sponsorships Ms Stone thereafter entered into. Even if, as Ms Stone said, the management agreement came about by Mr Hynes approaching her, the fact that she agreed that he was to be her business manager suggests that she was far more interested in sponsorship than her affidavit evidence would suggest.

It is relevant to note that Ms Stone did not select the competitions she competed in on the basis of money, but rather on the basis of the need to participate in meets to gain competitive experience.

Athletes who may be said to carry on a business would be likely to choose the meets they compete in (except those which qualify the athlete for selection to the national team in competitions such as the Olympic Games) having in mind the criterion of profits...while this is not a determining factor, it is clearly a factor.

A business which consists of selling a product turns that product to account for money. Athletes do not have a tangible product to turn to account. What the professional athlete who carries on a business does is turn the athlete's talent to account for money rather than turn a tangible product to account. There are only a limited number of ways that an athlete can do so. The primary opportunity will be sponsorship. Another opportunity will arise by participation in competitions where there is prize money to be won, with or without an appearance fee. Another opportunity will be personal appearances for money, whether those personal appearances involve participating in sporting contests or attending functions or speaking engagements.

Ms Stone did virtually all of these things, except, perhaps attending a sporting function not so much to compete as to be paid for attending. Not without some doubt I have reached the conclusion that on the evidence Ms Stone can be said, at least by the time the year of income came, to have turned her undoubted talent to account for money, notwithstanding that she clearly also competed in sporting competitions to improve her talent and notwithstanding that she had another occupation, that of a policewoman, which she likewise pursued.

I have reached the conclusion that Ms Stone was in the year of income carrying on a business notwithstanding that many, if not most of the competitions in which Ms Stone competed over the years were competitions in which it was necessary for her to compete either to qualify for selection to the Australian Commonwealth or Olympic Games teams

or to enhance and maintain the high standard which she achieved. I would not find that Ms Stone entered any particular competition on the basis that the entry, without more, carried with it the right to be paid an appearance fee. Nor would I find that prize money alone motivated her to compete in a particular meeting.

It follows, that because Ms Stone is carrying on a business all of the rewards of that business or the rewards which are incidental to that business would be income in ordinary concepts. It is therefore not strictly necessary to consider whether the individual amounts or some of them would have had the character of income when paid or given to Ms Stone if she did not carry on a business. However, in case the present matter should go further I now set out my comments on the remaining matters argued before me.

Editor:

Although no new law was made in this decision Hill J clearly sets out the method by which the assessability of athlete's receipts will be determined. Hill J himself noted that this case was "on the borderline". The decision should be compulsory reading for advisors to athletes. Unfortunately Hill J did not have the opportunity to consider the related GST issues. This decision has been appealed.

(4) Trading Stock valuation issues (Energy Resources of Aust Ltd v C of T)

Source: (402444) Energy Resources of Aust Ltd v Commissioner of Taxation (includes corrigendum dated 29 January 2003) [2003] FCA 26 (28 January 2003)

http://www.austlii.edu.au/au/cases/cth/federal_ct/2003/26.html

Issue

What was the value of trading stock on hand at the beginning of the years of income ended 30 June 1993 given that the closing value for 1992 had been correctly established?

Facts

The parties accepted that the value of the trading stock was to be "its cost price" as referred to in subs 31(1) of the 1936 Act correctly to be determined by the "absorption cost method" but disputed the amount of that cost price.

The wrong method was used to establish the closing value in 1992 and the taxpayer wanted to ask the correct method (the absorption cost method), to establish the closing value in 1993. Accordingly, the parties agreed that application of the absorption cost method would increase the figures for trading stock on hand at the beginning of the relevant years.

The value of trading stock on hand at the end of the 1992 year (and the beginning of the 1993 year) was returned as being \$86,994,492, yet it is now agreed that the value produced by a proper application of the absorption cost method is \$103,925,157 - an increase of \$16,930,665.

It is common ground that by reason of effluxion of time, the possibility of the Commissioner's amending the assessment in respect of the 1992 year had ceased to be available: see subss 170(1) and (2) of the ITAA.

Legislation

Section 29 of the ITAA provides, relevantly, that:

"[t]he value of ... each article of ... trading stock to be taken into account at the beginning of the year of income shall be its value as ascertained under this ... Act at the end of the year immediately preceding the year of income."

Section 28 provides:

"Where a taxpayer carries on any business, the value, ascertained under this subdivision, of all trading stock on hand at the beginning of the year of income, and all trading stock on hand at the end of that year shall be taken into account in ascertaining whether or not the taxpayer has a taxable income."

Commissioner's submission

The Commissioner submits that by reason of being out of time to amend the 1992 assessment coupled with the operation of s 29, the value of trading stock on hand at the end of the 1992 year, unalterably fixed at \$86,994,492, is necessarily also the value of trading stock on hand at the beginning of the 1993 year.

Decision

The section required that the value of each article of ERA's trading stock at the beginning of the 1993 year be its value as ascertained under the 1936 Act at the end of the 1992 year.

