

Monthly Tax Update Notes

March 2007

Complimentary Edition

STOP PRESS: FAMILY TRUST ELECTIONS

On 27 February 2007 the Tax Office announced an extension of the previous one off opportunity in relation to the late lodgement of Family Trust Elections and interposed entity elections. The extension of this one off opportunity will be of some assistance to those who missed the earlier deadline.

Under the opportunity:

- ◆ tax practitioners or taxpayers are not required to obtain copies of earlier year election forms
- ◆ entities taking advantage of this opportunity will be required to make certain declarations when doing so
- ◆ entities have until **31 May 2007** to lodge the paperwork in accordance with the procedures
- ◆ entities not required to lodge a return for the 2004 income tax year will have until 31 May 2007 to provide details of the election together with the relevant declaration relating to this opportunity, and
- ◆ entities who have already lodged income tax returns for 2004 will have until 31 May 2007 to lodge a one-off opportunity declaration form together with a 2004 family trust election and/or 2004 interposed entity election.

See:

[Procedures for lodging family trust elections \(FTEs\) and interposed entity elections \(IEEs\) under the lodgment opportunity in Practice Statement PS LA 2004/1 \(GA\)](#)

[Family trust elections \(FTEs\) and interposed entity elections \(IEEs\) - Lodgment Opportunity - Commissioner's Announcement 15 April 2004 - Question and Answers](#)

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1 INCOME TAX

1.1 Politicians, Boards & Statutory Authorities

(a) Assessable & Deductible items

(1) *** Non-Forestry Managed Investment Schemes (Assistant Treasurer – Mr Dutton)

Source Month 02-2007

[The Assistant Treasurer - Media Release - Amendments to the Capital Gains Tax Scrip for Scrip Roll Over \[14/02/2007\]](#)

On 21 December 2006 the Government announced the new arrangements for the taxation of investments in forestry Managed Investment Schemes (MIS).

The Government has decided it is not disposed to introduce a similar taxation arrangement for investments in non-forestry agribusiness MIS.

The Government, the ATO and the forestry and non-forestry agribusiness MIS industry have been involved in extensive discussions in recent months over the future tax treatment of investments in such MIS.

During these discussions, the ATO has indicated that developments in this area of the law have required the ATO to reconsider its interpretation of the current taxation law as it applies to both forestry and non-forestry MIS investments.

The ATO has advised the Government that it is preparing a draft Taxation Ruling which will set out its reconsidered position which will apply to arrangements entered into after 30 June 2007. The ATO has also advised that, while the new draft ruling will be subject to the usual consultation processes, it does not intend to issue any Product Rulings for investments in forestry and non-forestry agribusiness MIS after the 2006-2007 year based on its previous interpretation of the law. The ATO has stated that it would continue to issue Product Rulings for investments made prior to 1 July 2007.

The effect of this change of interpretation of the current law is that investors in MIS would no longer be able to claim upfront deductions for their contributions to the MIS on the basis that the investor is 'carrying on a business'.

Investments in MIS that are covered by existing product rulings that allow immediate deductibility for the investor's initial contribution, and for contributions in subsequent years, will be protected (provided the MIS continues to operate in the manner described in the application for the product ruling).

With effect from 1 July 2007:

- ◆ investors in forestry MIS will be entitled to an upfront statutory deduction for all expenditure, provided that at least 70 per cent of the expenditure is directly related to developing forestry.
- ◆ it will not be necessary for investors in forestry to demonstrate that they are carrying on a business in order to claim the statutory deduction.

The effect of the likely change in interpretation by the ATO will be to place investments in non-forestry agribusiness MIS on the same footing as other 'passive' investments in agriculture.

(2) ** Amendments to the CGT scrip for scrip roll-over – a Ralph recommendation (Assistant Treasurer – Mr Dutton)

Source Month 02-2007

[The Assistant Treasurer - Media Release - Amendments to the Capital Gains Tax Scrip for Scrip Roll Over \[14/02/2007\]](#)

The Government will amend the ITAA to extend the CGT scrip for scrip roll-over to membership interests in companies limited by guarantee that are medical defence organisations.

The amendments will ensure that the CGT scrip for scrip roll-over is available to post CGT membership interests in a company limited by guarantee if such interests are replaced after 14 February 2007 with membership interests in another company limited by guarantee and both companies are medical defence organisations.

The Review of Business Taxation (chaired by Mr John Ralph AC) recommended the scrip for scrip roll-over in 1999 in order to achieve a better allocation of the nation's capital resources by removing CGT as an impediment to mergers and takeovers.

Legislation giving effect to this announcement will be introduced as soon as practicable, following consultation with industry on the design and the implementation of the amendments.

(b) Policy

(1) ** The net closes - Tax Information Exchange Agreement (The Assistant Treasurer – Mr Dutton)

Source Month 02-2007

[The Assistant Treasurer - Media Release - Australia-Antigua and Barbuda Sign Tax Information Exchange Agreement \[01/02/2007\]](#)

A newly made Tax Information Exchange Agreement (TIEA) between Australia and Antigua and Barbuda:

- ◆ provides for full exchange of information on criminal and civil tax matters between Australia and Antigua and Barbuda;
- ◆ aims to improve transparency and to establish effective information exchange for tax purposes and provides important momentum to achieving the aims of the OECD's Harmful Tax Practices Initiative and related Global Forum on Taxation;
- ◆ is the second such arrangement entered into by Australia, which signed a TIEA with Bermuda in 2005.

The TIEA will enter into force when the Australian and Antiguan governments exchange diplomatic notes, advising the constitutional processes required for entry into force have been completed.

In Australia, this process involves tabling the agreement and a National Interest Analysis in Parliament for review by the Joint Standing Committee on Treaties.

(2) ** Making Tax Compliance Easier for Small Business (The Treasurer – Press Release 003/2007)

Source Month 02-2007-80

[The Commonwealth Treasurer – Press Release - Making Tax Compliance Easier for Small Business — Consultation on the Exposure Draft Legislation for the New Small Business Framework \[09/02/2007\]](#)

The Treasurer and Minister for Small Business and Tourism released exposure draft legislation containing proposals to reduce compliance burdens for small businesses by standardising the eligibility thresholds for small business tax concessions from 1 July 2007.

Separate eligibility tests currently exist for GST, the STS, CGT, FBT, PAYG and the small business concessions.

Under the proposals, any business with annual turnover of less than \$2 million will be able to access these concessions, subject to any additional criteria set out in the particular concessions.

Editor:

Interested parties are invited to submit comments on the exposure draft legislation, which can be found on the treasury website at www.treasury.gov.au.

Comments can be submitted by email to_smallbusinessalignment@treasury.gov.au

The proposal should be broadened to include consideration of allowing businesses within the relevant net to elect to report their FBT liability on the year ended 30 June. Such a step would eliminate significant duplication of work.

1.2 Courts & Tribunals

(a) Courts

(1) ** Was there a reimbursement agreement? (Raftland Pty Ltd v C of T)

Source *MTUN 02-2007 – 32 ~ Raftland Pty Ltd v Commissioner of Taxation [2007] FCAFC 4 (31 January 2007)*

What was the issue?

Did section 100A operate to nullify the loss trust's unpaid present entitlement?

What was the outcome?

Does the outcome affect your firm's current practices?

Some thought should be given to distributions that are never actually paid and which reflect the following:

Dr	Distribution
	Cr Unpaid present entitlement

Often those distributions reflect avoiding the need to deal with a loan made by a corporate beneficiary such as would result if the corporate beneficiary received their present entitlement and loaned it back to the trust:

Dr	Unpaid present entitlement
	Cr Loan account

What were the facts?

The Heran Companies and Trusts

The Heran brothers – Mr Brian Heran, Mr Martin Heran and Mr Stephen Heran – controlled various building development companies (the “Heran interests”) including

- ◆ Heran Projects Pty Ltd (‘Heran Projects’) – the principal company;
- ◆ Northbank Homes Pty Ltd (‘Northbank Homes’); and
- ◆ Southbank Homes Pty Ltd (‘Southbank Homes’).

On 22 June 1995 Heran Projects agreed to pay Maggside the sum of \$2,915,000 for granting Heran Projects the right to sell investment properties owned by Maggside, and to retain any proceeds of sale of those properties.

Maggside Pty Ltd (‘Maggside’):

- ◆ was the trustee of the Brian Heran Discretionary Trust and, in that capacity, carried on a business of renting properties it owned as such.
- ◆ owed moneys to Heran Projects.

The dealings between Maggside and Heran Projects involved:

- ◆ Heran Projects making a payment to Maggside; and
- ◆ Maggside:
 - ~ making a payment to Heran Projects in the same sum, by way of repaying its loan from Heran Projects;
 - ~ making a further loan to Heran Projects.

On or before 30 June 1995:

- ◆ the Heran interests acquired two companies:
 - ~ Raftland Pty Ltd (‘Raftland’); and

- ~ Navygate Pty Ltd ('Navygate').
- ◆ each of Raftland and Navygate:
 - ~ had as their directors each of the Heran brothers;
 - ~ Brian and Stephen Heran as shareholders;
- ◆ two trusts were settled:
 - ~ the Raftland Trust, of which Raftland was trustee; and
 - ~ the Heran Developments Trust, of which Heran Developments Pty Ltd ('Heran Developments') was trustee.

Each of the Raftland Trust and the Heran Developments trust nominated the E & M Unit Trust as a Tertiary Beneficiary

Clause 3 of the deed for the Raftland deed provided for the trustee to distribute the income of the trust to the beneficiaries and in default of a distribution for the income to be held on trust for the tertiary beneficiaries.

Toward the end of the year ended 30 June 1995 the Heran companies were projected to make substantial taxable profits for that year.

Mr Brian Heran made enquiries of his solicitor concerning the possible 'acquisition' of a loss trust which might be utilised so as to absorb the projected profits and in turn the solicitor spoke to an accountant.

The E & M Unit Trust:

On 30 June 1995:

- ◆ Mr Carey, as trustee of the E & M Unit Trust, executed a deed in which:
 - ~ he acknowledged and accepted the appointment of the E & M Unit Trust as a beneficiary of the Raftland Trust; and
 - ~ in which he agreed not to disclaim his interest as beneficiary or any distribution from the Raftland Trust.
 - ~ acknowledged that he was also the trustee of the Thomasz Family Trust and the E C K Family Trust and that they were the sole unitholders in the E & M Unit Trust.
 - ~ he amended the trust deed for the E & M Unit Trust by removed himself as trustee of the E & M Unit Trust and appointing Raftland as trustee in his place effective on and from 2 July 1995.
 - ~ was identified as a potential target for acquisition at a price of \$250,000;
 - ~ apparently had tax losses from previous years in the order of \$4 million.
 - ~ was not initially associated with any of the entities controlled by the Heran brothers.
 - ~ had as its trustee, E & M Investments Pty Ltd, the directors and shareholders of which were Mrs Elizabeth Cox Kerr Thomasz (formerly E C K Carey) and her husband, Mr Mark Thomasz.
 - ~ had as its unitholders:
 - Mrs Thomasz as trustee of the E C K Family Trust (5 units); and
 - Thomasz Enterprises Pty Ltd as trustee of the Thomasz Family Trust (5 units).
 - ~ in its financial financial statements for the year ended 30 June 1991 disclosed:
 - accumulated losses of \$4,017,291.09;
 - liabilities, including those to beneficiary loan accounts, of \$3,966,478.01.
- ◆ Maggside resolved to distribute all the income of the Brian Heran Discretionary Trust for that year (\$2,892,762 but \$2,849,467 after allowing for carry forward trust losses of \$43,295) to the Raftland Trust.
- ◆ the directors of Raftland passed two resolutions:

- ~ that the Raftland Trust distribute the sum of \$250,000 to Mr Carey, in his capacity as trustee of the E & M Unit Trust; and
- ~ that the Raftland Trust distribute the balance of its income for 1995 to Mr Carey in that same capacity.
- ~ Mr Carey executed a deed in which, as trustee of the E & M Unit Trust:
 - he acknowledged his acceptance of appointment as a beneficiary of the Raftland Trust; and
 - he agreed not to disclaim his interest as beneficiary or any distribution from the Raftland Trust;
 - he acknowledged that he was also the trustee of the Thomasz Family Trust and the E C K Family Trust and that they were the sole unitholders in the E & M Unit Trust;
 - he amended the deed under which the E & M Unit Trust was established ('the E & M Unit Trust deed');
 - he removed himself as trustee of the E & M Unit Trust; and
 - he appointed Raftland as trustee in his place effective on and from 2 July 1995.

The 1996 and 1997 Transactions

In July 1995 Heran Developments, as trustee of the Heran Developments Trust took over the assets and liabilities of Heran Projects.

After the end of the 1996 year of income:

- ◆ Heran Projects distributed all of its trust income for the 1996 year to the Raftland Trust;
- ◆ Maggside, as trustee of the Brian Heran Discretionary Trust and Northbank Homes, as trustee of the Northbank Trust distributed all of their trust income for the 1996 year to the Raftland Trust.
- ◆ The Raftland Trust resolved to distribute its income for that year to the E & M Unit Trust.

The 1996 income tax return of the Raftland Trust showed a distribution of its income of \$779,705 and the return of the E & M Unit Trust discloses income in that amount, which it offset against prior year tax losses.

In the 1997 year, Northbank Homes distributed the first \$386,035 of the Northbank Trust's income to the Raftland Trust which offset the distribution against prior year tax losses and a nil net income resulted for the E & M unit trust.

In July 2002 the Commissioner:

- ◆ advised Raftland that a part IVA determination had been made:
- ◆ raised a notice of amended assessment for the 1995 year on a taxable income of \$2,849 467 assessing total tax of \$2,973,766.28, of which:
 - ~ \$1,594,622.26 was said to be for 'understatement penalty and interest';
 - ~ \$689,571.01 of that sum was said to be by way of penalty; and
 - ~ \$905,051.25 of that sum was said to be for interest.
- ◆ raised an amended assessment for the 1996 year, on a taxable income of \$779,705, was for \$837,610.43 of which:
 - ~ \$25,820.10 was said to be for 'additional tax for late return';
 - ~ \$433,633.41 was said to be by way of 'understatement penalty and interest';
 - ~ \$189,078.76 was said to be by way of penalty; and
 - ~ \$244,544.65 was said to be by way of interest.
- ◆ For the 1997 year, an amended assessment on a taxable income of \$386,035 raised a total of \$393,693.59 which included additional tax for late return of \$10,819.45, understatement penalty of \$93,999.58 and \$100,875.50 for interest.

The background to this appeal

The taxpayer:

- ◆ unsuccessfully objected to the Commissioner's assessment;
- ◆ unsuccessfully sought review of the Commissioner's objection decision disallowing objections against income tax assessments issued to Raftland, as trustee of the Raftland Trust, in respect of each of the years ended 30 June 1995, 1996 and 1997 (collectively 'the relevant years of income').

What occurred at first instance?

The Commissioner argued that:

- ◆ the E & M Unit Trust was not in existence as at 30 June 1995, with the result that there had been no effective distributions to it.
- ◆ neither of the 'purported distributions' – that of the sum of \$250,000 or that of the balance of the Raftland Trust's income for the 1995 tax year – reflected the true arrangement or transaction between the parties because:
 - ~ the resolutions to distribute were a 'sham' and should be disregarded;
 - ~ the appointment of the E & M Unit Trust as a Tertiary Beneficiary of the Raftland Trust, was made, and made only, to facilitate the false distributions.

The primary judge:

- ◆ found that:
 - ~ the nomination of the trustee of the E & M unit trust as a 'Tertiary Beneficiary' of the Raftland Trust at the time the Raftland Trust was settled was a sham transaction which could and should be disregarded.
 - ~ found that certain 'distributions' of income by Raftland, as trustee of the Raftland Trust, to the trustee of the E & M Unit Trust were sham transactions which could and should be disregarded.
- ◆ concluded that in each of the relevant years of income s 100A(1) applied so as:
 - ~ to disqualify any beneficiary's present entitlement to a share of income of the Raftland Trust that might otherwise exist; and
 - ~ leave the s 95 'net income' in each of those years to be assessed to Raftland under s 99A of the 1936 Act.

What was the decision? ~ Dowsett J

- [1] I have had the opportunity of reading the reasons prepared by Edmonds J and agree in the orders which his Honour proposes. I also generally agree with his Honour's reasons save in one respect. That concerns the primary Judge's finding that the appointment of the E & M Unit Trust as a tertiary beneficiary of the Raftland Trust was 'made only as part of the façade and should also be disregarded'...
- [2] ... The effect of her Honour's finding that the appointment of the E & M Unit Trust as tertiary beneficiary 'should also be disregarded' was that the undistributed income of the trust passed to the primary beneficiaries, Messrs Heran. However, as her Honour demonstrated, s 100A then operated so that Raftland was liable to be assessed to the income pursuant to s 99A.
- [4] As both the primary Judge and Edmonds J have recognized, the relevant question is whether or not the parties intended that legal or equitable rights and obligations be created by the various transactions into which they entered. Intention is a question of fact. In a case such as this the question to be addressed is whether the parties intended that the various transactions take effect, or whether they were really trying to camouflage the true nature of the dealings between them. In such a case the Court must decide where reality stops and camouflage starts. My only point of disagreement with the reasons prepared by Edmonds J is that I would not infer that those advising Mr Heran 'were well aware that, only to the extent that the trustee of the E & M Unit Trust was presently entitled to the income of the Raftland Trust, would that income be sheltered by the losses in the E & M Unit Trust'. (See [72] of his Honour's reasons.) It may be that reality stopped and camouflage started at an earlier stage, so that it was not a matter of distributing income to the E & M Unit

Trust but of appearing to have so distributed income. The distinction is subtle. It is likely that a relevant client taxpayer will have only the intention of minimizing exposure to income tax. The intentions of his or her legal and accounting advisers may be more complex.

What was the decision? ~ Conti J

[9] I agree with the reasons for judgment of Edmonds J and the consequential orders he proposes.

What was the decision? ~ Edmonds J

REASONING

- [21] Her Honour found that on 30 June 1995 Maggside resolved to distribute all the income of the Brian Heran Discretionary Trust for that year (\$2,892,762 but \$2,849,467 after allowing for carry forward trust losses of \$43,295) to the Raftland Trust. No finding was made that this was permitted by the terms of the Brian Heran Discretionary Trust; it just seems to have been assumed it was permissible. No issue was taken by the [Commissioner] that it was not permitted; indeed it seems that notwithstanding the Raftland Trust was established some five years after the Brian Heran Discretionary Trust, the definition of 'Primary Beneficiaries' in the Schedule to the deed of ... the Brian Heran Discretionary Trust ... contemplated that the Raftland Trust could be such a beneficiary; it is a trust in which 'Brian Joseph Heran or any of his brothers have an interest whether vested or contingent'.
- [22] The internal accounts of the Brain [sic] Heran Discretionary Trust record such a distribution and the internal accounts of the Raftland Trust show the corresponding receipt.
- [23] On the same day two resolutions were passed by the directors of Raftland: that the Raftland Trust distribute the sum of \$250,000 to Mr Carey, in his capacity as trustee of the E & M Unit Trust; and that the Raftland Trust distribute the balance of its income for 1995 to Mr Carey in that same capacity.
- [24] The moneys for the bank cheque in the sum of \$250,000, payable to Mr Carey and given to him at a meeting on 3 July 1995, were provided by Heran Projects, Northbank Homes and Southbank Homes. By a written direction, Mr Carey requested that payment be made to Harts Accountants. That firm deducted the sum of \$30,000 and the balance was paid to Mr Carey, who in turn paid it to Mr Thomasz. Mr Thomasz said that the Heran interests were not party to the arrangement for the payment to Harts. It was his decision to have the balance of the \$250,000 paid to the Thomasz Family Trust. The Thomasz Family Trust income tax return for the 1996 year (not the 1995 year) shows the sum of \$220,000 as having been received by way of 'business income'.
- [25] Raftland has not in fact paid the balance sum of \$2,642,762/\$2,599,467 (i.e. after deduction of the \$250,000 paid to Mr Carey) to the E & M Unit Trust, a finding which Raftland accepts.
- [27] On 3 July 1995 Raftland's directors met. The chairman reported that, apart from the amount of \$250,000 to be distributed to the trustee of the E & M Unit Trust for immediate payment to creditors and/or beneficiaries, the company did not expect to require the funds to which it was entitled under resolutions of Maggside made on 30 June 1995. He proposed that the available funds of the company be used to subscribe for non-voting shares in Navygate. To this end, it was resolved that:
- '...all the moneys to which the company became entitled as at 30 June 1995 from Maggside Pty Ltd be applied in the subscription for such shares in Navygate Pty Ltd to be paid as soon as any necessary alterations to the Memorandum and Articles of Association and to the authorised capital of Navygate have been effected.'*
- [28] The same day the directors of Navygate met and resolved to accept Raftland's offer to subscribe for shares and to do what was necessary to enable the issue of the additional shares. On 7 July 1995, at an Extraordinary General Meeting, the members of Navygate resolved to increase its share capital by 3 million shares of \$1.00 each and to alter the Memorandum and Articles of Association accordingly. The directors of Raftland then resolved to apply in writing for 3,999,998 shares in Navygate. The Chairman reported that the company, as trustee –
- '... had received substantial funds by way of income which were not otherwise required to be used in the business of the trustee and that other members of the Heran Group had offered to provide additional loan funds to enable the company to subscribe for 3,999,998 shares in the capital of Navygate Pty Ltd.'*
- [44] [Raftland]'s case on this subject is that the two resolutions made on 30 June 1995 to distribute \$250,000 and the balance of the income of the Raftland Trust to Mr Carey as trustee of the E & M Unit Trust created

present entitlements to, or vested and indefeasible interests in, the income of the Raftland Trust in the sums of \$250,000 and the balance amount of \$2,599,467, even if payment were not made: ...