In my opinion, the word "under" in s 29 means "in accordance with", as it does in subs 28(1). The opposing submission of the Commissioner requires the words "its value as ascertained under this or the previous Act" in s 29 to be read as if they meant something like "the amount at which it was valued". But the provisions of the 1936 Act for the **ascertainment of the value of trading stock** are found only in Subdivision B, and include, relevantly, subs 31(1). By contrast, the provisions for the making of an assessment of an amount of taxable income and of the tax payable thereon found in Pt IV (ss 161-177) of the 1936 Act do not contain provisions "under" which (whether in the sense of "in accordance with" which, or even "pursuant to" which) the value of an article of trading stock is "ascertained", as s 29 contemplates. The legislature might have repeated in s 29, subs 28(1)'s more specific reference to Subdivision B, but apparently because of the need to refer also to the previous Act, the drafter found it more convenient to use the more general language "this or the previous Act".

Accordingly, in view of the way in which ERA exercised its option under subs 31(1), the only value which s 28 required and permitted to be taken into account as the value of all of the articles of ERA's trading stock on hand at the end of the 1992 year of income, was their value ascertained as being their cost price, that is, their true cost price, that is, their cost price ascertained by application of the absorption costing method. The construction of s 29 urged on behalf of the Commissioner would "entrench error".

It follows, in view of the way in which ERA exercised its option under subs 31(1), that s 29 required that they also be valued at their true cost price, that is, in accordance with the absorption costing method, at the beginning of the 1993 year.

(5) Vibrational Individuation Programme Inc and Commissioner of Taxation [2003] AATA 158 (13 February 2003)

Source: (402410) Vibrational Individuation Programme Inc and Commissioner of Taxation [2003] AATA 158 (13 February 2003) (DJ Trowse (Member))

<http://www.austlii.edu.au/au/cases/cth/aat/2003/158.html>

Issue

Was the Vibrational Individuation Programme Inc. ("VIP") a public benevolent institution?

Should VIP be endorsed as a deductible gift recipient under subdivision 30-BA of ITAA97.

Background

The phrase *public benevolent institution* has no legislative definition.

Facts

The Commissioner, relied on authorities such as the High Court decision in *Perpetual Trustee Co. Ltd v FCT* to issue Taxation Determination TD 93/11 which states his definition of a public benevolent institution to be one which satisfies all of the following:

- ◆ has as its main or predominant object, the relief of poverty, sickness, suffering, distress, misfortune, destitution, or helplessness;
- ◆ is carried on without purpose of private gain for particular persons;
- ◆ is established for the benefit of a section or class of the public;
- ◆ the relief is available without discrimination to every member of that section of the public which the organisation aims to benefit; and
- ◆ the aid is given directly to those in need.

The Commissioner did not believe VIP met all of his criteria.

Decision

The Tribunal held that the activities of VIP, including such things as providing remedial care, counselling, education and support for people suffering mental and physical diseases and addictions to behaviours and substances, constituted

sufficient contribution to the welfare of the community to enable VIP to be endorsed as a deductible gift recipient under subdivision 30-BA of the Act.

1.4 ATO RELEASES

(a) Rulings & Draft Rulings

<http://law.ato.gov.au/atolaw/browse.htm?toc=03:RUL:Taxation>

Draft Taxation Rulings (DTRs) represent the preliminary, though considered, views of the Australian Taxation Office. DTRs may not be relied on by taxation officers, taxpayers and practitioners. It is only final Taxation Rulings that represent authoritative statements by the Australian Taxation Office of its stance on the particular matters covered in the Ruling.

(1) TR 2000/D17 & TD 2000/D23W

Source (402419) [TD 2000/D23W]

<http://www.ato.gov.au>

Draft Taxation Determinations TD 2000/D17 & TD 2000/D23 were withdrawn with effect from 22 January 2003.

The issues dealt with in each of the draft Taxation Determinations has been clarified by legislative amendments made to Subdivision s 165-CC and CD by the New Business Tax System (Consolidation, Value Shifting, Demergers and Other Measures) Act 2002.

The amendments apply, on a no detriment basis, from the commencement of respective Subdivision. The issue dealt with in TR 2000/D23 was use of a proxy for a company's adjusted unrealised loss at an alteration time under Subdivision 165-CD of the 1997 Act.

(b) Determinations & Draft Determinations

(1) Can the first element of the cost base of a CGT include money paid or property given to an entity other than the one from which the asset was acquired? (TD 2003/1)

Source (402422)

URL <http://law.ato.gov.au/atolaw/view.htm?docid=TXD/TD20031/NAT/ATO/00001>

What issue does the determination consider?

Can the first element of the cost base of a CGT asset in subsection 110-25(2) of the Act include money paid or property given to an entity other than the one from which the asset was acquired?

What is the determination?

The money does not have to be paid or property given to the entity from which the asset was acquired. However, but still needs to have been paid or given (as the case requires) in respect of the acquisition of the asset.

(2) Does Division 240 apply to a hire purchase agreement if there is a notional buyer but no notional seller? (TD 2003/D2)

Source (402425) TD 2003/D2

<http://law.ato.gov.au/atolaw/view.htm?docid=DXT/TD2003D2/NAT/ATO/00001>

What issue does the determination consider?

Does Division 240 of the Income Tax Assessment Act 1997 ('the Act') apply to a hire purchase agreement if there is a notional buyer but no notional seller that is a party to that agreement?

Background

The broad scheme of Division 240 is to treat hire purchase agreements as a sale of the relevant goods to the hirer ('notional buyer') combined with a loan from the supplier ('notional seller') to the notional buyer.

A contract between a hirer and a supplier may meet the definition of hire purchase agreement so that, prima facie, Division 240 would apply.