- [72] The primary judge was correct to conclude (at [96]) that the series of transactions commencing with the purchase of rights by Heran Projects from Maggside, Maggside's distribution as trustee of the Brian Heran Discretionary Trust to Raftland and its purported distribution to the E & M Unit Trust was capable of and did constitute a 'reimbursement agreement' for the purposes of s 100A. As her Honour recognised, that conclusion accords with the width of meaning given to s 100A(13) by the Full Court in *Prestige Motors*.
- [73] The conclusion that there was a connecting circumstance between the reimbursement agreement and the arising of an entitlement under the Raftland Trust of the Heran brothers as Primary Beneficiaries was unexceptional, for the reason given by the primary judge, applying *Idlecroft* (at [100]).

Sham

- [75] Even if the two resolutions of the directors of Raftland were not efficacious to bring about the consequence that the trustee of the E & M Unit Trust was presently entitled to the whole of the income of the Raftland Trust for the year ended 30 June 1995, either because they were shams which could be ignored (see [90] of her Honour's reasons) or because [Raftland] did not discharge the onus it carried to prove the assessment was excessive (see [81] of her Honour's reasons), the failure of the default provisions of the proviso to cl 3(b) of the Raftland Trust deed to bring about that same consequence was, as a process of her Honour's reasoning, solely due to her finding that the nomination of the trustee of the E & M Unit Trust as a Tertiary Beneficiary in the Raftland Trust deed as executed was a sham (see [90] of her Honour's reasons). In other words, it had nothing whatsoever to do with the failure of [Raftland] to discharge the onus it carried.
- [76] The proposition that a provision contained in a deed of settlement pursuant to which a trust fund is established, such as the default provisions of the proviso to cl 3(b) of the Raftland Trust deed, is a sham, but not the deed itself, is not new. Such a submission was considered and accepted by a Full Court of this Court in *Faucilles*. ...
- [79] In the present case, the evidence is quite clear that the Raftland Trust was established by Mr Tobin on the instructions of Mr Brian Heran and that the settlor, Ms Somerville, Mr Tobin's employee, was but a nominal instrumentality through whom he (Mr Tobin) arranged for Mr Brian Heran's instructions to be carried out. It is also clear that Mr Tobin deliberately intended that the trustee of the E & M Unit Trust be a Tertiary Beneficiary for the Raftland Trust to enable it to receive distributions of, or otherwise be entitled in default of such distributions to, income of the Raftland Trust to be absorbed by the losses of the E & M Unit Trust; and that Mr Tobin was alive to the prospect that because the unit holders of the E & M Unit Trust had the right to call up the moneys representing their respective entitlements, steps had to be taken to ensure that, if such moneys were called up, that the call could be met by transferring shares in *Navygate* to the unit holders.
- [81] Those who advised Mr Brian Heran, notably Mr Tobin, but there were others such as senior counsel retained by Mr Tobin, were well aware that, only to the extent that the trustee of the E & M Unit Trust was presently entitled to the income of the Raftland Trust, would that income be sheltered by the losses in the E & M Unit Trust. The attainment of that fiscal objective drove the transaction from the point of view of its participants. Hence, if it was not achieved by a determination to pay to or apply or set aside the income of the Raftland Trust to the trustee of the E & M Unit Trust pursuant to cl 3(b)(i) of the Raftland Trust deed, it was to be achieved by the default provisions of the proviso to cl 3(b), reinforced by the provisions of cl 3(f), (see [10] *supra*)...
- [84] It follows, in my view, that in each of the years ended 30 June 1995, 1996 and 1997 the trustee of the E & M Unit Trust was presently entitled to the whole of the income of the Raftland Trust of those years, if not by force of resolutions to distribute such income passed by the trustee of the Raftland Trust on 30 June 1995 in the case of the 1995 year of income and by force of written determinations signed by Mr Brian Heran as a director of the trustee on 30 June 1996 and 30 June 1997 in the case of the 1996 and 1997 year of income, then by force of the default provisions of the proviso to cl 3(b), and the provisions of cl 3(f), of the Raftland Trust deed.

Section 100A

- [85] It then becomes necessary to consider the application (if any) of s 100A of the 1936 Act and, if it does apply, the consequences of its application. At [40] – [42] *supra* I observed that the primary judge had concluded that subs 100A(1) applied to deem the Primary Beneficiaries of the Raftland Trust – the three Heran brothers – not to be presently entitled to the income of that trust for any of the relevant years of income. On that hypothesis, that, subs 100A(1) aside, the Primary Beneficiaries were presently entitled to the income of the

Raftland Trust for each of the relevant years of income, her Honour concluded, correctly in my view, that the provisions of subs 100A(3A) did not apply to deny the application of subs 100A(1) because the Primary Beneficiaries were not beneficiaries in the capacity of trustees of other trust estates. In passing however, her Honour observed that subs 100A(3A) would have applied to deny the application of subs 100A(1) if the trustee of the E & M Unit Trust, rather than the Primary Beneficiaries, was, subs 100A(1) aside, presently entitled to the income of the Raftland Trust for each of the relevant years of income. On the view I take, that it is the trustee of the E & M Unit Trust which is presently entitled to the income of the Raftland Trust for each of the relevant years of income, the correctness of her Honour's passing remark that, in those circumstances, subs 100A(3A) would deny the application of subs 100A(1), looms as an important issue.

[86] Subsection 100A(1) provides:

(1) Where:

- (a) apart from this section, a beneficiary of a trust estate who is not under any legal disability is presently entitled to a share of the income of the trust estate; and*
- (b) the present entitlement of the beneficiary to that share or to a part of that share of the income of the trust estate (which share or part, as the case may be, is in this subsection referred to as the relevant trust income) arose out of a reimbursement agreement or arose by reason of any act, transaction or circumstance that occurred in connection with, or as a result of, a reimbursement agreement;*

the beneficiary shall, for the purposes of this Act, be deemed not to be, and never to have been, presently entitled to the relevant trust income.'

[88] Subsection 100A(3A) provides:

(3A) Where:

- (a) apart from this section, a beneficiary (in this subsection referred to as the trustee beneficiary) of a trust estate is presently entitled to a share of the income of the trust estate in the capacity of a trustee of another trust estate (in this subsection referred to as the interposed trust estate);*
- (b) apart from this subsection, the trustee beneficiary would, by virtue of subsection (1), be deemed not to be, and never to have been, presently entitled to that share or a part of that share of the income of the first-mentioned trust estate (which share or part is in this subsection referred to as the relevant trust income); and*
- (c) apart from this section, a beneficiary of the interposed trust estate is or was, or beneficiaries of the interposed trust estate are or were, presently entitled, or deemed to be presently entitled, to any income of the interposed trust estate (in this subsection referred to as the distributable trust income) that is attributable to the relevant trust income;*

subsection (1) does not apply, and shall be deemed never to have applied, in relation to the trustee beneficiary, in relation to any part of the relevant trust income to which the distributable trust income is attributable.'

[89] By way of a definitional context, subss 100A(7), (8), (9) and (13) provide:

(7) Subject to subsection (8), a reference in this section, in relation to a beneficiary of a trust estate, to a reimbursement agreement shall be read as a reference to an agreement, whether entered into before or after the commencement of this section, that provides for the payment of money or the transfer of property to, or the provision of services or other benefits for, a person or persons other than the beneficiary or the beneficiary and another person or other persons.

(8) A reference in subsection (7) to an agreement shall be read as not including a reference to an agreement that was not entered into for the purpose, or for purposes that included the purpose, of securing that a person who, if the agreement had not been entered into, would have been liable to pay income tax in respect of a year of income would not be liable to pay income tax in respect of that year of income or would be liable to pay less income tax in respect of that year of income than that person would have been liable to pay if the agreement had not been entered into.

(9) For the purposes of subsection (8), an agreement shall be taken to have been entered into for a particular purpose, or for purposes that included a particular purpose, if any of the parties to the agreement entered into the agreement for that purpose, or for purposes that included that purpose, as the case may be.

...

(13) In this section: .

"agreement" means any agreement, arrangement or understanding, whether formal or informal, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings, but does not include an agreement, arrangement or understanding entered into in the course of ordinary family or commercial dealing.

"property" includes a chose in action and also includes an estate, interest, right or power, whether at law or in equity, in or over property. .

- [90] As the primary judge observed (at [54]), the background to the introduction of s 100A into the 1936 Act in 1979 is set out in the Treasurer's statement of 11 June 1978 and in the Explanatory Memorandum accompanying the Bill. ...
- [91] Having regard to the definition of 'reimbursement agreement' in subs 100A(7) – it is not necessary to rely on the expansions provided by subss 100A(9) and 100A(13) (definition of 'agreement') – I am of the view that the agreement of 22 June 1995 between Heran Projects and Maggside, as trustee of the Brian Heran Discretionary Trust, is a 'reimbursement agreement' in relation to a beneficiary of the Raftland Trust namely, the trustee of the E & M Unit Trust – it provides for the payment of money to a person other than the beneficiary (the trustee of the E & M Unit Trust) namely, Maggside. It is not, despite Mr Tobin's suggestion that the sale of Maggside's rights might have some business purpose, an agreement entered into in the course of ordinary family or commercial dealing so as to be excluded under the exclusionary provisions of the definition of 'agreement' in subs 100A(13) and there can be no doubt that at least one of the parties, if not more, which entered into the agreement did so for a relevant tax avoidance purpose so as not to attract the exclusion in subs 100A(8).
- [92] I am also of the view that the present entitlement of the trustee of the E & M Unit Trust to the income of the Raftland Trust for the year of income ended 30 June 1995 'arose out of' that reimbursement agreement as identified, in the sense that 'but for' that reimbursement agreement there would have been no income of the Raftland Trust to which the trustee of the E & M Unit Trust would have been presently entitled: Mr Brian Heran conceded as much in his evidence in chief ([14] and [15] of his affidavit sworn 13 October 2005) and see Idlecroft at [44]. For these reasons, leaving to one side for the moment the operation of subs 100A(3A), the provisions of subs 100A(1) apply to the whole of the income of the Raftland Trust for the year ended 30 June 1995.
- [93] The position in relation to the years ended 30 June 1996 and 1997 is not as clear because neither the primary judge in her reasons, nor the Commissioner in his oral argument on appeal, identified a 'reimbursement agreement' in respect of either year. ...
- [94] The income which came into the Raftland Trust for the year ended 30 June 1996 came from three sources:
1. The Brian Heran Discretionary Trust \$57,973
 2. The Northbank Trust \$148,144
 3. The Heran Developments Trust \$573,588
- The income which came into the Raftland Trust for the year ended 30 June 1997 (\$386,035) came from the Northbank Trust – the first \$386,035 of the income of the Northbank Trust of that year.
- [95] The \$57,973 which came into the Raftland Trust from the Brian Heran Discretionary Trust for the year ended 30 June 1996 appears to be sourced in rental and interest income. In other words, it is not sourced in the 'reimbursement agreement' between Heran Projects and Maggside, as trustee of the Brian Heran Discretionary Trust, identified in respect of the year ended 30 June 1995 or in the arrangements among Heran Projects, Heran Developments as trustee of the Heran Developments Trust and Northbank Homes as trustee of the Northbank Trust, described and characterised below. For this reason, I do not think it attracts the operation of subs 100A(1). The position with respect to the \$148,144 and the \$573,588 which came into the Raftland Trust from the Northbank Trust and the Heran Developments Trust respectively for the year ended 30 June 1996 and the \$386,033 which came into the Raftland Trust from the Northbank Trust for the year ended 30 June 1997 is different. Again, none of those streams of income is sourced in the 'reimbursement agreement' between Heran Projects and Maggside, as trustee of the Brian Heran Discretionary Trust, identified in respect of the year ended 30 June 1995. In other words, if the trustee of the E & M Unit Trust in relation to the Raftland Trust was presently entitled to income of the Raftland Trust in the years of income ended 30 June 1996 (apart from \$57,973) and 1997 in circumstances such as to attract subs 100A(1), it was not because of a 'reimbursement agreement' of the type referred to in [92] supra, but because of a different 'reimbursement agreement' or different 'reimbursement agreements'. As I have indicated, her Honour the primary judge did not deal with this issue. Her Honour said (at [104]):

'The same conclusions apply to the assessable income of the Raftland Trust Estate in each of these years. The further purported distributions from Raftland, albeit as a conduit of other entities, are characterised by the initial transaction. There were not in reality further distributions and the parties did not intend them to take effect as such. The Primary Beneficiaries are deemed not to be presently entitled to the income and Raftland's income is to be assessed under s 99A.'

- [99] It may be inferred from Mr Brian Heran's evidence in chief, in the absence of any contrary evidence or contention to the contrary, that the whole of the income which came into the Raftland Trust from the Northbank Trust in both the 1996 and 1997 years of income and from the Heran Developments Trust in the 1996 year of income was sourced in the foregoing arrangements among Heran Projects, Heran Developments as trustee of the Heran Developments Trust and Northbank Homes as trustee of the Northbank Trust. Moreover, having regard to the definition of 'reimbursement agreement' in subs 100A(7), as expanded by subss 100A(9) and 100A(13) (definition of 'agreement'), I am of the view that these arrangements among Heran Projects, Heran Developments as trustee of the Heran Developments Trust and Northbank Homes, as trustee of the Northbank Trust, are a 'reimbursement agreement' in relation to a beneficiary of the Raftland Trust namely, the trustee of the E & M Unit Trust – they provide for the payment of money to a person other than the beneficiary (the trustee of the E & M Unit Trust) namely Heran Developments and Northbank Homes. There was no evidence to suggest that the arrangements were entered into in the course of ordinary family or commercial dealing – Mr Brian Heran conceded as much, at least as to part – so as to be excluded under the exclusionary provisions of the definition of 'agreement' in subs 100A(13) and there can be no doubt that at least one of the parties, if not more, which entered into the arrangements did so for a relevant tax avoidance purpose so as not to attract the exclusion in subs 100A(8).
- [100] This brings me to the important issue of whether the provisions of subs 100A(3A) deny the application of subs 100A(1) in relation to each of the years of income ended 30 June 1995, 1996 and 1997...
- [102] This last condition requires one to determine whether, and if so, the extent to which, the beneficiaries of the E & M Unit Trust namely, Mr Carey in his capacity as trustee of the Thomasz Family Trust and Mr Carey in his capacity as trustee of the ECK Family Trust, were presently entitled to the whole of the income of the E & M Unit Trust in each of the relevant years of income, the whole of such income in each of those years being wholly attributable to the relevant trust income. The starting point for this determination is the relevant provisions of the E & M Unit Trust deed.
- [104] The term 'set aside' in relation to a Unit Holder is defined in cl 1(14) of the E & M Unit Trust deed to include 'placing sums to the credit of such Unit Holder in the books of the Trust Fund' and 'pay' includes 'transfer assign and convey'.
- [106] I have come to the conclusion that neither Mr Carey, in his capacity as trustee of the Thomasz Family Trust, nor Mr Carey, in his capacity as trustee of the ECK Family Trust, was presently entitled to any of the income of the E & M Unit Trust for the years ended 30 June 1995, 1996 and 1997. In relation to the year ended 30 June 1995 this applies as much to the \$250,000 distributed by the trustee of the Raftland Trust to the trustee of the E & M Unit Trust (net \$220,000) and onward, after the end of that year of income, to the Thomasz Family Trust as it does to the balance of the income of the Raftland Trust for that year to which I have found, as I did for the whole of the income of the Raftland Trust for the 1996 and 1997 years, the trustee of the E & M Unit Trust was presently entitled. There are a number of reasons for my conclusion in this regard.
- [107] First and foremost, for the years ended 30 June 1995, 1996 and 1997 the E & M Unit Trust had no net income which it could distribute to unit holders – by way of payment, application or setting aside – pursuant to cl 22(a) of the E & M Unit Trust deed. I am not referring here to the s 95 net income, but to the net income for trust law purposes. Clearly, there was no s 95 net income because of the carry forward tax losses, but equally there was no net income for trust law purposes because of the losses of previous years. The losses of previous years had been incurred by the trustee at the time in carrying on a business of buying and selling real property. The general rule is that such losses in one year must, in the absence of any contrary direction in the trusts instrument, be made up out of profits of subsequent years and not out of capital: *Upton v Brown* (1884) 26 Ch D 588; *Re Reynolds* [1942] VLR 158. There can be no profits properly distributable in cash until all past losses are paid: See *Jacobs' Law of Trusts in Australia*, Seventh Edition, at [1945].
- [108] [Raftland] submitted that the E & M Unit Trust deed contained a contrary direction that this general rule was not to apply. It points to the obligation (cl 22(a)) to distribute 'the whole of the net income of the Trust Fund of that Accounting Period'. But this really begs the question if, because of the previous years' losses, there is no net income. The contrary direction would, at the very least in my view, have to mandate the calculation of the net income of an accounting period without regard to prior year losses.

- [109] [Raftland] further submitted that the general rule only has application where the class of income beneficiaries and capital beneficiaries are different and here the unitholders in the E & M Unit Trust have coterminous interests in both income and capital of the trust fund. The origin of the rule may well have been conditioned by situations involving beneficiaries having interest in income but not in capital and vice versa, but the rule itself is not so qualified.
- [110] In any event, the financial accounts of the E & M Unit Trust were prepared on the basis that the general rule applied, that is, that the prior year losses had to be made good before there was a net income available for distribution. Hence the balance sheets of the E & M Unit Trust for the year ended 30 June 1995 shows the income from the Raftland Trust augmenting the fund by \$2,892,762 and a corresponding current asset in the same amount. There were no liabilities nor any record of claims of unitholders upon such assets because the net assets of the fund were shown as \$2,892,762.
- [111] The same treatment is to be discerned in the balance sheets of the E & M Unit Trust for the years ended 30 June 1996 and 1997, with the augmentation of the fund from the previous year in each such case being shown as 'unappropriated profits'. Interestingly, the \$250,000 paid to the trustee of the E & M Unit Trust (net \$220,000) and onward, after the end of the year of income ended 30 June 1995, to the Thomasz Family Trust, is shown as an asset of the E & M Unit Trust in its balance sheets for each of the relevant years of income, described as 'Loan other entities'.
- [112] The second reason why I have concluded that the unitholders of the E & M Unit Trust were not presently entitled to the income of that trust for the years ended 30 June 1995, 1996 and 1997 is because even if the E & M Unit Trust, contrary to the position described in [107] – [111] supra, had a distributable net income in each of those years, there is no evidence that the trustee paid, applied or set aside such income for the benefit of unitholders in accordance with cl 22(a) of the E & M Unit Trust deed. Indeed, such evidence as there is, the financial accounts for each of the relevant years of income, points the other way. It is common ground that there was no payment or application of such income to the unitholders and there was no 'setting aside' in the sense of crediting the unitholders in the books of the trust fund – see the definition of 'set aside' in relation to a unitholder in cl 1(14) of the E & M Unit Trust deed. And in the absence of any 'setting aside', the provisions of cl 22(d) have no operation.
- [114] It follows, in my view, that because condition (c) for the application of subs 100A(3A) was not satisfied, subs 100A(3A) does not apply to deny the application of subs 100A(1) to the income of the Raftland Trust to which the trustee of the E & M Unit Trust was otherwise presently entitled for each of the relevant years of income. For the year ended 30 June 1995 this applies as much to the \$250,000 actually distributed by the trustee of the Raftland Trust to the trustee of the E & M Unit Trust. Accepting that the trustee of the E & M Unit Trust was presently entitled to that amount by virtue of the default provisions in the proviso to cl 3(b) of the Raftland Trust deed, if not by the resolution of the board of Raftland passed on 30 June 1995 and the subsequent payment to Mr Carey as trustee of the E & M Unit Trust after the end of that year of income, the unitholders in the E & M Unit Trust were not presently entitled to that amount (or, for that matter, the net amount after, deduction of Harts Accountants' commission) as at 30 June 1995. There had been no payment or application of that amount to them as at that date and no such amount had been 'set aside' as at that date by a crediting in the books of the trust fund. The subsequent payment by cheque of an amount of \$220,000 by Mr Carey, as trustee of the E & M Unit Trust, to Mr Thomasz and his unilateral decision to include that amount as income of the Thomasz Family Trust for the year ended 30 June 1996 (not 30 June 1995) does nothing to make the unitholders presently entitled to that income as at 30 June 1995. Indeed, it suggests the contrary.