What is the ruling

Under subsection 240-17(1), a notional seller is a party to the agreement that:

- ◆ actually owns the goods; or
- ◆ is taken to be the owner by a previous application of Division 240.

If the supplier meets neither of these requirements, it will not be a notional seller.

It is not possible to apply Division 240 in circumstances where there is no notional seller.

(3) When can a trustee obtain a deduction for interest expenses incurred to pay distributions to beneficiaries? (TD 2003/D4)

Source (402427) TD 2003/D4

<http://law.ato.gov.au/atolaw/view.htm?docid=DXT/TD2003D4/NAT/ATO/00001>

What issue is considered by the determination?

In what circumstances can a trustee obtain a deduction for interest expenses incurred on borrowed funds used to pay distributions to beneficiaries when calculating the net income of the trust estate?

What is the determination?

In order for an interest expense to be deductible, the interest expense must have a sufficient connection with the operations or activities which more directly gain or produce the taxpayer's assessable income and not be of a capital, private or domestic nature.

If the obligation to pay distributions to a beneficiary is not sufficiently connected with the assessable income earning activity, or business, carried on by a trustee in the capacity of the trustee of a particular trust estate, interest on borrowed funds used to make distributions will not be deductible. This will be the case regardless of whether the obligation arises as a result of statute (for example, family maintenance provisions), or as a result of the instrument giving rise to the trust estate.

Further consideration of internally generated goodwill

The ATO considers that internally generated goodwill or an unrealised revaluation of assets are not, in the relevant sense, amounts invested in the income producing operations of a trust by a beneficiary.

The ATO holds the opinion that the amount invested in a trust:

- ◆ consists of the sums contributed for the purpose of either establishing the trust, or funding the trust's ongoing income producing activities;
- ◆ is not the same as the property of the trust and that the actual assets of the trust (that is its property) vary from day to day, and include everything owned by the trust and having monetary value.
- ◆ is at any specific point in time fixed by reference to the trust deed and any additional agreements between the relevant parties.

The ATO considers that:

- ◆ amounts attributable to internally generated goodwill or an unrealised revaluation of assets may represent the monetary value of assets of the trust, they do not represent sums contributed by the beneficiaries and are not normally distributable to beneficiaries during the life of the trust.
- ◆ there may be situations where sufficient evidence will exist to establish that the objective use of the borrowed funds by the trustee of a non-fixed trust is to repay amounts previously invested in a business carried on by the trustee, in the capacity as trustee of a particular trust estate.
- ◆ generally speaking, the settlors of funds upon non-fixed trusts are making a gift rather than investing money in a business to be carried on for their benefit. In the case of a non-fixed trust where the objects do not, prior to the vesting of some or all of the income or capital of the trust in a particular object or objects (for example, as a result of the trust vesting):
 - have a right to call for a distribution of either the income or capital of the trust, or
 - invest amounts (for example, by settling amounts on the trust or by agreeing to invest an unpaid present entitlement in the income earning activities of the relevant trust) that are used in a business carried on by the trustee on behalf of the relevant trust estate,

a borrowing to make a distribution to a discretionary object cannot be likened to re-financing invested capital withdrawn by the person to whom it is owed. Interest on money so borrowed is not incurred for the purpose of gaining or producing assessable income. Rather the purpose of the borrowing will be merely to discharge an obligation to distribute or to preserve assets of the trust estate. Therefore the interest is not deductible.

(c) Class Rulings

<http://law.ato.gov.au/atolaw/browse.htm?toc=03:RUL:Class>

Status of a Class Ruling:

Certain parts of a Class Ruling constitute a 'public ruling' in terms of Part IVAAA of the Taxation Administration Act 1953. CR 2001/1 explains Class Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner

Source: ATO Assist (402385)

CR 2003/6	Income tax: Approved Early Retirement Scheme - Unilever Australia Limited 05/02/2003
CR 2003/7	Income tax: Exempt Income – Commonwealth Aged Care Nursing Scholarships 05/02/2003
CR 2003/5	Income tax: assessable income: football umpires: Northern Tasmanian Football Umpires Association Inc. (NTFUA) receipts 22/01/2003
CR 2003/1	Income tax: assessable income: football umpires: Darwin Football Association Inc. Receipts 15/01/2003

CR 2003/2	Income tax: Approved Early Retirement Scheme - Mackay Sugar Co-Operative Association Limited 15/01/2003
CR 2003/3	Income Tax: Approved Early Retirement Scheme – Blackheath and Thornburgh College 15/01/2003
CR 2003/4	Income Tax: University of Canberra - Co-Operative Research Centre for Freshwater Ecology Summer Student Scholarships in Freshwater Ecology 15/01/2003
CR 2003/8	Income tax: Approved Early Retirement Scheme - Kangan Batman Institute of TAFE
CR 2003/9	Income tax: Approved Early Retirement Scheme - CSR Emoleum Services Pty Ltd
CR 2003/10	Income tax: Special Dividend, Capital Reduction and Related Scheme of Arrangement for the Demerger of Rinker Group Limited from CSR Limited

(d) Product Rulings & Addenda*Source: ATO Assist (402386)*<http://law.ato.gov.au/atolaw/browse.htm?toc=03:RUL:Product>

The number, subject heading, and the What this Product Ruling is about (including Tax laws, Class of persons and Qualifications sections), Date of effect, Withdrawal, Previous Ruling, Arrangement and Ruling parts of products rulings will generally constitute a 'public ruling' in terms of Part IVAAA of the Taxation Administration Act 1953.