(1) ** Court Overturns AAT imposed scheme penalties (Starr v C of T)

Source Starr v Commissioner of Taxation of the Commonwealth of Australia [2007] FCA 23 (23 January 2007)
http://www.austlii.edu.au/au/cases/cth/federal_ct/2007/23.html

What was the issue?

Did the AAT err in law on holding that section 224(z) does not involve an inquiry into the subjective purposes of tax power?

What was the outcome?

The taxpayers succeeded in their appeals against the penalties originally imposed by the AAT.

The Court found that:

- ◆ schemes in relation to which s 226 applied were tax avoidance schemes within the meaning of s 224;
- ◆ a shortfall to which section 226 applied for the purposes of determining a penalty must be a shortfall caused by the taxpayer's treatment of income tax law as "applying in relation to a scheme in a particular way" but that did not flow from:
 - ~ the Commissioner's characterisation of the scheme:
 - as a tax avoidance scheme whether under Pt IVA; or
 - any other provision of the Act;
 - ~ any action by the Commissioner consequential upon such characterisation.

Does the outcome affect your firm's current practices?

If a scheme client has had a penalty imposed, despite having had a commercial purpose for entering the scheme, you might consider (or if a settlement has already been reached, re-consider) the reasons for which they entered the scheme, the size of any penalty imposed and whether any settlement agreement can bind a client in circumstances where the Commissioner's position on offering the terms of settlement reflected an incorrect application of the relevant law.

After careful consideration of all of the relevant factors you might consider advising the client as to the wisdom of contesting the penalties imposed.

What were the facts?

The tax payers were investors in the ACM cattle breeding scheme (considered in Vincent's case where Part IVA was found to apply) whose stated, and uncontested, purpose in entering into the scheme was to obtain a commercial return.

What was the decision?

- [23] The Tribunal observed that Pt IVA requires the purpose of a scheme to be assessed objectively. ... The Tribunal accepted the submission on behalf of the Commissioner that the language of s 224(2) indicated that an examination of the objective facts and circumstances surrounding the scheme was necessary and that this "tied in with the objective inquiry required in Pt IVA".
- [24] The Tribunal found that the ACM scheme was a tax avoidance scheme in terms of s 224(2) of the ITAA entered into or carried out with the sole or dominant purpose of enabling the participants and, in this case, the [taxpayer]s, to pay no tax or less tax. Section 226L therefore applied. The [taxpayer]s had not provided any evidence that their involvement in the ACM scheme was objectively different from the facts and circumstances ruled upon by the Federal Court in the case of Vincent 124 FCR 350. Accordingly, the Tribunal found the [taxpayer]s had not "discharged their onus".
- [29] The debate in this case was joined as a debate between a construction of s 224(2) which says that the "purpose" to which it referred is to be subjectively determined and the construction which says it is to be objectively determined. In my opinion however, the relevant dichotomy is between a mental state inferred by reference to subjective and objective evidence and a mental state attributed on the basis of objective evidence which excludes consideration of the actual mental states of those behind or entering into the scheme.
- [42] In my opinion [authorities reviewed] are consistent with the proposition that the law should generally be construed according to the ordinary meaning of the words it uses having regard to their context and legislative purpose. Where a mental state is referred to it should be construed as an actual mental state unless the context indicates a constructive or attributed mental state.

Constructional considerations

- [43] The conditions necessary to attract penalty tax under s 226L established by that provision were as follows:
1. *The taxpayer has a tax shortfall for a year.*
 2. *The shortfall was caused in whole or in part by the taxpayer treating an income tax law as applying in relation to a scheme in a particular way.*
 3. *The scheme was a scheme within the meaning of Pt IVA that was entered into for the sole or dominant purpose of enabling a person to pay no tax or less tax.*
 4. *The scheme is not one in relation to which ss 224, 225, 226 or 226AA apply.*

- [44] The effect of the fourth and last mentioned condition was that s 226L does not apply to cases in which the tax shortfall exists as the result of action by the Commissioner under anti-avoidance provisions of the ITAA of the kind referred to in ss 224, 225, 226 and 226AA. While the shortfall to which the section applied must be caused by the taxpayer's treatment of income tax law as "applying in relation to a scheme in a particular way" it does not flow from the Commissioner's characterisation of the scheme as a tax avoidance scheme whether under Pt IVA or any other provision of the Act nor upon any action by the Commissioner consequential upon such characterisation.
- [47] The schemes in relation to which s 226 applied were tax avoidance schemes within the meaning of s 224. The definition of "tax avoidance scheme" in s 224(2) had two elements. The first was that it be "a scheme within the meaning of Part IVA". That picked up the definition of "scheme" in s 177A. Importantly, a "scheme within the meaning of Part IVA" was not thereby "a scheme to which Pt IVA applies". The latter category is defined in s 177D and is a subclass of schemes within the meaning of Pt IVA. It is limited, inter alia, by the requirement that "it would be concluded that the person, or one of the persons who entered into the scheme or any part of the scheme did so for the purpose of enabling the relevant taxpayer to obtain a tax benefit in connection with the scheme ...". The section does not require an inquiry into the actual mental state of the taxpayer or anybody else concerned with the scheme but rather into what "would be concluded" about purpose after consideration of the eight factors listed in the section.
- [48] In determining the nature of the inquiry into the purpose referred to in the definition of "tax avoidance scheme" in s 224(2) it is important not to be distracted by s 177D. That section, unlike s 224(2), is concerned with what "would be concluded" about the purpose of those entering into a scheme having regard to the eight listed factors. That inquiry differs from the inquiry mandated by s 224(2). It defines the field of considerations from which an attribution of purpose can be made. It does not extend to actual states of mind.
- [49] What is to be considered in assessing purpose under s 224(2) is determined by reference to the ordinary meaning of its words having regard to context and purpose. They carried that interpretation with them into s 226L. Section 226L picked up the definition from s 224(2) rather than setting out its own. It was the definition as construed in the context and for the purpose of s 224 that therefore applied to s 226L.
- [50] The text of the definition of "tax avoidance scheme" in s 224(2) had the following inter-related features:
- 1 *It used the relevant purpose to define the subclass of schemes which are "tax avoidance schemes" for the purpose of s 224.*
 - 2 *The relevant sole and dominant purpose was that for which the scheme "was entered into or carried out".*
 - 3 *The use of the words "entered into" or "carried out" suggest that the provision was formulated on the apparent assumption that the relevant inquiry was into the existence of an actual rather than attributed purpose.*

The definition is used for the purpose of imposing liability to a penalty by way of additional tax. In my opinion the word "purpose" in the definition of "tax avoidance" in s 224(2) should be taken, like "purpose" in s 4D of the Trade Practices Act, to have referred to the purpose of those who entered into the relevant scheme. In this case the purpose is that of the taxpayers, Messrs Starr and Hopkins, and possibly also those of their advisors. The uncontested evidence of all of them was that their purpose in entering into the scheme was to obtain a commercial return. While tax benefits were relevant, they were not the sole or dominant purpose.

- [53] In my opinion, the Tribunal erred in law in excluding consideration of the stated purposes of Messrs Starr and Hopkins. Their statements were not contested. They were not inherently improbable. The Tribunal came to a contrary conclusion evidently based upon that reached by the Federal Court in Vincent 124 FCR 350 about the application of Pt IVA.
- [54] It seems that in this case the Tribunal reached its conclusions about the relevant purpose upon the apparent assumption that the statements of the taxpayers, Messrs Starr and Hopkins, were irrelevant. In my opinion, however, there is no point in remitting these matters to the Tribunal as the evidence about the taxpayers' actual purposes in entering the schemes was not contested by the Commissioner. In the circumstances, the decisions of the Tribunal will be set aside and the objections allowed. The parties will be given liberty to apply for any necessary consequential orders.

(2) ** Same business test examined for loss transfer (Keycorp Limited v C of T)

Source Month mm-2007 - ## -

[hyperlink Keycorp Limited v Commissioner of Taxation \[2007\] FCA 41 \(7 February 2007\)](#)

What was the issue?

Can KYC transfer to KSL an amount of its tax loss for the year ended 30 June 2001 so that KSL may deduct the amount of loss transferred in accordance with section 36-17 in the year of income ended 30 June 2002?

Can KYC and KSL have an extension of time within which to effect a written agreement for transfer of the amount of the loss of one month from receipt of the ruling?"

The amount to be transferred was that part of the loss incurred by KYC during the period 14 December 2000 to 30 June 2001

What was the outcome?

The court concluded that while the whole of a loss from a loss year and a proportion of a loss from a loss year could be transferred, a part loss from part of a loss year could not be transferred.

Does the outcome affect your firm's current practices?

The decision draws attention to the need for careful consideration of the rules for non consolidated groups.

What were the facts?

The tax payer KYC, a public listed company, applied for a private ruling about the transfer of losses between it and another company KSL.

The principal activities of KYC and its subsidiaries are:

- ◆ Research, development and sales of devices and systems to allow secure electronic payments and transactions at the point-of-sale;
- ◆ Service solutions (including installation, maintenance, help desk support, logistics and asset management services for point-of-sale terminals and automatic teller machines;
- ◆ Research, development and sales of smartcard technology, including licensing of operating systems and applications for smartcards; and
- ◆ Marketing and sales of secure transaction network solutions.

For a number of income years prior to the 2001 tax year, KYC lodged tax returns on the basis of a substituted accounting period (SAP), being an early balancing SAP ending on 31 December.

During the 2001 year, KYC reverted to a 30 June year end due to a change in ownership of the company. Transition to the 30 June year end was effected via an 18 month return covering the period 1 January 2000 to 30 June 2001 representing KYC's 2001 year of income.

During the 18 month period ended 30 June 2001, KYC incurred a tax loss of \$39,068,802 and had to carry forward tax losses of \$27,470,209.

KSL was incorporated:

- ◆ in Australia on 21 August 2000 with all shares in KSL directly owned by KYC;
- ◆ as a special purpose entity to acquire a particular business from Telstra Corporation Ltd (Telstra).

On 25 October 2000, Telstra (through its wholly owned subsidiary Telstra cb.fs Limited) agreed to subscribe for 38,700,000 ordinary fully paid shares in the capital of KYC representing approximately 51% of the total capital of KYC at the time of issue.

Telstra transferred the business to KSL on 14 December 2000 immediately after KSL issued shares to Telstra under an agreement between Telstra, KSL and KYC dated 25 October 2000.

The only activity of KSL prior to 14 December 2002 was to enter into contracts for the acquisition of the business.

During the year ended 30 June 2002, KSL derived taxable income of \$27,748,457.

KYC and KSL entered into a loss transfer agreement to transfer \$27,748,457 in tax losses from KYC to KSL in order to reduce the taxable income of KSL to nil.

The Commissioner gave the following ruling given on 27 September 2005 was in the following terms:

"1.No. KYC may not pursuant to Division 170 of the ITAA 1997 transfer an amount of its tax loss incurred during part of an income year (being the period 14 December 2000 to 30 June 2001) to avoid an abnormal trading event which resulted in change of ownership.

KSL may not deduct the amount of loss transferred in accordance with section 36-17 of the ITAA 1997 in the year of income ended 30 June 2002.

On 26 October 2005, KYC and KSL lodged an objection to the private ruling.

What was the legislation?

Section 170-5 sets out the basic principles for transferring tax losses:

- (1) *A company can transfer a tax loss to another company so that the other company can deduct it in the income year of the transfer.*
- (2) *Both companies must be members of the same wholly-owned group. There are other eligibility requirements that they must also satisfy.*
- (3) *The transferred loss must be "surplus" in the sense that the transferring company cannot use it because there is not enough assessable income to offset it. The other company must have enough assessable income to offset the transferred tax loss.*
- (4) *Neither company must be prevented from deducting the loss by Division 165 or 175.*
- (5) *The tax loss is transferred by an agreement between the 2 companies.*
- (6) *The tax loss can be transferred in the same year as it is incurred. In that case different rules apply."*

Section 170-10 deals with when a company can transfer a tax loss:

- (1) *A company (the loss company) can transfer an amount of its * tax loss for an income year (the loss year) to another company (the income company) if the conditions in this Subdivision are met.*
- (2) *The amount transferred can be the whole or part of the * tax loss."*
[emphasis in original]

What was the decision?

- [8] The appeal raises the correctness of the respondent's conclusions and, more particularly:
 - (a) the meaning of the word "part" as it appears in ss 170-10 and 170-15 of the ITAA 1997; and
 - (b) the effect of s 170-40(2) of the ITAA 1997 in this context.
- [19] Section 170-15(1) provides that the amount of the tax loss that is transferred is taken to be a tax loss incurred by the income company (see ss 995(1) and 170-10(1) for the meaning of the phrase "income company") in the loss year (see ss 995(1), 36-10(4) and 170-10(1) for the meaning of the phrase "loss year").
- [20] Thus, to the extent that the whole or part of a tax loss is (validly) transferred from the loss company to the income company, that amount is a tax loss of the transferee or income company for the year in which the loss occurred in the transferor or loss company.
- [21] Section 170-15(2) provides for the deeming of the timing of the loss by the income company to be a year earlier if the loss year is the same as the income year of transfer, because Division 36 requires that a tax loss to be deducted must be incurred in an earlier year of income.
- [25] Subdivision 175-A of the ITAA 1997 was introduced at the same time as Division 170. It contains provisions which enable the Commissioner to reverse the effect of schemes that, in order to avoid tax, bring together in the same company assessable income and tax losses, current year deductions, or deductions for bad debts that apart from the scheme would not be fully used: s 175-1. Section 175-5 concerns when the Commissioner can disallow deduction for a tax loss. Section 175-10 concerns income or capital gain injected into a company because of available tax losses...

Disposition of the matter

- [85] Ultimately, I think the matter is capable of being rendered to one issue: Is Division 170 and, in particular, s 170-10 directed in any circumstances to the transfer of a tax loss that is referable to part of an income year and as such able to be described as "part of a tax loss for an income year"?
- [86] The view that I have come to is that the answer to this question is, "no".
- [87] I accept that, as a matter of English, part of a tax loss that is referable to some nominated part of a year can be said to be part of the tax loss for the whole of that year. That this is an available meaning can be accepted. One does not start, however, with some disembodied plain meaning of a phrase, find what can fall within it and, having done so, be required to look for good reason why the full width of that meaning should not apply in the particular context. The task is to construe the terms of s 170-10 in the context in which they appear in the ITAA 1997, recognising their context and place as, in significant respects, a plain English redrafting of earlier provisions in the ITAA 1936. It is also necessary to appreciate that the provisions dealing with deducting or carrying forward and transferring tax losses can be seen as provisions designed to benefit the taxpayer, not as provision to raise revenue. In that respect, they should not be read narrowly.
- [90] I do not find the conclusion that part of the tax loss for an income year could possibly be the tax loss, if any, in a segment of the whole year easy to accept from s 170 as a matter of language. I do not find it an entirely natural or easy meaning. Part of tax loss for an income year is more easily understood as a part (whether a proportion or a fixed nominated amount) of a loss incurred in the whole income year.
- [91] The context in which one finds these words assists in the recognition that this latter approach is correct. The ITAA 1997 gives a defined meaning to the phrases "tax loss", "income year" and "financial year" which look to, at least, a whole 12 month period. These are basal concepts in the legislation.
- [92] In a closely related body of provisions dealing with the deduction of tax losses the notion of part of the loss that was incurred during a part of a year is expressly provided for: s 165-20. Not only is the phrase provided for there, but also wherever the legislature apparently wished to provide for part of something arising by reference to a time period otherwise than by reference to the basal building block of the legislation, the income year, or financial year, it did so.
- [93] Further, Subdivision 165-B sets out a detailed regime for working out taxable income and tax loss in parts of years in which there has been a change in ownership or control and in which the business continuity test is also not satisfied. Accepting the anti-avoidance origins of Subdivision 165B, nevertheless, its existence and relationship with the operation of Division 165, throws light upon the language of s 170-10, a related or cognate provision. The capacity to use periods of time shorter than the basal time unit is not a matter of passing interest or account. If the legislation were to be directed to a segment of the basal unit of the income year, one would expect that to be spelt out in terms of the kind that it is in s 165-20 and provided for with rules such as those in Subdivision 165B.
- [94] If the phrase "part of the tax loss for the income year" encompasses part of the tax loss for the income year which is referable to part of the income year, one will or may be left without rules (other than, of course, ordinary accounting practice and principle) for the ascertainment of income and deduction for that segment of time. If what is being sought to be transferred is the whole loss in the part of the year that has been marked out by a change in ownership and control, Sub-division 165-B will, however, apply: s 165-23. If there has not been such a change and a choice as to a time period is being made, presumably only accounting principles will apply.
- [95] I do not think that this was intended. Section 170-10, in terms, set against the background of the basal importance of the unit of the income year and the language used when part of a loss or other aspect of gain or deduction is intended to be referred to by reference to part of a year, does not encompass part of a loss by reference to part of an income year.
- [96] This does not mean that only a monetary amount can be transferred. A percentage or some other division of the tax loss (as calculated for the whole income year) can be transferred. But it means that only a part (a proportion or amount) of the whole year's tax loss can be transferred.
- [97] This leads to a lack of complete conformity between the regime for deduction under Division 165 and that for transfer under Division 170. I do not see that as an oddity or inconvenience. It is merely what Parliament has chosen. It would be odder and possibly more inconvenient if the taxpayer were left freely able to choose the time unit of its tax affairs to transfer its losses, in circumstances where the Parliament has set down a detailed regime for dealing with working out taxable income and tax loss where, for one reason, there are two or more temporal units of the basal income year.

[98] I do not think that an appreciation of the precursor to Division 170 in the ITAA 1936 takes the matter beyond the words of Sub

(3) ** Partner's share of partnership income (McNally v C of T)

Source McNally v Commissioner of Taxation [2007] FCA 51 (2 February 2007)

[McNally v Commissioner of Taxation \[2007\] FCA 51 \(2 February 2007\)](#)

What was the issue?

Was there an error of law disclosed by the way the Tribunal answered the question whether certain sums should have been included in the taxpayer's income?

What was the outcome?

The court concluded that the Tribunal made an error of law in relation to its characterisation of WIP.

The court did not accept that an item should be treated as part of the assessable income of the Deloitte partnership merely because there is an expectation that the item will become fiscal income of the partnership at some time in the year in question.

What were the facts?

The taxpayer:

- ◆ joined the firm of Duesburys in 1991;
- ◆ made a capital contribution of \$174,000, \$160,000 of which was financed by an advance from Westpac
- ◆ In 1994, after Duesburys merged with 'Deloitte', made a further capital contribution of \$150,000, the whole of which was financed by an advance from National Australia Bank.

The agreement between the partners at Deloitte ('the partnership agreement') provided:

- ◆ for the keeping of partnership books of account, and required the preparation of a balance sheet, and profit and loss account, as at 30 June each year;
- ◆ that no partner would have any personal financial interest in the partnership apart from the accrued or accruing profits to which he was entitled from time to time, and any other amounts recorded in the partnership accounts as due to him.

The capital of the partnership was divided between partners according to cl 11(A) of the partnership agreement, which provided:

The capital of the Partnership shall be divided into shares which shall be represented by Role and Responsibility Units designated as R/R units and the total number of such units and their allocation between the Partners shall be determined from time to time by the Policy Board having regard to the respective roles and responsibilities of the Partners.

For each R/R unit held by a partner, that partner was obliged to deposit with the firm a stipulated sum of money and formed part of the basis for the distribution to partners of the profits of the firm for each year. "Performance Units" were not part of the capital, but were allocated to partners after each year to reflect their performance in that year.

A partner could be involuntarily removed by resolution of the Policy Board (on the recommendation of the Chief Executive Officer) on the ground that such removal was "in the best interests" of the partnership.

Upon ceasing to be a partner otherwise than by death, a partner was entitled to be paid the amount of his capital account, his share of profits from the end of the last completed year down to the date of ceasing to be a partner, and his share of other undrawn profits (if any).

Clause 8 of section D3 of the Partner Manual provided (in part):

It is intended that all profits of the Partnership for each year shall be distributed to the partners and following completion of the financial accounts of the partnership for each year to 30 June all undistributed profits for that year shall be distributed.

The Partners shall be entitled to the profits ... pro rata according to their respective totals for Role Units and Performance Units allocated to them in respect of that year and, to any extent necessary to

reflect such entitlement, adjustments shall be made as between them having regard to distributions made on account of the profits.

On 17 July 1997, the Policy Board of Deloittes resolved that it was in the best interests of the partnership that the taxpayer be removed from the partnership

Pursuant to an agreement reached at mediation, Deloittes paid \$310,000 to the two banks mentioned in cl 4 thereof, and the balance of the settlement sum of \$500,000, \$190,000, to the taxpayer.

In his income tax return for the 1998 year, the taxpayer stated that his distribution from partnerships was \$0.00. He was originally assessed on the basis of that statement. However, information from Deloittes caused the Commissioner to revisit.

Deloittes provided to the Commissioner a three-page statement which set out –

- ◆ the taxpayer's investment in the partnership as at 30 June 1998;
- ◆ the taxpayer's "distributable income" for the year to 30 June 1998;
- ◆ a schedule of the taxpayer's "taxable income" for the year to 30 June 1998; and
- ◆ the distribution of the taxpayer's taxable income for the year to 30 June 1998.

According to the statement, the taxpayer had no investment in the partnership as at 30 June 1998. The statement also showed that there was, in the 1998 year, no normal profit distribution to the taxpayer. However, there was an amount of \$230,000 shown as "Profit Distribution – Partnership – Gratuitous Payment". Together with two other relatively insignificant sums, the taxpayer's entitlement to distributable income for the year was shown as \$233,031.63. That sum, rounded to \$233,032, was shown in the taxable income schedule as the taxpayer's share of the partnership income from all sources.

Deloittes advised the Commissioner that:

- ◆ upon the entry of a new partner, Deloittes does not include opening timing differences in its calculation of that partner's share of the net income of the partnership at the end of the partner's first financial year because at the beginning of the partner's first year with Deloitte, he/she has no interest in Deloitte's net assets including timing differences;
- ◆ the opening timing differences are shared among all of the partners who were Deloitte members as at the beginning of the year so that the total net income of the partnership is distributed to partners and taxed;
- ◆ at year-end, a partner is a continuing partner which entitles him/her to a share of Deloitte's net assets including closing timing differences such as WIP;
- ◆ does not include closing timing differences in its calculation of an exiting partner's share of the net income of the partnership at the end of that partner's last financial year;
- ◆ when a partner retires during the year, Deloitte includes his/her share of opening timing differences in its calculation at year-end (30 June), the retired partner no longer has a share in closing timing differences as his/her entitlement to a share in the net assets has terminated;
- ◆ the closing timing differences are included in the net income calculation of the remaining partners.

What was the decision?

[16] The taxable income schedule in the statement was as follows:

DELOITTE TOUCHE TOHMATSU SCHEDULE OF TAXABLE INCOME 30 JUNE 1998	
PARTNER	MCNALLY W.A.
YOUR SHARE OF FIRM INCOME FROM ALL SOURCES	233,032
PARTNERSHIP PENSION - ITEM 10 BLOCK O (For Individual returns)	
INTER GROUP DIVIDENDS EX CORPORATE ENTITIES GROSSED UP	1,312
NON-DEDUCTIBLE/NON-ASSESSABLE ITEMS	1,986
SHARE OF TAXABLE INCOME BEFORE TIMING DIFFERENCES	236,330

OPENING TIMING DIFFERENCES	
W.I.P	89,428
PREPAYMENTS	56,997
OTHER	176,465
	322,890
CLOSING TIMING DIFFERENCES	
W.I.P	0
PREPAYMENTS	0
OTHER	0
PROVISIONS	0
	0
TOTAL TAXABLE INCOME FROM ALL SOURCES	559,220
LESS SPECIFIC PARTNERSHIP DEDUCTIONS:-	
SUPERANNUATION	0
INTEREST IN CORPORATE ENTITIES (see JMM memo attached)	0
SALARY	
GROUP LIFE INSURANCE	0
TAXABLE INCOME TO BE INCLUDED IN YOUR FAMILY GROUP'S RETURNS	559,220

- [17] On the face of it, there was a discrepancy between these figures and the taxpayer's return for the 1998 year. There were, apparently, communications between the taxpayer and the Commissioner, the result of which was that the Commissioner wrote a letter to the taxpayer's accountants dated 29 November 2002, in which it was asserted that the Deloitte partnership return for the 1998 year disclosed that the taxpayer's share of the partnership net income was \$557,521, made up as follows:

	\$		\$
Gratuitous partnership profit distribution	230,000		
Allowance	1,333		
Inter group dividends (grossed up)	1,312		
Non deductible items	1,986		
Tax timing differences that were deducted from 1997 accounting income and assessable in 1998	322,890		557,521

- [18] The Commissioner's letter stated that the sum of \$557,521 was the taxpayer's individual interest in the net income of the partnership for the purposes of s 92(1) of the Income Tax Assessment Act 1936 (Cth) ('the 1936 Act').
- [42] Central to the disposition of both these appeals is an appreciation that the Commissioner's amended assessment was referable to s 92 of the 1936 Act. That is to say, the sum which the Commissioner included in the taxpayer's assessable income for 1998 was so included not because it was income according to ordinary concepts, but because it was the taxpayer's interest in the net income of Deloitte. By s 91 of the 1936 Act, a partnership must furnish a return of its income, but is not liable to pay tax thereon. Section 92 provides that the assessable income of a partner in a partnership shall include –

...so much of the individual interest of the partner in the net income of the partnership of the year of income as is attributable to a period when the partner was a resident....

By s 90 of the 1936 Act, the "net income" of a partnership is –

...the assessable income of the partnership, calculated as if the partnership were a taxpayer who was a resident, less all allowable deductions...

except certain deductions not presently material. Strictly speaking, the process of identifying the assessable income of the taxpayer should have involved two steps: determining what was the net income of Deloitte, and calculating the individual interest of the taxpayer in that income.

- [44] Deloitte filed a return of the income of the partnership, as required by s 91, for the 1998 year ... Mr Lockie submits, however, and I agree, that the taxpayer "is entitled to have considered the nature of the transaction which gives rise to the suggested liability for tax unaffected by what the partnership may do or say in relation to his income": *Stapleton v Federal Commissioner of Taxation* (1989) 89 ATC 4818, 4827.
- [45] On the other hand, this is not a full appeal from the decision of the Tribunal. The question is not whether certain sums should have been included in the assessable income of the taxpayer: it is whether an error of law is disclosed by the way the Tribunal answered that question. What was the taxpayer's interest in the net income of Deloitte was a question of fact. The Tribunal held that the opening timing differences should have been included in the taxpayer's assessable income as returned, thereby implicitly holding that such differences were part of the net income of Deloitte for 1998. It is only if those holdings were infected by an error of law that the taxpayer is entitled to succeed on his appeal.
- [46] The Commissioner accepted that the valuation of work-in-progress in a business such as that conducted by Deloitte is not as such income according to ordinary concepts. When, as appears to have been the case here, accrual accounting is employed for the purpose of calculating the income of a partnership, only when a sum has become recoverable is it to be regarded as part of that income. These propositions were, it seems to me, propounded as matters of law by the High Court in *Henderson v Federal Commissioner of Taxation* (1970) 119 CLR 612, 650-651. It would follow that any decision which included work-in-progress as part of the net income of a partnership should be regarded as being erroneous in point of law.
- [47] As set out in para 7 above, the Partner Manual of Deloitte provided that work-in-progress should not be brought into account for income tax purposes. However, it also provided that work-in-progress at 30 June each year would be "deemed to be derived as taxable income in the following year". As between the partnership and the Commissioner, such a deeming provision could not be conclusive as to the calculation of the net income of the partnership pursuant to s 92 of the 1936 Act. As between the partners of Deloitte, a provision which specified how the net income of the partnership was to be distributed between them – i.e. what was each partner's interest in that income – would be binding. However, such an agreement could be effective and binding for taxation purposes only if it operated by reference to income which was in fact and in law net income within the meaning of s 90 of the 1936 Act.
- [48] How are the two provisions of the Partner Manual referred to in the previous paragraph to be reconciled? The first is apparently consistent with the law as stated in *Henderson*; the second appears not to be, in that it brings work-in-progress into taxable (i.e. fiscal) income in the following year. The answer, I consider, is to be found in the explanation provided by Deloitte as to their calculation of the timing differences as set out in para 23 above. Internally, Deloitte includes work-in-progress in the calculation of its income – "accounting income" as it has been called. However, since work-in-progress is not income for the purposes of taxation law, when calculating the figure that will be returned as the income of the partnership under s 91 of the 1936 Act, Deloitte takes the value of work-in-progress out of the accounting income figure. This procedure is intended to produce the correct figure to be returned under s 91 – one which is confined to the assessable income of the partnership as though it were an individual taxpayer, as required by ss 90 and 92 of the 1936 Act.
- [49] Having thus calculated their assessable income for a particular year in the correct way, Deloitte must then add the value of work-in-progress back into their reckoning of their income for taxation purposes for the following year. That is the effect of the deeming provision in the manual to which I have referred. Properly understood, that provision does not "deem" anything to be something that it is not (as lawyers are accustomed to find in legislation from time to time): rather, it is in the nature of an instruction to those responsible for maintaining the accounts that, in their calculation of the income which Deloitte will return each fiscal year under s 91 of the 1936 Act, the value of work-in-progress as at 1 July that year should be included. However, in the course of that very calculation, the value of work-in-progress at year-end will be excluded. The net effect, manifestly, will be that only to the extent that it has been invoiced – thereby losing its status as work-

in-progress – will the value of what was the work-in-progress on 1 July appear in the partnership's income as returned under s 91 as at the following 30 June.

- [50] By the method of maintaining their accounts in the way I have described, Deloitte ensures that only income within the meaning of the legislation – i.e. never including work-in-progress – is treated as income of the partnership for taxation purposes. As I have said, the result is in harmony with the law as stated in Henderson.
- [54] It is manifest, from the Deloitte's distribution statement, that the opening timing differences for the year ended 30 June 1998 have been included in the taxpayer's interest in what is said to be the (fiscal) income of the partnership, and that those "differences" include work-in-progress. Because the closing timing differences have not been excluded, the resulting figure necessarily includes work-in-progress. The justification, presumably, for the non-exclusion of closing timing differences is that the taxpayer was not a partner on 30 June 1998, when those differences were excluded for the remaining partners. That is not, I consider, a justification which should be regarded as acceptable under taxation law. If, as I have held, the assessable income of Deloitte could not include work-in-progress, necessarily the taxpayer's share of (or interest in) that income could not include such an element. The fact that the taxpayer was a partner for part only of the year in question cannot affect the legally correct approach to the matter of the determination of Deloitte's assessable income, to the extent that the taxpayer had an interest in it. If a set of accounts for taxation purposes was struck when the taxpayer left on 17 July 1997, necessarily work-in-progress would have been taken out. That was not done, the result of which may create practical difficulties in the way of calculating the taxpayer's interest. However that may be, it provides no reason to calculate that interest in a way that unarguably includes work-in-progress.
- [55] The effect of the Tribunal's decision was to uphold so much of the Commissioner's assessment as included work-in-progress in the assessable income of the partnership for the purpose only of calculating the taxpayer's interest under s 92 of the 1936 Act. For the reasons given above, that was erroneous in point of law.
- [56] Within the broad category of opening timing differences, I have so far concentrated on work-in-progress (an amount of \$89,428 out of a total of \$322,890). The category includes also "prepayments" and "other". There was no evidence as to what these items involved...
- [57] I cannot accept that an item should be treated as part of the assessable income of Deloitte merely because there is an expectation that it will become fiscal income at some time in the year in question. In the present case, the taxpayer has had attributed to him what is said to be a share in the income of Deloitte, where that income is as appears in the accounts on 1 July 1997. On Ms Symon's explanation, there was then only an expectation that relevant items in that income would fall into the category of fiscal income. The Tribunal accepted that approach without any investigation of whether, before the taxpayer's interest in that income was calculated and for the purpose of that calculation, such an expectation had become reality. Although I know little of the exact nature of the items to which I here refer, if their inclusion is based upon the approach explained by Ms Symon, it does appear to result in amounts which were not as such part of the assessable income of Deloitte at any time being notionally apportioned in some way, and in a share of, or an interest in, such amounts being treated as the income of the taxpayer for the purposes of s 92. That approach is, I consider, wrong in law.
- [58] What I have said above might reasonably be read as implying that the taxpayer's interest in the net income of Deloitte in the 1998 year was some figure other than that assessed by the Commissioner. It is, however, no part of the court's role to make any such finding, and I do not do so. I was invited by Mr Lockie to find that no part of the opening timing differences should have been taken into the taxpayer's assessable income. I do not make such a finding. Indeed, the only question before the court is whether the Tribunal's decision was erroneous in point of law. In relation to work-in-progress, I consider that it was. In relation to other elements of the opening timing differences, I consider that the Tribunal erred in law to the extent that it found that the mere fact that they had been brought into Deloitte's internal account for fiscal purposes thereby made them part of the net income of the partnership within the meaning of s 90 of the 1936 Act. Whether they were part of the net income was – and will again be – a question for the Tribunal. It will doubtless involve issues of fact which are not before the court.
- [59] The Commissioner's appeal may be disposed of more simply. I accept Ms Symon's submission that, when the Tribunal came to consider the settlement sum of \$500,000, it looked only at whether all or any part of that sum was the income of the taxpayer according to ordinary concepts...

[60] If it be the fact, as the Tribunal found, that the \$500,000 was an undissected lump sum, such fact may have provided a useful evidentiary link in the determination of what was the taxpayer's interest in the income of Deloitte in the 1998 year. That is not for the court to say. But that fact should not be regarded as dispositive for the purposes of s 92 of the 1936 Act. As I read the Tribunal's reasons, it did so regard that fact. In this respect also I consider that the Tribunal erred in law.

[61] For the above reasons, each of the appeals will be allowed. I propose to set aside the Tribunal's decision and to remit the taxpayer's application for a review of the Commissioner's assessment to the Tribunal for reconsideration in accordance with these reasons...

(4) ** Commissioner fails to identify the tax benefit in a Part IVA claim (Epov v C of T)

Source (xxxxxx) *Epov v Commissioner of Taxation* [2007] FCA 34
http://www.austlii.edu.au/au/cases/cth/federal_ct/2007/34.html

What was the issue?

Can the Commissioner issue an amended assessment when the taxpayer has an appeal against an objection decision before the Court?

Are payments by a company of dividends paid out of profits assessable income of the taxpayer under ss 108 and 109C?

Did Part IVA apply?

What was the outcome?

The taxpayer succeeded on the issues where he had supporting evidence but failed on other issues where there was no supporting evidence on the basis that he failed to satisfy the burden of proof. The Commissioner failed to establish the existence of a tax benefit.

The Court set aside the Commissioner's objection decision for each of the years of income and:

- ◆ in relation to the year ended 30 June 1996, allowed the taxpayer's appeal in respect of that year.
- ◆ in relation to the year ended 30 June 1997, remitted the matter to the Commissioner to be decided in accordance with the reasons for judgment but otherwise dismissed the appeal.
- ◆ in relation to the year ended 30 June 1998, remitted to the Commissioner to be decided in accordance with the reasons for judgment but otherwise dismissed the appeal.

What were the facts?

Prior to 11 September 2001 the taxpayer had not lodged tax returns for the years ended 30 June 1996, 1997 and 1998 (together 'years of income').

In essence the Commissioner alleged that the taxpayer was the recipient of payments made by ACCB Pty Ltd, many of which were made to other entities and that the taxpayer had not included those payments in his income.

ACCB was incorporated in Australia on 22 January 1993 with:

- ◆ the taxpayer as the managing director, chairman of the board and holder of one ordinary share during each of the years of income:
- ◆ other directors and shareholders being Mr Chuan-Qiang Dong ('Mr Dong') and Mr Christopher Kaye ('Mr Kaye').

ACCB used the taxpayer's then de facto spouse, Ms Leanne Kerin ('Ms Kerin'), as its bookkeeper and de facto financial controller.

Ms Kerin was also the bookkeeper and de facto financial controller for the taxpayer's personal financial affairs.

ACCB made several payments:

- ◆ In the in 1996 year a payment of \$71,000 to the taxpayer.
- ◆ In the 1997 year, a number of payments totalling \$2,496,165 to New Asia (5), Georgette (1) and to Epov (9);

- ◆ In the 1998 year, a number of payments totalling \$999,000 to Georgette (13).

New Asia was incorporated on 20 September 1995 in the Turks and Caicos Islands and was given an exemption from tax in that jurisdiction for 20 years.

Georgette was incorporated in Australia on 8 December 1992 and had two shares issued during the years of income, one owned by the taxpayer and the other owned by Ms Kerin.

Beresford Investments Limited ('Beresford') was incorporated on or about 2 May 1996 in the Republic of Vanuatu. The sole registered shareholder of Beresford throughout the years of income was Mr Hutton.

Viney was incorporated in Australia on 7 June 1996 and acted as the trustee of the Viney Family Trust ('Viney Trust').

Ms Helena Rule ('Ms Rule') was the accountant and tax agent for the taxpayer, ACBB, Georgette and Viney Pty Limited ('Viney') throughout the years of income.

On 11 September 2001 the Commissioner issued assessments (the "original assessments") for the years of income to the taxpayer including in the taxpayer's assessable income the amounts paid by ACCB including amounts paid to:

- ◆ New Asia International Import & Export Co Ltd ('New Asia');
- ◆ Georgette Constructions Pty Ltd ('Georgette'); and
- ◆ the taxpayer himself.

In reliance on section 44 and section 108 alternatively 109C alternatively Part IVA, the Commissioner included in the taxpayer's assessable income the following (not all of which remained in dispute):

Year	Section of the 1936 Act	Amount
1996	ss 108 and 44(1)	\$71,000
	ss 109C and 44(1)	\$71,000
	Alternatively ss 177F(1)(a), 177F(2) and 44(1)	
1997	ss 108 and 44(1)	\$2,496,165
	Alternatively ss 177F(1)(a), 177F(2) and 44(1)	\$1,530,565
	Alternatively ss 177F(1)(a), 177F(2) and 44(1)	\$500,000
1998	ss 108 and 44(1)	\$723,000
	ss 109C and 44(1)	\$276,000
	Alternatively ss 177F(1)(a), 177F(2) and 44(1)	\$999,000

The taxpayer's unsuccessfully objected against the assessments and later appealed to the court against the Objection Decisions for the years of income.

The dispute existed as follows:

- ◆ in relation to the 1996 year – there was no dispute as the taxpayer had returned the \$71,000;
- ◆ in relation to the 1997 year – the dispute was as to \$1,866,613 reflecting the increase in the taxpayer's taxable income over and above that assessed by the original assessment (\$629,552) by \$2,018,324;
- ◆ in relation to the 1998 year – the dispute was as to \$999,000 reflecting the increase in the taxpayer's taxable income over and above that returned (\$157,607).

On 22 July the Commissioner issued amended assessments

What was the decision?

- [29] During the 1997 year of income a total of \$465,600 was paid to the taxpayer by cheques drawn on ACBB's bank account. The taxpayer does not dispute that these payments were made by ACBB....
- [30] There is no evidence as to what the payments to the taxpayer were for – loans, dividends, reward for services rendered or otherwise. The corresponding cheque butts contain a number of cryptic descriptions but they are not evidence of the nature and character of the payments, any more than are the 'details' appearing in ACBB's general ledger report.

- [40] It is common ground that the sum of \$2,984,643 [paid to New Asia] was not paid to the taxpayer, however, the Commissioner contends that, by reason of the matters referred to in [35] – [39] above, it was, to the extent of \$300,000, \$100,000, \$200,000 and \$500,000, paid ‘on behalf of, or for the individual benefit of’ the taxpayer within par (b) of subs 108(1). The taxpayer disputes this contention.
- [45] Accepting for present purposes that the funds which came into Australia from Beresford to Viney, through Ms Rule’s trust account, were loans, from the findings of primary facts outlined above, it is possible to make consequential or secondary findings and to draw certain inferences from those findings of primary fact.
- [46] First, it seems clear that the funds which came into Australia from Beresford to Viney, through Ms Rule’s trust account, were sourced out of New Asia – payments which New Asia made to Beresford. Second, it seems clear, although perhaps not quite as clear, that the funds which New Asia used to fund Beresford were sourced out of ACBB – the payments which ACBB made to New Asia. In making this consequential or secondary finding it is not necessary to show identity of money; money is fungible and precise identity is just not possible. By source of funding I mean the source which enables or facilitates such funding.
- [47] ... the failure of the taxpayer to adduce any evidence – apart from bold assertions by the taxpayer in the witness box – as to what the ACBB payments to New Asia were for, make it impossible to be satisfied that they were not for the individual benefit of the taxpayer, with New Asia being nothing more than the taxpayer’s collection vehicle. If the taxpayer had adduced evidence which enabled one to be satisfied that the ACBB payments were for stock-in-trade as asserted by the taxpayer, this lack of satisfaction may not have arisen. It is not as if the adducing of such evidence imposed a difficult task; there were only two relevant payments by ACBB – one for \$920,565 on 5 July 1996 and the other for \$2,984,643 on 27 March 1997. This too impels the inference that the two payments were not for stock-in-trade otherwise evidence in support would surely have been adduced.