Product Ruling PR 1999/95 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.

PR 2003/3	Income Tax: Margaret River Watershed Premium Wine Project - 2003 Growers
PR 2003/2	Income tax: 2003 Timbercorp Almond Project (revised arrangement) 29/01/2003

PR 2002/141 W	Income tax: Forest Rewards Tropical Fruits Project 2 29/01/2003
PR 2002/143 W	Income tax: 2003 Timbercorp Almond Project 29/01/2003
PR 2003/4	Income tax: Brooklyn Park Olive Groves (revised arrangement)
PR 2003/5	Income tax: Australian Growth - Timber 2002/2003

(e) Interpretative Decisions

Nil

(f) Practice Statements & Taxpayer Alerts**(1) Distributions to SMSF through an Interposed Trust (TA 2003/1)***Source (402420) [TA 2003/1]*<http://law.ato.gov.au/atolaw/print.htm?docid=TPA/TA20031/NAT/ATO/00001>***What is the arrangement?***

- ◆ An existing business is operated under a trust, partnership or company structure, or a new business is established within a trust structure.
- ◆ Modifications are made to the trust deed and a fixed trust is established as a beneficiary of the trust.
- ◆ A fixed trust is also then established as a beneficiary.
- ◆ The operating trust distributes a substantial amount of income to the fixed trust, which in turn then makes an equivalent distribution to a superannuation fund.
- ◆ The superannuation fund is taxed at the concessional rate of 15% on the distribution from the fixed trust.
- ◆ The members of the superannuation fund are the owners of the business and other family members.

What are the ATO concerns?

The ATO considers that the arrangement outlined gives rise to taxation issues which include:

- ◆ Whether the arrangement circumvents the anti-avoidance provisions of subsection 273(7) of the 1936 Act which deals with special income of superannuation funds.
- ◆ The opportunity to arbitrage tax rates between the concessional 15% tax rate for superannuation funds and the marginal tax rate on the business income (either at company or individual tax rates).
- ◆ Circumventing the age based deduction limits.

Avoiding the superannuation surcharge.

2. GST

2.1 POLITICIANS, BOARDS & STATUTORY AUTHORITIES

Nil

2.2 AUSTRALIAN PARLIAMENT

Source: Australian Parliament House Website (402377)

<http://www.aph.gov.au>

These legislation notes were prepared by Marcus Duckett of Hall & Wilcox, Lawyers. Telephone: 9603 3555.

(a) Acts Which Received Royal Assent

Nil

(b) Awaiting Royal Assent

Nil

(c) Laid Aside or Removed from Notice Paper 2001

Nil

(d) Before Parliament

(1) Taxation Laws Amendment (A Simpler Business Activity Statement) Bill 2002.

Introduced to the House on 11 March 2002.

This Bill proposes to amend the A New Tax System (Goods and Services Tax) Act 1999 No. 55 (Cth) by providing small businesses with an alternative means of calculating tax payable than the existing formula found under s17-5 of the Act. It is proposed that taxpayers will be able to elect to use what is called the "ratio method" instead of the existing "net amount" calculation by multiplying the taxpayer's turnover by a ratio determined by the Commissioner of Taxation ("the Commissioner") and printed on the taxpayer's BAS (Business Activity Statement).

(e) Regulations Promulgated

Nil

(f) Notice of Bills to be Introduced to Parliament

Nil

2.3 COURTS & TRIBUNALS

(a) Courts

Nil

(b) Tribunals

Nil

2.4 ATO RELEASES

(a) Taxation Rulings & Draft Rulings

<http://law.ato.gov.au/atolaw/browse.htm?toc=03:RUL:Taxation>

(1) What is “precious metal” for the purposes of GST? [GSTR 2003/D1]

Source (402421) [GSTR 2003/D1]

<http://law.ato.gov.au/atolaw/print.htm?docid=DGS/GST2003D1/NAT/ATO/00001>

What does the ruling consider?

The ruling considers what is 'precious metal' for the purposes of sections 38-385 and 40-100 of the GST Act.

What is the ruling?

The ruling considers what is 'precious metal' for the purposes of sections 38-385 and 40-100 of the GST Act.

(2) Supplies that are GST free as professional or trade courses (GSTR 2003/1)

Source (402429) GSTR 2003/1 Formerly released in draft form as GSTR 2002/D5

<http://law.ato.gov.au/atolaw/view.htm?docid=GST/GST20031/NAT/ATO/00001>

What is the ruling about?

This Ruling explains the meaning of 'professional or trade course' in section 195-1 of the GST Act that is GST-free under paragraph 38-85(a).

The ruling does not vary from the draft ruling other than in a cosmetic sense.

What is the background to the ruling?

The supply of an education course is GST-free under section 38-85. Paragraph (j) of the definition of 'education course' in section 195-1 includes a 'professional or trade course'.

A 'professional or trade course' is defined in section 195-1 as:

'a course leading to a qualification that is an essential prerequisite:

- (a) for entry to a particular profession or trade in Australia; or
- (b) to commence the practice of (but not to maintain the practice of) a profession or trade in Australia.'

What is the ruling?

A course will be a professional or trade course as defined in section 195-1 if:

ATO Releases

- it is a course leading to a qualification; and
- the qualification is an 'essential prerequisite'.

A course that leads to a qualification that is an essential prerequisite for maintaining or progressing within the practice of a profession or trade is not a professional or trade course.

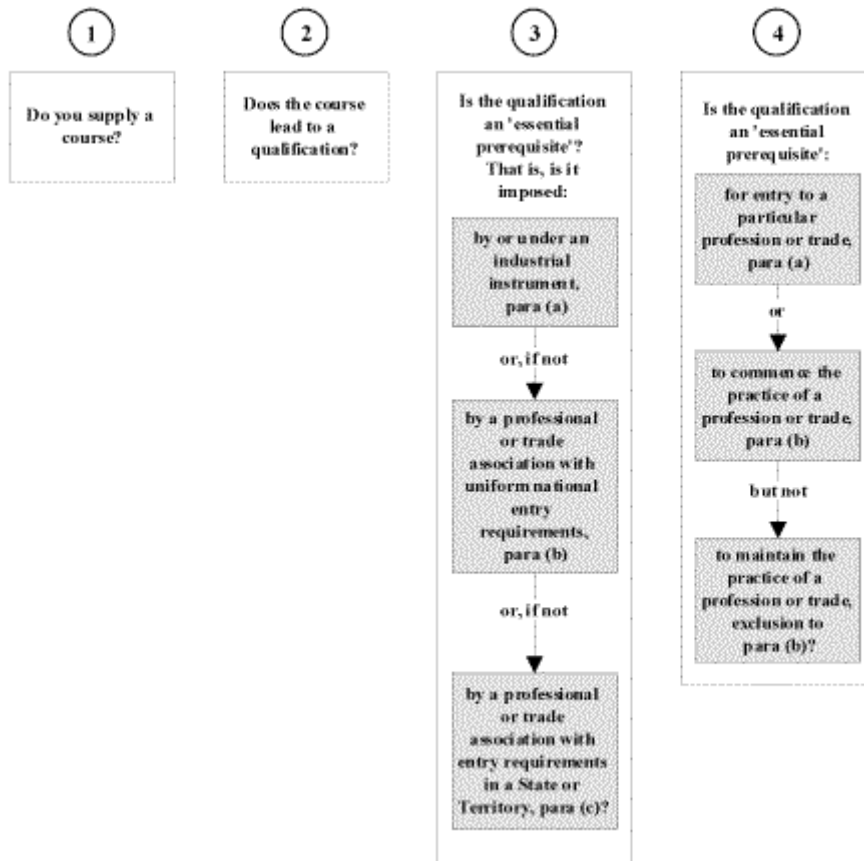
If a person cannot enter, or commence practising in, a profession or trade without a particular qualification, a course that leads to that qualification is a professional or trade course.

If there is a sufficiently direct link between the course, and a qualification that is recognised and imposed for admission to a particular profession or trade then the course is a professional or trade course.

The particular qualification must be imposed by an industrial instrument or, in the absence of any industrial instrument relating to that profession or trade, by a professional or trade association at the national level. In the absence of an industrial instrument or a professional or trade association at the national level, the qualification must be imposed by a professional or trade association at the State or Territory level.

A course that essentially teaches basic skills (for example, reading or writing), necessary for most jobs, or that enhances general knowledge and/or provides generic skills (for example, learning how to drive a motor vehicle), is not a professional or trade course. These courses do not lead to a qualification that is an essential prerequisite.

The following chart prepared by the ATO and contained in the ruling sets out the question necessary to determine whether a particular course is a professional or trade course.



A professional or trade course is supplied if the answer to each of the above questions is “yes”.

(b) Determinations & Draft Determinations

<http://law.ato.gov.au/atolaw/browse.htm?toc=04:DAB:Determinations:Taxation>

Nil

(c) Interpretative Decisions

Nil

(d) Practice Statements

Nil

(e) Fact Sheets

Nil

(f) Other Publications & Updates

Nil

3. FBT

3.1 POLITICIANS, BOARDS & STATUTORY AUTHORITIES

Nil

3.2 AUSTRALIAN PARLIAMENT

Nil

3.3 COURTS & TRIBUNALS

Nil

3.4 ATO RELEASES

Nil

4. STATE TAXES

4.1 POLITICIANS, BOARDS & STATUTORY AUTHORITIES

(1) Unit Trust Stamp Duty Loophole Closed (Treasurer of Victoria 7 February 2003)

Source (402435) Treasurer of Victoria

<http://www.vicgov.au>

The Bracks Government will introduce legislation preventing the use of complex unit trust schemes to avoid conveyancing duty on property transactions.

The scheme involves the redemption and re-issue of units in land-owning trusts as the result of an agreement for the sale of assets of the trust, along with a change in the trustee.

The Government would amend the Duties Act 2000 in the Autumn session of Parliament to ensure that the original intent of the legislation, to apply conveyancing duty to these transactions, is maintained.

Victoria is moving, in line with other States, to address these issues.

Legislation to remove the loophole will have effect from 7 February 2003.

4.2 STATE PARLIAMENT

Source: Australian Parliament House Website (402379)

URL: <http://www.aph.gov.au>

These legislation notes were prepared by Marcus Duckett of Hall & Wilcox, Lawyers. Telephone: 9603 3555.