The 1996 Year of Income

- [61] The Commissioner’s argument never articulated how the payment of \$71,000 by ACBB to Guardian Realty in satisfaction of the deposit payable by Viney at the time it entered into a contract to purchase 17 Viney’s Lane, Dural could be a payment on behalf of, or for the individual benefit of, the taxpayer, such as to attract the application of s 108. I do not find that surprising because on the evidence no such argument is open. It is true that Viney purchased the Viney’s Lane property as trustee of the Viney Family Trust and that the taxpayer was a ‘general Beneficiary’ thereof, but that, without more, does not lead to the conclusion that the payment by ACBB of the deposit to the vendor’s agent at the time of exchange of contracts was a payment on behalf of, or for the individual benefit of, the taxpayer ... The Commissioner’s argument on this aspect cannot be accepted.
- [62] And the Commissioner’s argument in reliance, in the alternative, on the provisions of Part IVA, fares no better. The Commissioner’s written submissions carefully avoided any statement or analysis of the tax benefit alleged to have been obtained by the taxpayer in connection with the alleged scheme:...
- [63] I am therefore of the view that the taxpayer’s appeal in respect of the 1996 year of income should be upheld.
- [67] The payment by ACBB to Georgette on 20 June 1997 falls to be determined in the context of the ACBB payments to Georgette in the 1998 year of income. I am therefore of the view that the taxpayer’s appeal in respect of the 1997 year of income should be upheld to the extent of the exclusion of \$10,000 from his assessable income, but otherwise the appeal should be dismissed.
- [68] Not without some doubt, and in the case of certain payments only by way of inference, I have concluded that the payments which ACBB made to Georgette, one in the 1997 year of income and the remainder in the 1998 year of income, were by way of advances to which an obligation of repayment attached. Otherwise, the terms and conditions of such advances are not capable of being identified from the evidence. I have already referred to the evidence in this regard at [43] and [44] and my overall assessment of that evidence at [48].
- [69] There is no evidence to enable one to infer that the payments were made to discharge an obligation of the taxpayer to Georgette so that they might be said to be made on his behalf nor to enable one to infer that the payments were made for his individual benefit by reason, for example, of being used by Georgette for his benefit rather than for the benefit of Viney or Georgette itself.
- [70] I find support for the conclusion in [68] above in the fact that ACBB did make a large number of payments to the taxpayer direct: See [10] above. In other words, where they were intended to benefit the taxpayer himself, rather than some associated entity, the payments were made to the taxpayer. The best manifestation of this was the payment of \$103,000 made on 3 November 1997 – \$53,000 of which was paid to the taxpayer and

\$50,000 of which was paid to Georgette; the inference being that there was a real choice made as to the intended beneficiary of the payment.

- [71] It follows, in my view, that none of the payments made by ACBB to Georgette fall into the assessable income of the taxpayer by force of ss 108, 109C and 44(1) of the 1936 Act. It remains to consider the alternative basis of assessment, namely Part IVA. The difficulty here is the same as that referred to in [62] above, namely the lack of identification of any tax benefit obtained by the taxpayer in connection with the alleged scheme; in short, the absence of any evidence which would enable one to hypothesise that had the alleged scheme had not been entered into, it would be a reasonable expectation that ACBB, instead of making the payments to Georgette, would have made them to the taxpayer or to someone else on behalf of, or for the individual benefit of, the taxpayer. As I there said, that is where the argument began and that is where it finished. It cannot be accepted

COSTS

- [73] The taxpayer has been partially successful although quantitatively, over all years of income, largely unsuccessful. I think the appropriate order should be that the respondent pay one-third of the taxpayer's costs and that the taxpayer pay two-thirds of the respondent's costs.

(5) (Listed only) **Garrett v D C of T [2007] FCA 94 (8 February 2007)**

Source Month 02-2007-35

[Garrett v Deputy Commissioner of Taxation \[2007\] FCA 94 \(8 February 2007\)](#)

What was the issue?

Was an application by a taxpayer for an extension of time in which to appeal from a decision of a Federal Magistrate a competent application?

(6) (Listed only) **Nath v DC of T [2007] FCA 98 (7 February 2007)**

Source Month 02-2007 -36-

[Nath v Deputy Commissioner of Taxation \[2007\] FCA 98 \(7 February 2007\)](#)

What was the issue?

Was the taxpayer entitled to an extension of time for compliance with the bankruptcy notice issued by the Commissioner?

(b) Tribunals

(1) ** **Tax office bullies win - (The Taxpayers and C of T)**

Source Month 02-2007 - 37-

[The Taxpayers and Commissioner of Taxation \[2007\] AATA 45 \(2 February 2007\)](#)

What was the issue?

Was the Tribunal empowered to hear the taxpayers review applications?

What was the outcome?

The Tribunal lacked the power to entertain the application.

Does the outcome affect your firm's current practices?

The decision highlights the need:

- ◆ to be certain that there is a legal basis for any structure or entity that you advise or recommend that a client uses;

- ◆ to have very prescriptive terms of settlement or agreement when dealing with the Commissioner, particularly if tax office employee advocates rather than the more experienced litigators employed by the Australian Government Solicitor, are involved in drafting the terms of the settlement or agreement.

This is the second recent decision in which the taxpayers have misunderstood the terms of settlement to which they agreed (or perhaps the scope of those terms).

More recently, and closer to home, tax practitioners, using a unit trust structure, have found to their horror and subsequent expense, that the Tax Agents Board did not have power to register unit trusts, or their trustees, as tax agents.

What were the facts?

The taxpayers:

- ◆ are a married couple and Mr Taxpayer is an engineer have been engaged in a long-running dispute with the Commissioner;
- ◆ originally filed returns in relation to the 1996, 1997 and 1998 years of income on the basis that they conducted an engineering partnership together.

The Commissioner claimed the taxpayers contravened Part IVA in treating their income in this manner.

On the morning of the original hearing the parties:

- ◆ informed the Tribunal:
 - ~ they had become aware that the legislation governing professional engineers prohibited engineers from forming partnerships with non-engineers.
 - ~ the legislation had been overlooked in the preparation of the returns (and it would seem also by the tax office until that time);
- ◆ asked the Tribunal to proceed on the following basis:
 - ~ the taxpayer [sic] would withdraw the original assessments and the claim that he was in partnership.
 - ~ the taxpayer would submit amended returns for the years ended 30 June 1996, 1997 and 1998 on the assumptions that:
 - Mr Taxpayer's income included all of the fees paid to the partnership and
 - Mr Taxpayer employed his wife and paid her a reasonable wage that would give rise to a deduction.
- ◆ the parties agreed that a reasonable wage for Mrs Taxpayer was \$15 per hour.

What was the decision?

- [6] ... In due course, the Tribunal set aside the objection decisions and remitted the matter for reconsideration in accordance with its reasons:
- [7] The parties apparently engaged in a course of unproductive correspondence concerning the next steps in the process. Mr Taxpayer said he wanted to claim additional business expenses that were consistent with the Tribunal's reasons. Mrs Taxpayer also wanted to raise some new matters. The applicants did not file amended returns: they say they were put off by the Commissioner's apparent unwillingness to discuss the matter.
- [8] Amended assessments in relation to Mr Taxpayer's income were issued on 23 October 2003. The Commissioner says he had already made adjustments in relation to salary and wages, partnership distributions and interest income in accordance with the reasoning of the Tribunal. He says the Tribunal's reasons did not authorise him to deal with any other claims, and he was obliged to give effect to the Tribunal's decision promptly. Objections were lodged and Notices of Amended Assessment were issued on 10 February 2005. The applicants insist those assessments have not taken all of their claims into account ... They also say the Commissioner is not acting consistently with the terms of the Tribunal's remittal.
- [9] The applicants objected to the amended assessments and the Commissioner's objection decisions have now come before the Tribunal.

- [11] In this case, the amendments made to the assessments occurred following the Tribunal's earlier decision. The Commissioner took a view of the scope of the remit and went ahead and issued amended assessments on that basis without waiting for the applicants' amended assessments. It may be that the terms of the remittal should have been clearer, but that was what the parties agreed should occur. In retrospect, a more detailed indication of the matters to be considered would have avoided the present situation.
- [12] There appears to have been a breakdown in communication between the applicants and the Australian Tax Office following the Tribunal's earlier decision but this does not change the fact I am now faced with a situation where an amended assessment has been issued. Regardless of the process which led that to occur, s 14ZV restricts the right of objection, and therefore appeal, to matters that were the subject of the amendments. The matters raised by the applicants are not dealt with in those amendments, although I express no view on whether they should have been.

(2) ** Keeping up to date with client work and no client complaints insufficient for Board (Iacono and Tax Agents' Board of Victoria) [2007] AATA 1045 (6 February 2007)

Source Month 02-2007 - 38-

[Iacono and Tax Agents' Board of Victoria \[2007\] AATA 1045 \(6 February 2007\)](#)

What was the issue?

Was the Board's decision to suspend Mr Iacono's registration as a tax agent for a period of three months appropriate?

Was the appropriate time for ascertaining the relevant facts as to whether a person was a fit and proper person:

- ◆ the time of the original hearing; or
- ◆ the time of the current hearing?

What was the outcome?

The Tribunal found that:

- ◆ the appropriate time for determining the relevant facts as to whether a person was fit and proper to act as a tax agent was the time of the earlier hearing.
- ◆ it was appropriate to suspend Mr Iacono for 3 months.

Does the outcome affect your firm's current practices?

In view of the reasons articulated by the Member if you are acting for a tax agent whose registration is at risk you should reconsider any strategy involving delay in a hearing date.

The delay strategy is commonly employed in all punitive forums, to ensure the relevant to establish that the relevant person has had time to show that he no longer warrants such a severe censure as might have been forthcoming at an earlier hearing.

What was the relevant legislative provision?

Section 251K(2)(d) of the ITAA 1936 provides that the Board may suspend or cancel the registration of any tax agent upon being satisfied that the tax agent is not a fit and proper person to prepare income tax returns and transact business on behalf of taxpayers in income tax matters.

What were the facts?

On 17 February 2006 the AAT found that Mr Iacono was not, at the time the Tax Agents' Board of Victoria (the Board) exercised its discretion to suspend Mr Iacono's tax registration for a period of three months, a fit and proper person to prepare income tax returns and transact business on behalf of taxpayers' income tax matters. (see [2006] AATA 136)

Mr Iacono appealed aspects of the AAT findings to the Federal Court.

What was the decision?

The Federal Court remitted the matter to the Tribunal to determine the appropriate penalty.

- [7] Mr Athanasiou, a solicitor who appeared on behalf of Mr Iacono, submitted [in reliance on section 251BC], the time at which the Tribunal should assess the appropriate suspension was the date of the remittal hearing, 8 January 2007. ... However, when this matter was on appeal before the Federal Court, Finn J did not dispute the Tribunal's findings that at the time of the decision Mr Iacono was not a fit and proper person within the meaning of the Assessment Act. For that reason, in determining the appropriate suspension, if any, which should be applied to Mr Iacono, it is my view that the facts which existed as at 17 February 2006 must be determinative of the issue ... In any event, Mr Athanasiou did not tender any further evidence upon which he sought to rely for the purpose of this hearing. I am satisfied that the particular time referred to in s 251BC of the Assessment Act is the time when I made the finding that Mr Iacono was not a fit and proper person due to his conviction for taxation offences.
- [9] Mr Athanasiou submitted that I should take into account Mr Iacono's ill health at the time that he failed to complete his own income tax returns ... However, the medical problems of which Mr Iacono complained - high blood pressure, ulcers and sleep apnoea - were all conditions from which Mr Iacono suffered for many years prior to his conviction in 2005 for failure to lodge tax returns. There was no evidence at all that between 2001 and 2003, which were the years of the income tax returns in question, Mr Iacono suffered from any other transient illness which prevented him from being able to pay attention to his own tax affairs. In fact, as Mr Small (a solicitor representing the Tax Agents Board) submitted, it was unusual indeed that Mr Iacono complained that his ill health was responsible for him failing to complete his tax returns while, at the same time, there were no client complaints; and he managed, it appears, to complete all of the necessary work for his clients. In my view, that is a serious anomaly in Mr Iacono's argument and I am not prepared to accept his long-standing medical problems as having been the cause of his failure to lodge income tax returns for the 2001, 2002 and 2003 income years.
- [10] I accept Mr Athanasiou's submissions that if any suspension is warranted, it should not be imposed by way of penalty...
- [11] It is clear that Mr Iacono's registration should only be suspended if it is necessary to protect the public...
- [12] In my view, Mr Iacono's clients have a right to know that their tax agent may not enjoy the confidence of the Australian Taxation Office. They also have the right to know that Mr Iacono has been found not to be a *fit and proper person to prepare income tax returns and transact business* on their behalf in income tax matters ... It seems to me that the only way by which his clients would become aware of these facts is if Mr Iacono were given a period of suspension. The period of suspension should be of sufficient length to ensure that his clients become aware of his lack of fitness to act in their tax matters. For that to occur, it seems to me that a suspension of one month would be inadequate, particularly at this time of the year when tax activity is likely to be low. In my view, a period of three months is appropriate to ensure that Mr Iacono's lack of fitness to act in client's tax matters will be brought to their attention so that they are able to make an informed decision as to whether Mr Iacono should continue to act for them.

CONCLUSION

- [13] Having reconsidered this matter, I am of the view that it is appropriate that Mr Iacono be suspended for a period of three months from acting as a tax agent ...

(3) (Listed only) Central Highlands Wine Grape Project (Macpherson and C of T)

Source *Macpherson and Commissioner of Taxation [2007] AATA 1022 (22 January 2007)*

<http://www.austlii.edu.au/au/cases/cth/aat/2007/1022.html>

What was the issue?

Did Part IVA apply in relation to an investment in Central Highlands Wine Grape Project?

1.3 APRA, ASIC & ATO Interpretations

(a) Taxation Rulings & Draft Rulings

(1) ** TR 2007/D1 - Non-commercial losses - Commissioner's discretion

Source Month 02-2007 - 50

[TR 2007/D1 - Income tax: non-commercial business losses: Commissioner's discretion - Untitled Section \(As at 24 January 2007\)](#)

What issue does the ruling consider?

The Ruling provides guidelines on how the Commissioner's discretions contained in each of the limbs in section 35-55 may be exercised.

- ◆ in relation to paragraph 35-55(1)(a), referred to as the special circumstances limb, - the types of special circumstances that will attract the exercise of the discretion;
- ◆ in relation to paragraph 35-55(1)(b), known as the lead time limb: -
 - ~ the meaning of '**because of its nature**';
 - ~ the nature of '**objective expectation**'; and
 - ~ determining the '**period that is commercially viable for the industry concerned**'.

What was the background to the ruling?

Section 35-10 is an integrity measure which defers losses from business activities unless they satisfy a test. The rule is subject to an exception if the Commissioner exercises the discretion in subsection 35-55(1).

What is the relevant legislative provision?

35 55 Commissioner's discretion

- (1) *The Commissioner may decide that the rule in subsection 35-10(2) does not apply to a *business activity for one or more income years if the Commissioner is satisfied that it would be unreasonable to apply that rule because:*
- (a) *the business activity was or will be affected in that or those income years by special circumstances outside the control of the operators of the business activity, including drought, flood, bushfire or some other natural disaster; or*
- Note: This paragraph is intended to provide for a case where a business activity would have satisfied one of the tests if it were not for the special circumstances.*
- (b) *the business activity has started to be carried on and, for that or those income years:*
- (i) *because of its nature, it has not satisfied, or will not satisfy, one of the tests set out in section 35 30, 35 35, 35 40 or 35 45; and*
- (ii) *there is an objective expectation, based on evidence from independent sources (where available) that, within a period that is commercially viable for the industry concerned, the activity will either meet one of those tests or will produce assessable income for an income year greater than the deductions attributable to it for that year (apart from the operation of subsections 35-10(2) and (2C)).*
- Note: This paragraph is intended to cover a business activity that has a lead time between the commencement of the activity and the production of any assessable income. For example, an activity involving the planting of hardwood trees for harvest, where many years would pass before the activity could reasonably be expected to produce income.*
- (2) *The Commissioner may decide that the rule in subsection 35 10(2B) does not apply to a *business activity for an income year if the Commissioner is satisfied that it would be unreasonable to apply that rule because special circumstances of the kind referred to in paragraph (1)(a) of this section prevented the activity from starting.*

Note: This subsection is intended to provide for a case where a business activity would have begun to be carried on and satisfied one of the tests if it were not for the special circumstances.

What was the ruling?

The tax office view in relation to:

- ◆ to the special circumstances limb is that:
 - ~ Sections 35-30, 35-35, 35-40 and 35-45 set objective tests, at least one of which should be satisfied by a business activity for it to be regarded as commercial for the purposes of the Division and the discretion provided should be interpreted in this context;
 - ~ The discretion is not intended to apply where a business activity makes a loss because of factors which can apply to any business and which do not affect the ability of the activity to satisfy one of the four tests;
 - ~ The discretion is intended to be available for a commercial business activity that has failed, or objectively is expected to fail for a period of time, to satisfy one of the tests in Division 35 for reasons outside the control of the operator;
 - ~ Ordinarily, special circumstances are those which have materially affected the business activity, causing it to not satisfy one of the four tests in Division 35;
 - ~ In other cases, where the business activity would have failed a test in any event because it is still within the period that is commercially viable for the industry concerned, the special circumstances may extend the time within which that particular business activity could objectively be expected to pass a test;
 - ~ The discretion can be exercised in income years after the one in which the special circumstances occurred if the effects of those special circumstances on a business activity continue such that the business activity is prevented from satisfying one of the tests in that later income year.
- ◆ the lead time limb is that:
 - ~ For the failure to satisfy one of the four tests to be 'because of its nature', the failure must be because of some inherent characteristic that the taxpayer's business activity has in common with other business activities of that type (see *Federal Commissioner of Taxation v. Eskandari* (2004) 134 FCR 569; [2004] FCA 8 (Eskandari) at FCA 32);
 - ~ Where this initial period has passed, any continuing failure to satisfy a test will be for reasons outside of subparagraph 35-55(1)(b)(i), and the discretion will not be exercised (unless the special circumstances limb is satisfied);
 - ~ The Commissioner must be satisfied that an objective expectation exists, for each of the year(s) in question, that the business activity will satisfy a test or produce a tax profit within a period that is commercially viable for the industry concerned;
 - ~ As not all business activities will commence immediately at the start of an income year. A tolerance of at least one year beyond the income year otherwise identified from the relevant material as the end of this period will be applied;
- ◆ the interaction between the two limbs when the lead time limb may also apply to a business activity affected by such circumstances during a time when 'because of its nature' it is not able to satisfy a test, but this time is still 'within [the] period that is commercially viable for the industry concerned' – it will not be appropriate to enquire whether or not, had the special circumstances not existed, the activity would have satisfied a test, as paragraph 35-55(1)(b) recognises that there are reasons outside the control of the operators of the activity why, regardless of the existence of the special circumstances, this would not have occurred.

(b) Determinations & Draft Determinations

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

(1) ** TD 2007/D1 ~ Does income defined to include dividends include a deemed dividend?

Source (Month 02-2007 – Docket 51) TD 2007/D1

[TD 2007/D1 - Income tax: does the notional assessable income of a controlled foreign company include an amount deemed to be a dividend under section 47A of the Income Tax Assessment Act 1936? \(As at 31 January 2007\)](#)

What issue does the ruling consider?

Does the notional assessable income of a CFC include an amount deemed to be a dividend under section 47A?

What effect will this determination have on your firm's current practices?

The tax office examples show neatly how some passive income issues (and perhaps other equally unpleasant outcomes) can be avoided by the use of intra group transfers, subject to Part IVA of course.

What is the relevant legislative provision?**Section 446****Passive income**

- (1) *Subject to this Division, for the purposes of this Part, the following amounts are passive income of a company of a statutory accounting period:*
- (a) *dividends (within the meaning of section 6) paid to the company in the statutory accounting period;*
 - (b) *unit trust dividends (within the meaning of Division 6B or 6C of Part III) paid to the company in the statutory accounting period;*
 - (c) *a distribution made to the company where the distribution is taken to be a dividend because of section 47;*
 - (d) *tainted interest income derived by the company in the statutory accounting period;*
 - (e) *annuities derived by the company in the statutory accounting period;*
 - (f) *tainted rental income derived by the company in the statutory accounting period;*
 - (g) *tainted royalty income derived by the company in the statutory accounting period;*
 - (h) *an amount derived by the company in the statutory accounting period as consideration for the assignment, in whole or in part, of any copyright, patent, design, trade mark or other like property or right;*
 - (j) *income derived from carrying on a business of trading in tainted assets;*
 - (k) *net gains that accrued to the company in the statutory accounting period in respect of the disposal of tainted assets;*
 - (m) *net tainted commodity gains that accrued to the company during the statutory accounting period;*
 - (n) *net tainted currency exchange gains that accrued to the company during the statutory accounting period.*

What was the determination?