(a) Victoria

(1) Pay-roll Tax (Maternity and Adoption Leave Exemption) Bill 2002 (Vic)

Introduced into the Legislative Assembly and second reading speech 17 October 2002, lapsed as at 5 November 2002.

This Bill makes amendments to the *Pay-roll Tax Act 1971 (Vic)*, to grant a new exemption from pay-roll tax in respect of paid maternity leave and paid adoption leave. From 1 January 2003, employers providing paid maternity or adoption leave are entitled to an exemption for any wages paid to an employee, up to a maximum of 14 weeks maternity leave or adoption leave. The maternity leave exemption is available in respect of leave provided to female employees. The adoption leave exemption is available in respect of leave provided to both female and male employees.

(b) Western Australia

(1) Debits Tax Assessment Bill 2001 (No. 84)

Introduced to the Legislative Assembly 5 December 2001 and second reading speech Legislative Council 19 June 2002

This Bill will replace the existing *Debits Tax Assessment Act 1990*. The administrative provisions of the *Debits Tax Assessment Act* have been relocated in the *Taxation Administration Bill 2000*. This Bill re-enacts the tax specific provisions applicable to debits tax.

(2) Debits Tax Bill 2001 (No. 85)

Introduced to the Legislative Assembly 5 December 2001 and second reading speech Legislative Council 19 June 2002

This Bill will replace the existing *Debits Tax Act 1990*. It combines the *Taxation Administration Act 2001*, the *Debits Tax Assessment Act 2001* and this Bill so they can be read as one Act. The commencement date of the Bill is specified as the commencement date of the *Taxation Administration Act 2001*.

(3) Land Tax Assessment Bill 2001 (No. 82)

Introduced to the Legislative Assembly 5 December 2001 and second reading speech Legislative Council 19 June 2002

This Bill will replace the existing *Land Tax Assessment Act 1976*. The *Land Tax Assessment Act 1976* contains administrative provisions that are to be standardised to conform with other taxation legislation and relocated in the *Taxation Administration Bill 2001*.

(4) Land Tax Bill 2001 (No. 83)

Introduced to the Legislative Assembly 5 December 2001 and second reading speech Legislative Council 19 June 2002

This Bill will replace the existing *Land Tax Act 1976*. Many of the administrative provisions of the 1976 Act have not been reproduced in this Bill. Common administrative provisions that apply to this Act and several other taxation Acts are located in the *Taxation Administration Bill 2001*.

(5) Payroll Tax Assessment Bill 2001 (No. 80)

Introduced to the Legislative Assembly 5 December 2001 and second reading speech Legislative Council 19 June 2002

This Bill will replace the existing *Payroll Tax Assessment Act 1971*. The 1971 Act is to be repealed by the *Taxation Administration (Consequential Provisions) Bill 2001*.

(6) Payroll Tax Bill 2001 (No. 81)

Introduced to the Legislative Assembly 5 December 2001 and second reading speech Legislative Council 19 June 2002

This Bill replaces the existing *Payroll Tax Act 1971*. The Act is to be repealed due to the large number of consequential changes necessary to amalgamate and standardise the administrative provisions of four taxation statutes in the *Taxation Administration Bill*.

(7) Stamp Amendment Bill 2001 (No. 86)

Introduced to the Legislative Assembly 5 December 2001 and second reading speech Legislative Council 28 November 2002

The purpose of this Bill is to delete the majority of the administration provisions of the *Stamp Act 1921*. In contrast to a number of other Bills in this package, the Bill does not repeal the *Stamps Act 1921*.

(8) Taxation Administration Bill 2001 (No. 79)

Introduced to the Legislative Assembly 5 December 2001 and second reading speech Legislative Council 11 April 2002 and consideration in detail 4 December 2002

This Bill provides for the administration and enforcement of legislation dealing with state taxation. It seeks to amalgamate and standardise the administrative provisions of the four major trading Acts, namely the *Pay-roll Tax Assessment Act 1971*; *Stamp Act 1921*; *Land Act Assessment Act 1971*; and *Debits Tax Assessment Act 1990*.

(9) Taxation Administration (Consequential Provisions) Bill 2001 (No. 87)

Introduced to the Legislative Assembly 5 December 2001 and second reading speech Legislative Council 11 April 2002

This Bill seeks to repeal six Acts which have been re-written as a consequence of the *Taxation Administration Bill [2001]*. The Bill also seeks to amend a number of Acts as a consequence of the changes to the *Taxation Administration Bill [2001]*, the re-write of the debits tax, land tax and payroll legislation and amendments to the *Stamps Act*. Finally, the Bill seeks to provide transitional and savings provisions to ensure a smooth changeover to the new arrangements proposed as part of this package of Bills.

(10) Unclaimed Money (Superannuation and RSA Providers) Bill 2002 (WA)

This Bill proposes to amend the Unclaimed Money Act 1990 No. 31 (WA) in order to clarify that the Act would not apply to "unclaimed money" as referred to in s. 12 or s. 14 of the Superannuation (Unclaimed Money and Lost Members) Act 1999 No. 127 (Cth).

(c) Australian Capital Territory**(1) Revenue Legislation Amendment Bill (No. 2) 2002**

Introduced into the Legislative Assembly and second reading speech 14 November 2002

The Bill proposes to amend various principal acts, including the Payroll Tax Act 1987, Rates and Land Tax Act 1926 and First Home Owner Grant Act 2000.

Payroll Tax Act 1987

The Bill seeks to amend the Act to reflect the Commonwealth's repeal of the requirement for unemployment registration with the Commonwealth Employment Service (CES).

Rates and Land Tax Act 1926

The Bill proposes to enable the determination of fees by a disallowable instrument for the issue of conveyancing certificates and statements of account. These fees are currently imposed by an Administrative Order.

First Home Owner Grant Act 2000

The Bill intends to correct an omission in the Act by precluding a person from receiving a grant if, after 1 July 2000, they have purchased and lived in a property prior to a subsequent acquisition of property for which for which they seek to apply for a grant.

(2) Taxation (Government Business Enterprises) Bill 2002 (ACT)

Introduced to the House on 12 December 2002

This Bill proposes to provide for the implementation of the national tax equivalent regime and for the application of Territory taxes to ACT government agencies by implementing the 2001 memorandum of understanding between the ACT, the Commonwealth, the States and the Commissioner of Taxation that imposes a liability to pay Commonwealth income tax equivalents on nominated government entities.

(d) South Australia

Nil

(e) Tasmania

Nil

4.3 COURTS & TRIBUNALS

(a) Courts

Nil

(b) Tribunals

Nil

4.4 STATE REVENUE OFFICE RELEASES

Nil

5. SUPERANNUATION, ETP'S & PENSIONS

5.1 POLITICIANS, BOARDS & STATUTORY AUTHORITIES

Nil

5.2 AUSTRALIAN PARLIAMENT

Source: Australian Parliament House Website (402380)

<http://www.aph.gov.au>

These legislation notes were prepared by Marcus Duckett of Hall & Wilcox, Lawyers. Telephone: 9603 3555.

(a) Acts which Received Royal Assent

Nil

(b) Awaiting Royal Assent

Nil

(c) Laid Aside or Removed from Notice Paper 2001

Nil

(d) Before Parliament

(1) Superannuation Guarantee (Administration) Amendment Bill 2002

Introduced to the House on 11 March 2002 as a Private Members Bill by Mark Latham.

This Bill proposes to amend the Superannuation Guarantee (Administration) Act 1992 No. 111 (Cth) by requiring employers to remit superannuation guarantee payments on a quarterly rather than annual basis.

(2) Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 2002

Introduced to the House 21 February 2002 and introduced to the Senate 19 June 2002

This Bill seeks to give greater flexibility to public servant superannuation arrangements and provides options for employees who leave public servant employment to move to private sector as a result of sale or outsourcing. The Bill also provides for retirees who wish to provide increased benefits for their families after their death for the public servant and makes it easier to consolidate their superannuation.

(3) Superannuation (Financial Assistance Funding) Levy Amendment Bill 2002.

Introduced to the House and second reading speech on 12 December 2002.

This Bill proposes to reform the imposition of levies under the Superannuation (Financial Assistance Funding) Levy Act 1993 No. 79 (Cth) on regulated superannuation funds and approved deposit funds, for the purposes of recouping financial assistance granted under Part 23 of the Superannuation Industry (Supervision) Act 1993 No. 78 (Cth). In

particular, the Bill proposes to simplify the payment of levies by allowing an amount of financial assistance to be recouped in a single levy each financial year rather than multiple levies throughout the financial year.

(4) Superannuation (Government Co-contribution for Low Income Earners) Bill 2002

Introduced to the House on 27 June 2002 and introduced to the Senate on 11 November 2002.

This Bill is intended to introduce a regime whereby the federal Government would be prepared to match qualifying personal superannuation contributions made after 30 June 2002 made by eligible low-income earners. To be eligible for the proposed government co-contributions, a person must: have earned less than \$32,500 for the income year and have filed an income tax return; have made an eligible personal superannuation contribution into a complying superannuation fund or a retirement savings account ("RSA"); have employer-supported superannuation; and be younger than 71 by the end of the relevant income year. The level of the government's co-contribution is capped at \$1000.

(5) Superannuation Industry (Supervision) Amendment Bill 2002

Introduced to the House and second reading speech on 12 December 2002.

This Bill proposes to amend the Superannuation Industry (Supervision) Act 1993 No. 78 (Cth) by making minor amendments to support amendments proposed to the Superannuation (Financial Assistance Funding) Levy Act 1993 No. 79 (Cth).

(6) Superannuation Legislation Amendment Bill 2002

Introduced to the House and second reading speech on 27 June 2002 and introduced to the Senate 11 November 2002.

This Bill will amend various acts as a consequence of the Superannuation (Government Co-contributions for Low Income Earners) Bill 2002.

The Bill will reduce the superannuation surcharge rates by one-tenth of their current level over 3 years.

(7) Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002

Introduced to the House and second reading speech 27 June 2002.

This Bill proposes to amend the Superannuation Guarantee (Administration) Act 1992 No. 111 (Cth) by introducing a formal process by which employers must allow their employees to make a choice as to which complying superannuation fund, superannuation scheme or retirement savings account they wish to make contributions to. The Bill proposes to introduce penalties for the breach of those choice of fund requirements.

(8) Superannuation Legislation Amendment (Family Law) Bill 2002

Introduced to the House and second reading speech on 12 December 2002.

This Bill proposed to allow for superannuation interest to be apportioned between a couple that intends to file for divorce.