The tax office view is that:

- ◆ broadly, section 47A applies when a CFC resident in an unlisted country provides (directly or indirectly) a specified benefit to an associated entity.
- ◆ an amount is included in a CFC's notional assessable income only if it is an amount to which either:
 - ~ section 384 applies (in respect of a CFC resident in an unlisted country); or
 - ~ section 385 applies (in respect of a CFC resident in a listed country);
- ◆ an amount deemed to be a dividend under section 47A of the ITAA 1936:

- ~ is not a dividend within the meaning of section 6 so that section 47A only applies to distributions from a company that are not otherwise a dividend;
- ~ will not have satisfied the requisite conditions in section 6;
- ~ is not included in notional assessable income under either:
 - section 384 (in respect of an unlisted country controlled foreign company (CFC)); or
 - section 385 (in respect of a listed country CFC).
- ◆ subsection 446(1) of the ITAA 1936, which identifies passive income, refers to 'dividends (within the meaning of section 6)' and amounts deemed to be dividends under section 47, rather than simply referring to 'dividends', suggesting that the definition of 'passive income' was only intended to cover those deemed dividends specifically listed, rather than all amounts deemed to be dividends for the purposes of the ITAA 1936.

TR 2001/14 has been amended by removing discussion regarding the operation of the Commissioner's discretion.

(c) ** Class Rulings – New

CR 2006/125	Income tax: scrip for scrip roll-over: exchange of ordinary shares in The Australian Gas Light Company under the AGL Scheme of Arrangement: buy-back of converting shares 20 December 2006
CR 2006/126	Income tax: Shell Group - Employee Performance Share Plan 20 December 2006
CR 2006/127	Income tax: Becton Property Group: Becton Property Group Limited and Becton Property Trust Stapled Security Initial Public Offering 20 December 2006
CR 2006/128	Income tax: Becton Property Group Restructure: Becton Property Group Limited Share and Becton Property Trust Unit Stapling Arrangement 20 December 2006
CR 2006/129	Income tax: Qantas Deferred Share Plan - 2004/05 Performance Rights 20 December 2006
CR 2006/130	Income tax: Qantas Deferred Share Plan - 2005 Performance Rights 20 December 2006
CR 2006/131	Income tax: Qantas Deferred Share Plan - 2005 Performance Shares 20 December 2006

CR 2006/132	Income tax: treatment of payments received under the Securing our Fishing Future package:[atonl] [bull] Business Exit Assistance (Round 2) - Fishing Concession Voluntary Surrender[atonl] [bull] Boat Scrapping Incentive[atonl] [bull] Business Advice Assistance 20 December 2006
CR 2006/133	Income tax: proposed return of capital by Village Roadshow Ltd 20 December 2006
CR 2007/1	Income tax: Shell Group Restructure - Employee Option Plans - discounts assessed prior to restructure 10 January 2007
CR 2007/2	Income tax: leave - Deferred Salary Arrangements for employees of the City of Canning in Western Australia 10 January 2007
CR 2007/3	Income tax: capital gains: mandatorily converting preference shares: St. George Bank Limited 10 January 2007

(d) Class Rulings - Addenda/Withdrawn/Errata

Nil

Source: (866986)

(e) Product Rulings – New

PR 2006/163	Income tax: 2007 Macgrove Project (Early Growers) 20 December 2006
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PR 2006/164	Income tax: Gunns Plantations Limited Winegrape Project 2007 - Early Growers 20 December 2006
PR 2006/165	Income tax: ITC Diversified Forestry Project Stage 1 (2007) 20 December 2006

Source (866990)

(f) ATO ID's –

(1) Assessability

2007/9	Assessability of employment income received by a South African resident taxpayer
2007/10	Assessability of foreign income received by an Australian resident performing research in the USA
2007/21	Assessability of an Australian state government pension received by a Sri Lankan resident
2007/22	Assessability of an allocated pension from an Australian superannuation fund received by a Sri Lankan resident
2007/23	Assessability of an Australian sourced interest income received by a Sri Lankan resident
2007/24	Assessability of an Australian sourced eligible termination payment paid to a Singaporean resident
2007/25	Assessability of a benefit in kind paid by a former United Kingdom employer to an Australian resident

(h) Practice Statements

(1) ** PS LA 2007/2 ~ When the tax office will resort to spin doctor mode

Source Month 02-2007 – Docket 67-

[PS LA 2007/2 - Management of Decisions of Courts and Tribunals](#)

What issue does the Practice Statement consider?

How decisions of Courts and Tribunals are to be circulated to and considered by the appropriate stakeholders within the appropriate timeframes.

How risk arising from the decisions of Courts and Tribunals are analysed and strategically managed.

What will the Commissioner's practice in relation to the issue?

The tax office practice in relation to the issue will reflect the roles of various sections within the tax office.

- ◆ The Legal Services Branch will:

2007/26	Assessability of bonus received by an Australian resident working in Saudi Arabia
2007/27	Assessability of periodic insurance payments received by an Australian resident from Denmark

(2) DTA

2007/20	United States Convention: whether packing machines are 'substantial equipment'
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(3) Capital allowances

2007/11	Capital Allowances: depreciating asset - composite asset - open-cut mine pit haulage road
2007/12	Capital Allowances: depreciating assets - open-cut mine benches, batters, berms and catchberms
2007/13	Capital Allowances: depreciating asset - composite asset - all open-cut mine pit haulage roads
2007/14	Depreciating Assets: composite item - open-cut mine pit

(g) Withdrawals

2003/68 W	Commercial debt forgiveness: private company forgives shareholder debt
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Source: Month 02-2007 - 12

- ~ provide advice to key Tax Office stakeholders about the progress of litigation including advice that a decision is about to be handed down;
 - ~ provide within specified timeframes to key Tax Office stakeholders copies of the decision, the Decision Summary, opinions of counsel and Tax Counsel, and the Adverse Decision Report and the Decision Impact Statement if necessary;
 - ~ confer with key stakeholders at Strategic Internal Litigation Committees (SILCs)^{F4} which will be convened at critical stages of the progress of the litigation; and
 - ~ ensure that a strategy to manage any risks arising from the decision is agreed by the litigation team, and that responsibility for carrying out each task in the strategy has been allocated and recorded.
- ◆ The relevant Business Service Line will:
- ~ manage the mitigation strategies for the litigation, including the media strategies, particularly the adverse implications of the decision;
 - ~ escalate emerging priority technical issues (PTIs) to the Tax Counsel Network (TCN) or the Centres of Expertise as soon as they become aware of the issue; and
 - ~ if necessary, in collaboration with Law Sub-plan stakeholders, provide timely advice of the progress and implications of strategically important litigation^{F5} to the ATO executive, the Treasurer, the Minister for Revenue and the Assistant Treasurer and/or to Treasury.
- ◆ If Tax Counsel Network is involved, the relevant tax counsel will:
- ~ prepare recommendations to appeal (or not appeal) adverse decisions of the Tribunal and Courts;
 - ~ provide input into the development of any media and mitigation strategy; and
 - ~ approve the Decision Impact Statement before it is published.

2 GST

2.1 Politicians, Boards & Statutory Authorities [NIL]

2.2 Courts & Tribunals [NIL]

2.3 APRA, ASIC & ATO Interpretations

(a) Rulings & Draft Rulings

(1) ** GSTR 2007/1 ~ What are GST qualifying communal facilities in relevant villages

Source Month 02-2007 – 52 previously released in draft form as GSTR 2006/D3

[GSTR 2007/1 - Goods and services tax: when retirement village premises include communal facilities for use by the residents of the premises \(As at 7 February 2007\)](#)

What issue does the ruling consider?

When do retirement village premises include communal facilities for use by the residents of the premises so as to satisfy the GST definition of "retirement village"?

What was the background to the ruling?

The benefit of falling within the GST definition of retirement village is that some supplies to aged or disabled residents of retirement villages of accommodation, services related to accommodation, and meals are GST-free.

The definition of "retirement village" for GST purposes requires that the retirement village premises include communal facilities for use by its residents ("the communal facilities requirement"). The GST Act does not define the term "communal facilities".

This draft Ruling explains when retirement village premises include communal facilities for use by the residents of the premises as required by paragraph (c) of that definition of retirement village.

GSTR 2000/20 and GSTR 2003/3 set out the Commissioner's view regarding what constitutes residential premises.

What is the relevant legislative provision?

A New Tax System (Goods And Services Tax) Act 1999:

Section 38-260 Supplies of retirement village accommodation etc.

A supply is GST-free if:

- (a) *the supplier is a charitable institution, or a trustee of a charitable fund, that operates a *retirement village; and*
- (b) *the supply is made to a resident of the retirement village; and*
- (c) *the supply is:*
 - (i) *a supply of accommodation in the retirement village, or a supply of a service related to the supply of the accommodation; or*
 - (ii) *a supply of meals.*

Section 95-1 Dictionary

retirement village: premises are a retirement village if:

- (a) *the premises are *residential premises; and*
- (b) *accommodation in the premises is intended to be for persons who are at least 55 years old, or who are a certain age that is more than 55 years; and*
- (c) *the premises include communal facilities for use by the residents of the premises;*

but the following are not retirement villages:

- (d) *premises used, or intended to be used, for the provision of residential care (within the meaning of the Aged Care Act 1997) by an approved provider (within the meaning of that Act);*
- (e) **commercial residential premises.*

What was the ruling?

The tax office view is that:

- ◆ residential premises within the context of a retirement village include:
 - ~ the land on which a residential building(s) is constructed; and
 - ~ the surrounding land that actually or substantially contributes to:
 - the enjoyment of the building(s); or
 - to the fulfilment of the building's purposes as a residence (whether or not on separate titles).
- ◆ a retirement village residential premises includes communal facilities even if the communal facilities are themselves are not residential premises if:
 - ~ the communal facilities are physical; and
 - ~ the communal facilities are:
 - within, attached to or connected to the residential building(s); or
 - constructed on the surrounding land that actually or substantially contributes to the enjoyment of the building(s) or to the fulfilment of its purposes as a residence.
- ◆ services provided to residents are not physical and therefore do not meet the communal facilities requirement;
- ◆ off-site facilities are not communal facilities that are within the residential premises of the retirement village and therefore do not meet the communal facilities requirement .
- ◆ communal facilities are those facilities that are intended and capable of group use by the residents for recreational, sporting, social, religious, or other similar uses that enhance a sense of community among the residents;
- ◆ whether a building is intended and capable of group use by the residents for recreational, sporting, social, religious, or other similar uses that enhance a sense of community among the residents is determined objectively having regard to the primary function or purpose of the facilities as evidenced by their physical characteristics;
- ◆ in the retirement village context communal facilities would ordinarily include the following types of facilities:
 - ~ a library;
 - ~ a dining room;
 - ~ a recreation room;
 - ~ a chapel;
 - ~ an equipped gymnasium and outdoor recreational and leisure facilities such as a tennis court, a swimming pool or a barbeque area.
- ◆ while the residents must be able to use the communal facilities, the facilities need not necessarily be for the exclusive use of the residents (for example, the recreation room might be used for a few hours a week by a visiting hairdresser). Further, there is no requirement that the residents actually use the communal facilities provided the facilities are made available for their use. It follows that as the communal facilities must be made available for use by the residents, the facilities must be in existence rather than merely planned to satisfy the communal facilities requirement . However, where the communal facilities are temporarily unavailable the communal facilities requirement can still be met.

- ◆ the following facilities are not ordinarily communal facilities in the retirement village context:

(b) reception areas;

- ~ pathways, gardens;
- ~ driveways and landscaping;
- ~ any incidental use of such facilities for a group activity would not qualify them as communal facilities;

- ◆ facilities that are for the resident's own use in their individual units or apartments, such as a television antenna, internet connections or call button facilities, are also not communal facilities.

(c) Determinations & Draft Determinations

(d) New ATO ID's

2007/15	GST and right to a share of net profit in return for a contribution of money - not a credit arrangement
2007/16	GST and right to a share of net profit in return for a contribution of money - not an interest in a debt
2007/17	GST and right to a share of net profit in return for a contribution of money - not a supply of money
2007/18	GST and right to a share of net profit in return for a contribution of money - a taxable supply

2007/29	GST and contingent debt
2007/31	GST and barter scheme/trade exchanges: making a taxable supply of trade credits
2007/32	GST and transaction information supplied by an ADI - client's own transaction 16 February 2007
2007/33	GST and transaction information supplied by an ADI - not relating to a client's own transaction

Source: Month 02-2007-14

(e) Practice Statements

(1) ** PS LA 2007/3 ~ Remission of penalty - non compliant tax invoices of adjustment notes

Source Month 02-2007 – Docket 68

[PS LA 2007/3 - Remission of penalty for failure to comply with obligations in relation to ta...](#)

What issue does the Practice Statement consider?

Guidelines for the remission of a penalty imposed under section 288-45 or section 288-50 of Schedule 1 to the Taxation Administration Act 1953 for:

- ◆ failure to issue a tax invoice or adjustment note as required by GST legislation; or
- ◆ both an entity and its agent issuing separate tax invoices or separate adjustment notes contrary to the requirements of GST legislation.

What is the relevant legislative provision?

The administrative penalty regime in Part 4-25 of Schedule 1 to the Administration Act imposes uniform penalties for certain acts or omissions which relate to matters arising under taxation laws consisting of three distinct components:

- ◆ penalties relating to statements and schemes;
- ◆ penalties for late lodgment of returns and other documents; and
- ◆ penalties for failing to meet other taxation obligations.

What will the Tax Office practice be in relation to the issue?

The Tax Office practice in relation to the issue will be as follows:

- ◆ A decision to remit all or part of the penalty under subsection 298-20(1) should be made with regard to the following objectives of the penalty regime:
 - ~ a decision should be made based on the individual circumstances of the case;
 - ~ a decision should be consistent with the principles of the taxpayers' charter and the compliance model;
 - ~ to promote consistent treatment in respect of the penalty imposed – a penalty imposed should not be remitted without just cause, arbitrarily or as a matter of course;
 - ~ a decision to remit in part or in full or not to remit at all must be made in good faith and be reasonable;
 - ~ the discretion to remit penalties should be administered in a fashion to affect improvements in future compliance by taxpayers and to provide certainty for those taxpayers.
- ◆ In all cases where an entity is liable to pay an administrative penalty, remission of the penalty should be considered;
- ◆ Generally the entity should be provided with an opportunity to comply with tax invoice or adjustment note obligations prior to making a remission decision and a tax officer is to:
 - ~ explain to the entity its obligations;
 - ~ provide information on how to comply with these obligations; and
 - ~ allow a reasonable time to comply.

(2) ** PS LA 2007/4 ~ Remission of penalty for failure to register or deregister

Source (Month 02-2007 Docket 69) PSLA 2007/4

[PS LA 2007/4 - Remission of penalty for failure to comply with GST registration obligations.](#)

What issue does the Practice Statement consider?

This practice statement:

- ◆ explains that failure to comply with registration obligations as required under the GST Act will give rise to an administrative penalty
- ◆ provides guidance on how and when remission of the penalty is warranted, and
- ◆ expands upon discussion of this matter in paragraph 24 of Law Administration Practice Statement PS LA 2000/9 and paragraphs 56 and 57 of Law Administration Practice Statement PS LA 2002/8.

What was the background to the Practice Statement?

The administrative penalty regime consists of three distinct components:

- ◆ penalties relating to statements and schemes;
- ◆ penalties for late lodgement of returns and other documents; and
- ◆ penalties for failing to meet other taxation obligations.

What is the relevant legislative provision?

Section 288-40 imposes a penalty of 20 penalty units if an entity:

- ◆ fails to apply to register for GST when required by the GST Act, or
- ◆ if it is registered, to apply to cancel a GST registration as required. These penalties may be remitted under subsection 298-20(1).

What will the Tax Office practice in relation to the issue?

The Tax Office practice in relation to the issues considered will be as follows:

- ◆ A decision to remit all or part of the penalty under subsection 298-20(1) should be made with regard to the following objectives of the penalty regime:
 - ~ a decision should be made based on the individual circumstances of the case;
 - ~ a decision should be consistent with the principles of the taxpayers' charter and the compliance model;
 - ~ penalties imposed should not be remitted without just cause, arbitrarily or as a matter of course;
 - ~ the decision to remit in part or full or not to remit at all is made in good faith and is reasonable;
 - ~ all relevant matters and no irrelevant matters must be taken into consideration in making the decision.;
- ◆ the discretion to remit penalties should be administrated in a fashion to affect improvements in future compliance by taxpayers and to provide certainty for those taxpayers;
- ◆ in all cases where an entity is liable to pay an administrative penalty, remission of the penalty should be considered.
- ◆ generally the entity should be provided with an opportunity to comply with its registration obligations prior to making a remission decision and a tax officer is to:
 - ~ explain to the entity its registration obligations;
 - ~ provide information on how to comply with these obligations; and
 - ~ allow a reasonable time to comply.

3 STATE AND TERRITORY TAXES

3.1 Politicians, Boards & Statutory Authorities

Nil

3.2 Courts & Tribunals

Nil

3.3 State and Territory Revenue Office Interpretations

Nil

- (a) New South Wales**
- (b) Northern Territory**
- (c) Queensland**
- (d) South Australia**
- (e) Victoria**
- (f) Western Australia**

4 FBT

4.1 Politicians, Boards & Statutory Authorities - Policy Statements

Nil

4.2 Courts & Tribunals

(1) ** Pinball machines – is there an obligation to pay duty in SA? (Seneca Exploration v C of ST)

Source (Month 02-2007 – 34) ~ Seneca Exploration Pty Ltd T/A Dickeson's Amusements v Commissioner of State Taxation [2007] SASC 13 (19 January 2007)

<http://www.austlii.edu.au/au/cases/sa/SASC/2007/13.html>

What was the issue?

Was the taxpayer carrying on a rental business such that they were required to be registered under section 31D?

What was the outcome?

The court concluded that Seneca was required to be registered and that duty was payable.

Does the outcome affect your firm's current practices?

What were the facts?

Seneca owned amusement machines and carried on two businesses:

- ◆ one of which involved Seneca:
 - ~ placing amusement machines for use in premises owned and occupied by others;
 - ~ collecting money from the machines and remitting a fee to the proprietor of the premises or alternatively the proprietor collecting the money, retaining the amount of the fee, and forwarding the balance to Seneca ("the relevant business").
- ◆ The second of which involved Seneca hiring machines for a hiring fee to individuals for use at parties conducted by the individuals ("the party hire business").

[The wording of the relevant license agreement is set out in the decision.]

Following discussions between the Commissioner and Seneca, the Commissioner claimed that the carrying on of the relevant business and the party hire business required Seneca to register with the Commissioner and to pay duty in accordance with the provisions of Section 31I of the Stamp Duties Act.

On 25 July 2003, the Commissioner assessed stamp duty payable by Seneca Exploration Pty Ltd trading as Dickeson's Amusements ("Seneca").

Seneca:

- ◆ acknowledged that it was obliged to register in respect of the party hire business and to pay duty but denied that it was obliged to register and pay duty with respect to the relevant business.
- ◆ objected and sought a redetermination from the Treasurer of the State of South Australia.

On 8 March 2006, the Treasurer confirmed the Commissioner's assessment.

Seneca appealed against the assessment.

What was the relevant legislative provision?

Division 2 of Part 3 of the Stamp Duties Act imposes duty upon certain receipts of dutiable rental businesses by requiring such a person to be registered under section 31D.

Once a person is registered they incur:

- ◆ an obligation to lodge a monthly statement setting out the total amount received during the previous month in respect of the rental business.
- ◆ an obligation to pay duty on the amount returned in the statement at a prescribed rate.

A dutiable rental business is defined to include a rental business conferring rights to the possession or use of goods under a contractual bailment as that term is defined.

Section 31B provides:

In this Division, unless the contrary intention appears--

...

contractual bailment means a contract or agreement under which a person who owns, or is entitled to the possession of, goods confers on another a right to possession or use of the goods, and includes a hire-purchase agreement, but does not include a contract or agreement conferring a right to the possession or use of goods, or providing for the sale of goods, incidentally to a lease of, or licence to occupy, or the sale of, land;

What was the decision?