(e) Regulations Promulgated

Nil

5.3 COURTS & TRIBUNALS

(a) Courts

Nil

(b) Tribunals

Nil

5.4 APRA, ASIC & ATO RELEASES

(a) Taxation Rulings & Draft Rulings

<http://law.ato.gov.au/atolaw/browse.htm?toc=03:RUL:Taxation>

Nil

(b) Determinations & Draft Determinations

<http://law.ato.gov.au/atolaw/browse.htm?toc=04:DAB:Determinations:Taxation>

Nil

(c) Interpretative Decisions

Nil

(d) Practice Statements

Nil

(e) Fact Sheets

Nil

(f) Other Publications & Updates

Nil

6. OTHER IMPOSTS, OFFSETS & REBATES

6.1 POLITICIANS, BOARDS & STATUTORY AUTHORITIES

Nil

6.2 AUSTRALIAN PARLIAMENT

Source: Australian Parliament House Website (402381)

<http://www.aph.gov.au>

This Legislation notes were prepared by Marcus Duckett of Hall & Wilcox, Lawyers. Telephone: 9603 3555.

(a) Acts that Received Royal Assent

Nil

(b) Awaiting Royal Assent

Nil

(c) Laid Aside Or Removed From Notice Paper

Nil

(d) Before Parliament

(1) National Residue Survey (Excise) Levy Amendment Bill 2002

Introduced to the House and second reading speech 12 December 2002.

(2) Tobacco Excise Windfall Recovery (Assessment) Bill 2002

Introduced to the House on 16 September 2002.

This Bill proposes to introduce measures for the assessment of certain monetary windfalls, amounting to tobacco franchise fees that were paid to tobacco wholesalers but not passed on to a State or to the Commonwealth as excise.

(e) Regulations Promulgated

Nil

6.3 COURTS & TRIBUNALS

(a) Courts

Nil

(b) Tribunals

Nil

6.4 ATO RELEASES

(a) Taxation Rulings & Draft Rulings

<http://law.ato.gov.au/atolaw/browse.htm?toc=03:RUL:Taxation>

Nil

(b) Determinations & Draft Determinations

<http://law.ato.gov.au/atolaw/browse.htm?toc=04:DAB:Determinations:Taxation>

Nil

(c) Interpretative Decisions

Nil

(d) Practice Statements

Nil

(e) Fact Sheets

Nil

(f) Other Publications & Updates

Nil

Appeals**Source: Federal Court Website(402382)**http://www.fedcourt.gov.au/courtlists/lists_appeal.htm

These appeal notes were prepared by Marcus Duckett of Hall & Wilcox, Lawyers. Telephone: 9603 3555

- Ambulance Service of NSW v Deputy C of T [2002] FCA 1023
 Filed: N930/02, 06/09/2002
 Status: Hearing
 Next appearance: 03/03/2003
- Baxter v C of T [2002] FCA 1256
 Filed: N1200/02, 13/11/2002
 Status: Full Court Callover
 Next appearance: 13/02/2003
- C of T v La Rosa [2002] FCA 1036
 Filed: W267/02, 10/09/2002
 Status: Hearing
 Next appearance: 04/03/2003
- Cooke v C of T [2002] FCA 1315
 Filed: N1228/02, 19/11/2002
 Status: Full Court Callover
 Next appearance: 13/02/2003
- Croker v C of T [2002] FCA 1357
 Filed: N1014/02, 27/09/2002
 Status: Hearing
 Next appearance: 12/02/2003
- Dexcam Australia Pty Limited (in liquidation) v Deputy C of T [2002] FCA 820
 Filed: V460/02, 18/07/2002
 Status: Judgment reserved
 Next Appearance: Not fixed
- Electricity Supply Industry Superannuation (Qld) Ltd v Deputy C of T [2002] FCA 1274
 Filed: Q172/02, 07/11/2002
 Status: Full Court Callover
 Next appearance: 12/02/2003
- Electricity Supply Industry Superannuation (Qld) Ltd v Deputy C of T [2002] FCA 1417
 Filed: Q189/02, 11/12/2002
 Status: Full Court Callover
 Next appearance: 12/02/2003
- Hart v C of T [2002] FCA 1559
 Filed: Q199/02, 20/12/2002
 Status: Full Court Callover
 Next Appearance: 12/02/2003
- Linter Textiles Australia Limited (in liquidation) v C of T [2002] FCA 1089
 Filed: N1017/02, 27/09/2002
 Status: Hearing
 Next Appearance: 04/03/2003
- Mochkin v C of T [2002] FCA 675
 Filed: V389/02, 19/06/2002
 Status: Judgment reserved
 Next Appearance: Not fixed
- Prebble v C of T [2002] FCA 1434
 Filed: Q190/02, 13/12/2002
 Status: Settling Index & Appeal Papers
 Next Appearance: 12/02/2003
- Puzey v C of T [2002] FCA 1615
 Filed: W30/03 and W31/03, 04/02/2003
 Status: Full Court Callover
 Next Appearance: 12/02/2003
- Stone v C of T [2002] FCA 1492
 Filed: N1371/02, 18/12/2002
 Status: Full Court Callover
 Next appearance: 13/02/2003
- Trustees of the Indigenous Barristers' Trust v C of T [2002] FCA 1474
 Filed: N1378/02, 19/12/2002
 Status: Full Court Callover
 Next appearance: 13/02/2003

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