Consideration of Issues Arising

- [18] The feature of a rental business to be considered in the present case, having regard to the statutory definitions, is whether the business gives the right to possess or use goods under a "contractual bailment ...
- [20] The rights of Seneca and the proprietor of the premises in which the machines may be placed were regulated by a form of written agreement ... It is to be acknowledged that the agreement is in the form of a licence by which the proprietor grants to Seneca an exclusive licence to operate amusement machines on the premises.
- [21] ... Seneca's primary contention is that the agreement is not a contractual bailment because, it is said, it does not grant the proprietor any right to possession or use of the machines.
- [22] This contention should be rejected. The definition of a "contractual bailment" is broad. It readily encompasses commercial arrangements which fall outside of a typical rental agreement between a retail store and its customer ...
- [25] It is necessary to determine whether or not the agreement, as a matter of substance, confers a right of "possession" or "use" in respect of the relevant goods.
- [26] The word "use" in Division 2 of Part 3 of the Stamp Duties Act is of wide import and makes no distinction between "active" and "passive" use ...
- [27] The word "use" generally has a wide meaning ...
- [28] The word "use" is not confined to physical use. It extends to and includes a "purpose, or object or end, especially of a useful or advantageous nature ...
- [29] "Use", unlike possession, does not require exclusivity and does not preclude simultaneous use by others. The physical use of goods by one person does not preclude the conferral of use upon another.
- [30] Goods may be applied to a person's use by making them available to that person's customers.
- [32] The agreements entered into by Seneca relevantly confer use of amusement machines upon the proprietor. The "use" so conferred is the right to utilise the machines for the purpose of generating revenue for the proprietor's business. The conclusion that a proprietor will "use" the machines to generate income for their business is supported by the fact that the proprietor is entitled to up to 40% of the takings of the machines, with the arrangement being described as a "profit share" in the agreement. The use granted to the proprietor by Seneca is exercised contemporaneously with Seneca's own "use" of the machines for income generation purposes. It is irrelevant that the machines are not the core (or even a substantial part) of a proprietor's business.
- [33] For the above reasons, the conclusion should be reached that Seneca is conducting a rental business and as a result has an obligation to be registered.

(2) * Commissioner seeks to add reasons for decision on duty on Pentridge Prison land (Harry One Pty Ltd & Anor v C of SR)

Source (Month 02-2007 – 41)

[Harry One Pty Ltd & Anor v Commissioner of State Revenue \[2007\] VSC 13 \(14 February 2007\)](#)

What was the issue?

In an appeal against the Commissioner's disallowance of the taxpayer's objection was the Commissioner entitled to leave to rely upon an additional ground that the true value of the dutiable property was more than \$8.6 million?

Would adding the additional ground effectively constitute a reassessment of the duty by the Commissioner?

Was the Commissioner out of time to make a reassessment?

What was the outcome?

The court granted the Commissioner leave to amend the reasons for the Commissioner's determination.

Does the outcome affect your firm's current practices?

The reasons for the decision highlight the client's tardiness. It would have been interesting to see whether the court would have granted the Commissioner's application if the client had not been tardy in its response.

What was the relevant legislative provision?

Under s109 of the Taxation Administration Act 1997 ("the Act"), the Commissioner's case on an Appeal is limited to the grounds on which the taxpayers' objection to assessment was disallowed, unless the court otherwise orders.

What were the facts?

The taxpayers were two members of a group of developers who agreed to purchase and develop the former Pentridge Prison site under a joint venture agreement.

Following a dispute between the original intending developers part of the Pentridge Prison site known as Lot J was transferred on 5 April 2002 to the taxpayers as tenants in common for consideration described as "an agreement to partition dated 5 December 2000".

In early July 2002, the taxpayers lodged the transfer with the Commissioner for assessment to duty, together with a statutory declaration which referred to a valuation of the property for stamp duty purposes of \$5,150,000.

On 14 October 2002, the Commissioner issued a notice of assessment pursuant to s8(1) of the Act, assessing duty in the sum of \$283,250, based on the taxpayers' valuation.

The taxpayers paid the duty on 14 November 2002.

On 11 December 2002, the taxpayers lodged a notice of objection challenging both the validity and the correctness of the assessment on various grounds including the dutiable value on which duty was assessed.

The taxpayers argued that if the transaction is dutiable and not exempt (both of which are contested), then the dutiable value of the property was "nil or an amount less than \$5,150,000".

On 9 May 2003 the Commissioner, after receiving certain additional information that he had requested issued a notice of determination:

- ◆ rejecting arguments that the transfer was exempt under either s27 or s36 of the Act;
- ◆ accepting that the unencumbered value of Lot J was \$5,150,000, on the basis of the taxpayers' valuation report.

On 2 July 2003, the taxpayers requested that their objection be referred to the Court for hearing as an Appeal.

The Commissioner took a little over a year to refer the matter to the Court and on 6 October 2004 advised the taxpayer that he might wish to produce additional valuation evidence.

The Commissioner subsequently filed an application seeking leave to rely on further ground in addition to those he relied upon in disallowing the taxpayers' objection, namely, that the true value of the dutiable property was in fact more than \$8.6 million.

What was the decision?

Does s9(3) limit the operation of ss109 and 112?

[14] The Commissioner's present application is made under s109 of the Act, which provides as follows:

Grounds of review or appeal

On a review or an appeal –

- (a) *the taxpayer's case is limited to the grounds of the objection; and*
- (b) *the Commissioner's case is limited to the grounds on which the objection was disallowed*

– unless the Tribunal [being VCAT, the Victorian Civil and Administrative Tribunal] or Court otherwise orders.

[17] The taxpayers argue that in seeking to rely on a new ground of disallowance which might lead to an increase in tax liability, the Commissioner is "in reality" carrying out a reassessment. Accordingly, they argue that ss109 and 112 must be read subject to s9(3) of the Act, which provides as follows:

The Commissioner cannot make a reassessment of a tax liability more than 3 years after the initial assessment of the liability, unless –

- (a) *the reassessment is to adjust tax to give effect to a decision on an objection, review or appeal as to the initial assessment; or*
- (b) *at the same time the initial assessment or a reassessment was made, all the facts and circumstances affecting the tax liability under the relevant taxation law of the person in respect of whom the assessment or reassessment was made were not fully and truly disclosed to the Commissioner; or*
- (c) *the reassessment is authorised to be made more than 3 years after the initial assessment by another taxation law.*

[18] It is common ground that none of the exceptions in (a) to (c) apply, and that if s9(3) does apply, the 3 year period would have expired in October 2005...

[19] I agree with the Commissioner that s9(3) has no application here, because reliance on the new ground in the appeal will not involve the making of "a reassessment" ... Section 9 contains a specific administrative procedure, which may be used by the Commissioner on one or more occasions, and which may result in an increase or decrease in tax liability. As discussed below, it is quite different to the varying of an assessment by order of this court or VCAT, even though the final monetary result in each case may be the same.

Construction of s109

[29] The expression "unless the court otherwise orders" is facultative, empowering the court (or VCAT) to allow the parties to alter their cases...

[31] Here, the legislature has given the court and VCAT a broad power to permit either the taxpayer or the Commissioner to be relieved from the hardship of being bound by their original arguments. There is nothing in the legislative history or context of s109 which would require the court's broad power to be read down in some way.

Discretionary matters

Alleged valuation flaws

[32] ... the merits of the various valuations are matters to be determined at the hearing of this appeal, not on an application such as this.

Delay

[34] True it is that the Commissioner delayed for about 15 months in setting down the appeal, without satisfactory explanation. But since the appeal was set down, the taxpayers have been fairly leisurely in prosecuting it. They also took about 12 months to provide the last of the documents requested by the Commissioner, despite court orders and repeated requests to do so ... No prejudice has been demonstrated as having flown from any delay by the Commissioner, and I would not refuse to grant leave on the basis of delay.

Prejudice

- [35] The taxpayers also argue that they will be substantially prejudiced if the Commissioner is allowed to rely on the new ground, as they will have to spend money retaining new valuers to provide a valuation for the property, some years after the transfer...
- [36] It is not uncommon for valuers to be asked to value real property many years after the valuation date; there is no evidence that this would not be a feasible task for a new valuer to perform in this case (indeed, that is precisely what the Valuer-General had to do...
- [38] It follows that I am not satisfied that the Commissioner's application should be denied on the basis of any prejudice which may be suffered by the taxpayers.

Land tax assessments

- [39] The taxpayers seek to draw comfort from land tax assessment notices issued by the Commissioner between October 2003 and June 2005...
- [41] ... The argument is misconceived, quite apart from the fact that there is no time limit for an application under s109. Land tax is assessed on a different basis to stamp duty and is generally based on site values calculated by a rating authority for rates purposes. The fact that land tax assessment notices were issued does not establish that the Commissioner did obtain, or could have obtained, a valuation without the taxpayers' documents.

Conclusion

- [42] For the reasons discussed above, I conclude:
- (a) There is no time limit which would prevent the Commissioner from making this application under s109, or seeking at the hearing of the appeal an order under s112 increasing the assessment;
 - (b) Section 109 confers an unfettered discretion, which is remedial in nature;
 - (c) There is no discretionary consideration which would suggest that the Commissioner's application should be refused.

4.3 APRA, ASIC & ATO Interpretations

Nil

5 SUPERANNUATION, ETP'S & PENSIONS

5.1 Politicians, Boards & Statutory Authorities - Policy Statements

Nil

5.2 Courts & Tribunals

Nil

5.3 APRA, ASIC & ATO Interpretations

(a) Practice Statements

Nil

(b) New ATO ID's

Nil

(c) Withdrawn ATO ID'S

Nil

(d) Practice Statements

(1) *** PS LA 2007/1 (GA) ~ Assessing SGC where the employers have done what they could reasonably be expected to do to comply with the law by the due date

Source Month (02-2007 – 65)

[PS LA 2007/1 \(GA\) - Assessing superannuation guarantee charge where the employers have done what ...](#)

What issue does the Practice Statement consider?

The practice statement outlines circumstances in which, although the trustee of a complying superannuation fund or retirement savings account (RSA) has not received a contribution by the due date a tax officer may decide, for administrative reasons:

- ◆ to not raise an assessment of superannuation guarantee charge against an employer; or
- ◆ to allow an employer's objection to a superannuation guarantee charge assessment.

The Practice Statement is limited to situations in which it is clear the employer took all reasonable steps to comply with their obligations by the due date.

What was the background to the Practice Statement?

In recent months a series of Tribunal Decisions has highlighted the inflexibility and inequity of the SGC provisions. As the law hasn't been changed the Practice Statement is an administrative fix.

What is the outcome of the Practice Statement?

Some employers whose contributions are made late will be able to avoid the SGC penalty regime or to have previous penalties overturned.

How does the outcome affect your firm's current practices?

If you thought a previous SGC penalty was unreasonable you might be able to have that one set aside.

You must be thoroughly familiar with the situations outlined in the Practice Statement as it is unlikely that the Tax Office auditors will be both familiar with the situations and willing to adopt the concessionary approaches.

It is significant that employers will need to be able to prove certain things such as date of posting. You might need to design and establish new systems for many of your employers to ensure that they can avail of the concessions when a minor slip up occurs.

Not all minor slips up will benefit from the concessions outlined. There is no administrative relief for incorrectly calculated contributions.

What will the Commissioner's Practice be in relation to the issue?

A tax officer satisfied that the facts establish that an employer has taken reasonable steps to fulfil their obligations under the law will be able to avoid raising an SGC assessment against a particular employer in the following situations:

- ◆ the employer posted a contribution cheque within 28 days of the end of the quarter and:
 - ~ it is clear from the employer's business practices that the cheque was posted before the due date;
 - ~ the employer's business practices allow enough time for the cheque to arrive by mail, by the due date;
 - ~ the cheque was not post-dated or backdated;
 - ~ the cheque was honoured on presentation;
- ◆ the employer sent a payment to a superannuation fund or RSA with a reasonable understanding that it held an active account in the name of the employee:
 - ~ the employer sent the payment within sufficient time for the trustee of the superannuation fund or RSA to receive the payment within 28 days of the end of the quarter;
 - ~ the employer tried to contribute to the last known superannuation fund or RSA belonging to the employee;
 - ~ the employer could not reasonably have been expected to know that the employee's benefits were no longer held in that superannuation fund or RSA; and
 - ~ the employer takes reasonable steps to identify a current superannuation fund or RSA for the employee and makes an appropriate contribution to it as soon as practicable. (Note: Before 1 July 2006 the employer may have contributed the amount to the Superannuation Holding Account (SHA) special account;
- ◆ the employer allowed a clearing house reasonable time to make contributions;
 - ~ the clearing house is not an agent of the employer;
 - ~ having regard to the terms and conditions (including service standards) of any agreement with the clearing house the employer has allowed sufficient time for a clearing house to process their payments to meet the superannuation guarantee due date; and
 - ~ the failure to make the contribution on time was in no way attributable to any act or omission on the employer's part (for example, the clearing house was provided with or was able to access sufficient funds to make the contribution);
- ◆ an assessment of superannuation guarantee charge must be made where the contribution is late because of the acts or omissions of an employer's agent;

Objections to an SGC penalty can be determined on similar principles even though;

- ◆ the assessment of SGC was raised prior to the release of this practice statement; or
- ◆ the employer presents evidence, that was not available at the time of audit, to support an objection to an assessment resulting from that audit.

6 OTHER IMPOSTS, OFFSETS & REBATES

6.1 Politicians, Boards & Statutory Authorities

Nil

6.2 Courts & Tribunals

Nil

6.3 APRA, ASIC & ATO Interpretations

(a) Taxation Rulings & Draft Rulings

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

Nil

(b) New ATO ID'S

2007/19	Excise: conditions on a permit to receive concessional spirit
2007/28	Excise: recycled oil

2007/30	Excise: fuel tax credits - calculation of effective fuel tax
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Source: Month 02-2007 -16

7 LEGISLATION

7.1 Australian Parliament

(a) Acts receiving Royal Assent in the last month

Bill: http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2377&TABLE=BILLS

Explanatory Memorandum: <http://parlinfoweb.aph.gov.au/piweb//Repository/Legis/ems/Linked/02110600.pdf> Bills before Parliament

(1) Tax Laws Amendment (2006 Measures No. 6) Act 2007 ~ Act Number 4 of 2007 [previous citation Tax Laws Amendment (2006 Measures No. 6) Bill 2006]

Royal Assent 19 February 2007

This Act updates the list of deductible gift recipients (DGRs) and extend the period for which deductions are allowed for gifts to certain funds that have time limited DGR status.

The Act also transfers the power to appoint a person to act as the Commissioner of Taxation or Second Commissioner of Taxation, during a vacancy in, or absence from, either office from the Prime Minister to the Treasurer.

(b) Bills awaiting Royal Assent (package of Superannuation Bills) ++

++ The Bills listed below are listed in the order in which they were introduced to Parliament rather than the usual alphabetical order employed in this section of the MTUN.

The package of Superannuation Bills and the accompanying Explanatory Memoranda (EM's) and other Parliamentary material, including the debates and proposed amendments can be viewed at [Parliament of Australia: Bills](#) (See www.aph.gov.au and follow the Bills link to Current Bills by Title).

The commencement date for simplified superannuation

Simplified Superannuation commences on 1 July 2007, although limits on non-concessional contributions apply from 10 May 2006.

The revised age pension arrangements will commence on 20 September 2007.

The history of the package

The package of legislation comprising the simplified superannuation system is comprised of two distinct smaller packages of legislation:

- ◆ On 7 December 2006 the Tax Laws Amendment (Simplified Superannuation) Bill 2006 (the "TLA(SS)" Bill and five supporting Bills ("the TLA(SS) package of Bills") were introduced into the House of Representatives.
- ◆ Subsequently on 7 February 2007 the Superannuation Legislation Amendment (Simplification) Bill 2007 (the SLA(S) Bill") and a further four companion Bills (the SLA(S) package of Bills) were introduced to the House of Representatives.

The TLA(SS) package of Bills

The TLA(SS) package of Bills:

- ◆ implements Simplified Superannuation;
- ◆ is explained by a single common Explanatory Memorandum extending to 242 pages but is comprised of the TLASS Bill and a further five supporting Bills:
 - ~ Tax Laws Amendment (Simplified Superannuation) Bill 2006
 - ~ Superannuation (Excess Concessional Contributions Tax) Bill 2006
 - ~ Superannuation (Excess Non-Concessional Contributions Tax) bill 2006

- ~ Superannuation (Excess Untaxed Roll-Over Amounts Tax) Bill 2006
- ~ Superannuation (Departing Australia Superannuation Payments Tax) bill 2006
- ~ Superannuation (Self Managed Superannuation Funds) Supervisory Levy Amendment Bill 2006

The TLA(SS) Bill rewrites the superannuation taxation provisions from the ITAA 1936 into the ITAA 1997 at Division 290.

The SLA(S) package of Bills

The SLA(S) Bill 2007 makes:

- ◆ consequential amendments necessary due to the rewrite of the superannuation taxation law (such as the repeal of the old law and updating references to the old law contained in various Acts);
- ◆ minor additions to the TLA(SS) Bill and its supporting Bills; and
- ◆ amendments to enable future flows of unclaimed superannuation monies to be paid to the Australian Government rather than to the various state governments.

The SLA(S) package of Bills is comprised of:

- ◆ Superannuation Legislation Amendment (Simplification) Bill 2007;
- ◆ Income Tax Amendment Bill 2007;
- ◆ Income Tax (Former Complying Superannuation Funds) Amendment Bill 2007;
- ◆ Income Tax (Former Non-Resident Superannuation Funds) Amendment Bill 2007;
- ◆ Income Tax Rates Amendment (Superannuation) Bill 2007;

Parliament passed the bills on 27 February 2007

Each of the Bills within TLA(SS) package of Bills and the SLA(S) package of Bills:

- ◆ were passed by the Senate on 27 February to implement promises made on 9 May 2006 on Budget Night;
- ◆ represent an attempt to:
 - ~ simplify the current tax arrangements and restrictions that apply to superannuation benefits;
 - ~ provide retirees with greater flexibility as to how and when they draw down their superannuation benefits.

(1) * Tax Laws Amendment (Simplified Superannuation) Bill 2006**

Introduced to House of Representatives on 7 December 2006 and passed House on 13 February 2007. Introduced to the Senate on 7 February 2007 and passed Senate on 27 February 2007

Bill: <http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/Bills/Linked/07120600.pdf>

Explanatory Memorandum:

http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=EMS&Criteria=BILL_ID:r2681%3BEM_TYPE:EM%3BSOURCE:House%3B

The TLA(SS) Bill comprises 10 Schedules:

Schedule 1 of the TLA(SS) Bill contains the principal amendments in 4 parts:

- ◆ Part 1 – The Main Amendments to the Income Tax Assessment Act 1997;
- ◆ Part 2 – Main consequential amendments to each of the following:
 - ~ Income Tax Assessment Act 1936;
 - ~ Income Tax Assessment Act 1997;
 - ~ Income Tax Rates Act 1986;
 - ~ Taxation Administration Act 1953;
- ◆ Part 3 – Main transitional amendments made in the Income Tax (Transitional Provisions) Act 1997;
- ◆ Part 4 –TFN consequentials for Division 295 to each of the following:

- ~ Income Tax Assessment Act 1936;
- ~ Superannuation Industry (Supervision) Act 1993;
- ~ Taxation (Interest on Overpayments and Early Payments) Act 1983;

Schedule 1 inserts new Divisions 290, 292 and 295 into the ITAA 1997 so that it rather than the ITAA contains the key taxation elements of Simplified Superannuation. The amendments made in Part 1 of Schedule 1 include new rules to:

- ◆ allow employers from 1 July 2007 to claim a full deduction (or an offset), for a contribution to a complying superannuation fund (or RSA) on behalf of their employees if certain conditions are met [Schedule 1, item 1, section 290-60]:
 - ~ if the contribution is for an employee, defined in line with section 12 of the Superannuation Guarantee Administration Act 1992 [Schedule 1, item 1, subsection 290-65(1) and see paragraph 1.31 EM], under the age of 75 [Schedule 1, item 1, section 290-80];
 - ~ if the contribution is made for an employee, over the age of 75, but the contribution is made under the provisions of an industrial instrument [Schedule 1, item 1, section 290-80];
 - ~ if the contribution is for the purpose of providing superannuation benefits for the employee, even if these benefits are payable to dependants of the employee (or their legal personal representative) after the death of the employee;
 - ~ if the contribution is a one-off payment made under a salary sacrifice arrangement following the termination of the employment of a former employee and relates to a period of service during which the person was an employee [Schedule 1, item 1, section 290-85 see also EM paragraph 1.38];
 - ~ if the contribution is made for a former employee to reduce an employer's SG charge percentage and the other conditions for deductibility are present [Schedule 1, item 1, section 290-85];
 - ~ if the contribution is made in respect of an employee who has died and is made under a salary sacrifice arrangement or to satisfy the employer's SG obligations the conditions specified in section 290-85 must be satisfied [see paragraph 1.39 of the EM];
 - ~ the psi rules are satisfied [see paragraph 1.28 of the EM];
 - ~ if the contribution is made by a person with a controlling interest in the employer [Schedule 1, item 1, section 290-90 see also paragraph 1.40 of the EM]
- ◆ allow a self-employed person from 1 July 2007 to claim a full tax deduction for contributions to a complying superannuation fund (or RSA) under the age of 75 [Schedule 1, item 1, section 290-150 and see paragraph 1.44 of the EM];
- ◆ allow a person under the age of 75 and who meets the work test [Schedule 1, item 1, subsection 290-165(2) see EM 1.48] and certain notification provisions [Schedule 1, item 1, sections 290-170 to 290-175] to make deductible personal contributions if less than 10 per cent of the person's assessable income and reportable fringe benefits are attributable to employment as an employee without regard to the level of employer superannuation support [Schedule 1, item 1, section 290-160 see also paragraph 1.47 and 1.51-1.57 of the EM];
- ◆ allow a person:
 - ~ to claim an 18 per cent tax offset on superannuation contributions of up to \$3,000 made on behalf of their low income spouse [see paragraph 1.59 EM] but to categorise that contribution as a non concessional contribution for the spouse [see paragraph 1.82 EM];
 - ~ with the receiving spouse's consent, to quote their low income spouse's tax file number. [Schedule 1, item 1, sections 290-230 to 290-240];
- ◆ abolish reasonable benefit limits (RBLs);
- ◆ abolish age-based deduction limits;
- ◆ abolish tax on superannuation benefits paid from a taxed fund for people aged 60 and over whether as:
 - ~ a lump sum; or
 - ~ a pension;

- ◆ lower the tax paid on superannuation benefits paid from an untaxed fund for people aged 60 and over;
- ◆ from 1 July 2007 - to provide an indexed cap of \$50,000 per person per year for concessional contributions generally being contributions included in the assessable income of the superannuation entity [Schedule 1, item 1, section 292-25 see also EM paragraph 1.64] subject to some integrity rules that can be made by regulation [Schedule 1, item 1, subsection 292-25(3) see EM para 1.66];
- ◆ to exclude from a person's concessional contributions the following contributions to superannuation [see EM 1.65]:
 - ~ roll-over superannuation benefits to the extent that they consist of an element untaxed in the fund of the taxable component in the transferring fund [Schedule 1, item 1, subparagraph 292-25(2)(c)(ii)];
 - ~ up to \$1 million of directed termination payments (golden handshake payment) specified in employment contracts as at 9 May 2006, reduced by any earlier transitional termination payments that are received provided the payment is made prior to 1 July 2012 [Schedule 1, item 25, section 292-25];
- ◆ the amount of a superannuation benefit transferred from a foreign superannuation fund to which an election under subsection 307-50(2) applies [Schedule 1, item 1, subparagraph 292-25(2)(c)(i)]; or
 - ~ contributions to constitutionally protected superannuation funds [see EM Chapter 2 and Schedule 1, item 1, subparagraph 292-25(2)(c)(iii)];
 - ~ for each of the income years 2007-08 to 2011-12 – to provide an indexed transitional concessional cap of \$100,000 per year [Schedule 1, item 25, section 292-20(2) of the Income Tax (Transitional Provisions) Act 1997] for anyone over 50 in the year [Schedule 1, item 25, section 292-20(1)(b) of the Income Tax (Transitional Provisions) Act 1997 and para 1.69 EM];
 - ~ to provide separate concessional caps in relation to defined benefit interests [Schedule 1, item 1, subsection 292-175(1) and see EM paras 1.70-1.78];
 - ~ to provide a discretion to the Commissioner to disregard a payment of charge made by the Commissioner after 1 July 2007 in respect of a person to the extent that the payment relates to employer contributions that should have been made before 1 July 2007. [Schedule 1, item 1, sections 292-25 and 292-465 and see EM 1.68];
- ◆ from 1 July 2007:
 - ~ to impose an unindexed cap on contributions made to a superannuation fund in respect of the person but not included in the assessable income of a superannuation fund (“non concessional contributions” [Schedule 1, item 1, section 292-90]) of an amount equal to three times the indexed concessional contributions cap (initially the non concessional cap will be \$150,000 per person per year irrespective of the transitional concessional contributions cap) [Schedule 1, item 25, subsection 292-20(3) and see para 1.80 EM];
 - ~ to provide an averaging mechanism for larger contributions by allowing a person under 65 at the time of making a contribution to use their non concessional cap entitlement for the following two years (calculated on the current year's concessional cap amount . [Schedule 1, item 1, subsection 292-85(4)]) thereby enabling a contribution of \$450,000 in the first year [Schedule 1, item 1, subsections 292-85(3) and (4) see also paras 1.85 to 1.91 EM];
 - ~ to impose a tax on excess non-concessional contributions tax for a financial year in excess of the non-concessional contributions cap for the financial year. [Schedule 1, item 1, section 292-80 and subsections 292-85(1) and (2)];
- ◆ to include as non concessional contributions from 1 July 2007:
 - ~ a contribution made directly by an individual into their spouse's account [see para 1.82 EM].
 - ~ an excess concessional contribution [Schedule 1, item 1, paragraph 292-90(1)(b)]; and
 - ~ a contribution made to a constitutionally protected fund that, had the constitutionally protected fund been a taxed fund, would not have been taxed in the fund anyway [Schedule 1, item 1, subparagraph 292-90(2)(c)(iv)].
- ◆ to exclude (or exempt) as a non-concessional contributions from 1 July 2007:
 - ~ a Government co-contribution [Schedule 1, item 1, subparagraph 292-90(2)(c)(i)];

- ~ a contribution to a superannuation fund made with advance notice to the trustee [Schedule 1, item 1, paragraph 292-95(1)(d)] relating to a personal injury payment [Schedule 1, item 1, subparagraphs 292-90(2)(c)(ii) see also paragraph 1.91 EM], made within a 90 day time limit [Schedule 1, item 1, paragraph 292-95(1)(b)] subject to medical certification by two doctors [Schedule 1, item 1, paragraph 292-95(1)(c)] if no tax deduction is claimed and the payment is attributable to a structured settlement or order resulting in a personal injury payment or a lump sum workers compensation payment [Schedule 1, item 1, paragraph 292-95(1)(a)];
- ~ amounts from the disposal of certain small business assets [Schedule 1, item 1, subparagraphs 292-90(2)(c) (iii)] to a lifetime limit of \$1 million (indexed) (the “CGT Cap”) [Schedule 1, item 1, section 292-105] if the contribution is not included in the assessable income of the superannuation provider (ie, it must be a **personal** contribution for which no deduction is claimed);
- ~ by bringing within the lifetime \$1m CGT cap [see EM para 1.99] a contribution in respect of which the contributor gives notice in advance of their election to their superannuation provider [Schedule 1, item 1 paragraphs 292-100(2)(b) and (7)(b)];
- ~ capital proceeds from the disposal of assets that qualify for the CGT exemption in Subdivision 152-B [Schedule 1, item 1, subsection 292-100(2)]; and
- ~ capital proceeds from the disposal of assets that would have qualified for the CGT exemption in Subdivision 152-B but for their being no capital gain or a capital loss [Schedule 1, item 1, subsection 292-100(2)] or the asset being a pre-CGT asset [Schedule 1, item 1, subsection 292-100(5)]; or the asset being disposed of before the required 15-year holding period had elapsed because of the permanent incapacity of the person (which occurred after the asset was purchased) [Schedule 1, item 1, subsections 292-100(3) and (6)].
- ~ up to \$500,000 of capital gains that are disregarded under the CGT exemption in Subdivision 152-D [Schedule 1, item 1, subsection 292-100(7)];
- ◆ to provide a special rule in relation to non concessional contributions made between either budget night 2006 and 30 June 2006 or between 1 July 2006 and 30 June 2007 [Item 1, section 292-80(1) of the Income Tax (Transitional Provisions) Act 1997]:
 - ~ by deeming that period to be a financial year [Item 1, section 292-80(3)(a) of the Income Tax (Transitional Provisions) Act 1997] and generally providing for the non concessional contribution rules in Division 292-C to apply to those contributions subject to various amendments to the provisions in Division 292-C [Item 1, section 292-80(2) of the Income Tax (Transitional Provisions) Act 1997];
 - ~ by specifically defining a person’s non concessional contributions for that financial year having regard to the age based limits that existed at the time the contributions were made [Item 1, section 292-80(3)(b) and (6) of the Income Tax (Transitional Provisions) Act 1997];
 - ~ by fixing a non concessional contributions cap for the deemed financial year of \$1 million [Schedule 1, item 25, section 292-80(3)(c) of the Income Tax (Transitional Provisions) Act 1997] for each individual eligible to contribute (eg, those aged 65 to 74 must satisfy the work test set out in the Superannuation Industry (Supervision) Regulations 1994) [Schedule 1, item 25, subsection 292-80(1) of the Income Tax (Transitional Provisions) Act 1997];
 - ~ by fixing a CGT cap at the start of the deemed financial year of \$1 million [Schedule 1, item 25, section 292-80(3)(e) of the Income Tax (Transitional Provisions) Act 1997] and providing a mechanism for the carry forward of the CGT cap by fixing a non concessional contributions cap for the deemed financial year of \$1 million [Schedule 1, item 25, section 292-80(3)(h) of the Income Tax (Transitional Provisions) Act 1997];
- ◆ to modify the imposition of excess non-concessional contributions tax and the associated administration arrangements as follows:
 - ~ the bring \$450,000 three year bring forward arrangement will not apply until 1 July 2007 [Schedule 1, item 25, paragraph 292-80(3)(d) of the Income Tax (Transitional Provisions) Act 1997];
 - ~ contributions in excess of a person’s age-based deduction limit will be counted as a non-concessional contribution (as these contributions are undeducted employer contributions) [Schedule 1, item 25, subsections 292-80(5) and (6) of the Income Tax (Transitional Provisions) Act 1997];

- ~ the person's CGT cap amount will be \$1 million at 10 May 2006 and any contributions made during this period will reduce their CGT cap from 1 July 2007 [Schedule 1, item 25, paragraphs 292-80(3)(e) and (3)(h) of the Income Tax (Transitional Provisions) Act 1997];
- ~ the choice to use the personal injury or CGT cap exemption from the non-concessional contributions cap must be given to the superannuation provider by 31 July 2007 [Schedule 1, item 25, paragraphs 292-80(3)(f) and (g) of the Income Tax (Transitional Provisions) Act 1997].
- ◆ for a person to apply to the Commissioner for a transitional release authority before 1 July 2007 if the person has made excessive contributions in the last year so that the person has non-concessional contributions in excess of \$1 million for the period 10 May 2006 to 6 December 2006 [Schedule 1, item 25, section 292-80A of the Income Tax (Transitional Provisions) Act 1997];
- ◆ to provide a mechanism, a release authority, to enable a person to withdraw from superannuation, either voluntarily or compulsorily, an amount that constitutes an excess non concessional benefit or excess contributions tax in respect of an excess benefit [Schedule 1, item 25, section 292-405 of the Income Tax (Transitional Provisions) Act 1997 and paras 1.21 – 1.38 inclusive]
- ◆ if a person has excessive contributions in a year the person can apply for the Commissioner to exercise his discretion to disregard the contributions or to reallocate the contributions to another year [Schedule 1, item 25, section 292-465 of the Income Tax (Transitional Provisions) Act 1997 see para 1.114 – 1.121 EM];
- ◆ to provide for the reduction of a person's CGT cap:
 - ~ by the amount of each contribution the person elect [Schedule 1, item 1, subsection 292-100(9)] and notifies the trustee in advance is to be covered by the exemption from the non-concessional contributions cap;
 - ~ by the amount of each contribution the person elects to make between 10 May 2006 and 30 June 2007 (the deemed 2006-07 year) [Schedule 1, item 1, subsection 292-105(2) and Schedule 1, item 25, paragraph 292-80(3)(h) of the Income Tax (Transitional Provisions) Act 1997] and notifies the trustee in advance;
- ◆ to provide that if a person has the CGT event, the contribution reducing the CGT cap (and subject to the 7 day rule that operates in relation to an individual making an election under the retirement exemption in the small business concession rules) must be made no later than the day the person is required to lodge their tax return for the financial year in which the CGT event occurred or 30 days after the day the person received the capital proceeds (including an instalment), whichever is later [Schedule 1, item 1, paragraphs 292-100(2)(b) and (7)(b) and para 1.103 EM];
- ◆ to provide the opportunity for a CGT concession stakeholder of an entity that had a capital gain disregarded under the 15 year rule (or would have if certain conditions were met) to use either the non concessional contributions amount or the CGT cap if the entity makes a payment to that person within two years of the CGT event and that person makes a contribution limited to the person's stakeholder's control percentage of the capital proceeds within 30 days of that payment [Schedule 1, item 1, subsection 292-100(4)];
- ◆ to provide for a CGT concession stakeholder of an entity that had a capital gain disregarded under Subdivision 152-D to elect to use either the \$1m CGT cap or the 3 year bring forward or both subject to complying with both the advance notice to the trustee of the superannuation fund and also to making the payments within the required timeframes [Schedule 1, item 1, subsection 292-100(8)];
- ◆ to provide for the Commissioner to make an assessment (or an amended assessment) of excess contributions tax for excess concessional contributions or excess non concessional contributions tax [Schedule 1, item 1, subparagraph 292-230(1) see also paragraphs 1.138 – 1.154];

Schedule 2 ~ limits concessions on large employment termination payments;

Schedule 3 ~ provides the method for indexing certain limits on contributions and tax thresholds;

Schedule 4 ~ streamlines superannuation fund reporting requirements;

Schedule 5 ~ extends access to the Government co-contribution to include the self-employed;

Schedule 6 ~ introduces new administrative penalties for late returns and false statements;

Schedules 8 and 9 ~ halve the pension assets-test taper rate so that Age Pension, Service Pension and other pension recipients will only lose \$1.50 a fortnight (rather than \$3) for every \$1,000 of assets above the relevant threshold;

Schedule 10 ~ defines terms.

Division 290 of the ITAA excludes certain contributions to superannuation from being eligible for a deduction under Division 290 including:

- ◆ the roll-over of superannuation benefits [Schedule 1, item 1, section 290-5];
- ◆ a benefit transferred from an overseas superannuation fund [Schedule 1, item 1, section 290-5]; or
- ◆ a directed termination payment paid into a superannuation plan by an employer under transitional arrangements that apply until 30 June 2012 [Schedule 1, item 25, section 290-10 of the Income Tax (Transitional Provisions) Act 1997;
- ◆ a contribution made under the Family Law Act 1975 to satisfy the entitlement of a former spouse (who may also be an employee). [Schedule 1, item 1, subsection 290-60(4) and see paragraph 1.29 of the EM].

The remaining Bills in the TLA(SS) package and their broad functions are addressed below.

(2) * Superannuation (Departing Australia Superannuation Payments Tax) Bill 2006

Introduced to House of Representatives on 7 December 2006 and passed House on 13 February 2007. Introduced to the Senate on 7 February 2007 and passed Senate on 27 February 2007

Bill: <http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/Bills/Linked/07120604.pdf>

Explanatory Memorandum:

http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=EMS&Criteria=BILL_ID:r2689%3BEM_TYPE:EM%3BSOURCE:House%3B

In 6 pages this Bill proposed to replace the Income Tax (Superannuation Payments Withholding Tax) Act 2002 to reflect the new components of superannuation benefits while retaining the same rates of taxation

(3) * Superannuation (Excess Concessional Contributions Tax) Bill 2006

Introduced to House of Representatives on 7 December 2006 and passed House on 13 February 2007. Introduced to the Senate on 7 February 2007 and passed Senate on 27 February 2007

Bill: <http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/Bills/Linked/07120601.pdf>

Explanatory Memorandum:

http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=EMS&Criteria=BILL_ID:r2700%3BEM_TYPE:EM%3BSOURCE:House%3B

The Superannuation (Excess Concessional Contributions Tax) Bill 2006 will impose taxes on excess concessional and non-concessional contributions).

(4) * Superannuation (Excess Non-concessional Contributions Tax) Bill 2006

Introduced to House of Representatives on 7 December 2006 and passed House on 13 February 2007. Introduced to the Senate on 7 February 2007 and passed Senate on 27 February 2007

Bill:

http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=BILLS&Criteria=BILL_ID:r2690%3BSEO_NUM:0%3B

Explanatory Memorandum:

http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=EMS&Criteria=BILL_ID:r2690%3BEM_TYPE:EM%3BSOURCE:House%3B

Superannuation (Excess Non-Concessional Contributions Tax) Bill 2006 Superannuation (Excess Untaxed Roll-over Amounts Tax) Bill 2006

(5) * Superannuation (Excess Untaxed Roll-over Amounts Tax) Bill 2006

Introduced to House of Representatives on 7 December 2006 and passed House on 13 February 2007. Introduced to the Senate on 7 February 2007 and passed Senate on 27 February 2007

Bill:

http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=BILLS&Criteria=BILL_ID:r2688%3BSEQ_NUM:0%3B

Explanatory Memorandum: Not available

This Bill proposes to introduce a higher rate of tax on transfers over \$1 million from untaxed to taxed schemes.

(6) * Superannuation (Self Managed Superannuation Funds) Supervisory Levy Amendment Bill 2006

Introduced into the House of Representatives on 7 December 2006.

Bill:

<http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/Bills/Linked/07120605.pdf>

This Bill proposes to repeal the current penalty for the late lodgement of a self-managed superannuation fund's regulatory return.

(7) * Superannuation Legislation Amendment (Simplification) Bill 2007**

Introduced to House of Representatives on 7 February 2007 and passed House on 13 February 2007. Introduced to the Senate on 7 February 2007 and passed Senate on 27 February 2007

Bill:

EM :<http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/ems/Linked/07020702.pdf>

The SLA(S) Bill and companion Bills are related Bills to the TLA(SS) Bill . The SLA(S) Bill contains 4 schedules:

- Schedule 1 ~ contains consequential amendments necessary due to the rewrite of the superannuation taxation law (such as the repeal of the old law and updating references to the old law contained in various Acts);
- Schedule 2 ~ contains the other consequential amendments relating to small business relief for capital gains tax (CGT) events.
- Schedule 3
 - ~ makes minor additions to the law giving effect to the Simplified Superannuation reforms; and
 - ~ enables future flows of unclaimed superannuation monies under the Superannuation Unclaimed Moneys Act to be paid to the Australian Government rather than to State Governments.
- Schedule 4 ~ contains technical corrections

(8) * Income Tax Amendment 2007 Bill

Introduced to House on 7 February and passed House on 13 February 2007. Introduced to the Senate on 7 February 2007 and passed Senate on 27 February 2007

Bill

EM <http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/ems/Linked/07020703.pdf>

The Income Tax Amendment Bill 2007 makes consequential amendments to the Income Tax Act 1986.

(9) * Income Tax (Former Complying Superannuation Funds) Amendment 2007 Bill

Introduced to House of Representatives on 7 February 2007 and passed House on 13 February 2007. Introduced to the Senate on 7 February 2007 and passed Senate on 27 February 2007

Bill:

EM

The Income Tax (Former Complying Superannuation Funds) Amendment Bill 2007 makes consequential amendments to the Income Tax (Former Complying Superannuation Funds) Act 1994.

(10) * Income Tax (Former Non resident Superannuation Funds) Amendment 2007 Bill

Introduced to House of Representatives on 7 February 2007 and passed House on 13 February 2007. Introduced to the Senate on 7 February 2007 and passed Senate on 27 February 2007

[Bill:](#)
[EM](#)

The Income Tax (Former Non-resident Superannuation Funds) Amendment Bill 2007 makes consequential amendments to the Income Tax (Former Non-resident Superannuation Funds) Act 1994.

(11) * Income Tax Rates Amendment(Superannuation) 2007 Bill

Introduced to House of Representatives on 7 February 2007 and passed House on 13 February 2007. Introduced to the Senate on 7 February 2007 and passed Senate on 27 February 2007

[Bill:](#)
[EM](#)

The Income Tax Rates Amendment (Superannuation) Bill 2007 makes consequential amendments to the Income Tax Rates Act 1986.

(12) * Superannuation Legislation Amendment (Trustee Board and Other Measures)(Consequential Amendments) Bill 2007

Introduced to House of Representatives on 28 February 2007

[Bill:](#)
[EM](#)

7.2 Bills before Parliament – other than Superannuation Bills**(1) *** Tax Laws Amendment (2006 Measures No. 7) Bill 2006**

Introduced to House on 7 December 2006, passed House on 7 February.

Introduced to the Senate on 7 February 2007.

The Senate referred the Bill to the Senate Economics Committee for consideration. After conducting public hearings and considering submissions the Committee delivered its report to the on 27 February 2007. The Committee considered splitting the Bill into two Bills. One of the Bills would contain the present Schedule 1 dealing with the small business concessions and also Schedule 3 dealing with Streamlining gift fund and integrity arrangements for deductible gift recipients.

The problem Schedule appears to be Schedule 2 dealing with interest withholding tax. This development will delay the Senate consideration of the Bill.

[Bill: http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/Bills/Linked/07120619.pdf](http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/Bills/Linked/07120619.pdf)

[EM:](#)

http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=EMS&Criteria=BILL_ID:r2680%3BEM_TYPE:EM%3BSOURCE:House%3B [Memorandum: Not available](#)

The Bill proposes to make wide ranging amendments including the following:

- a “significant individual” 20% test replaces the “controlling individual” 50% test and forms the basis for identifying a CGT concession stakeholder;
- a “significant individual” will be an individual who holds a 20% small business participation interest in an entity directly, or indirectly through one or more interposed entities (eg other companies or trusts);
- an entity:
 - ~ can have an individual holding a small business participation in it despite not having any individuals having a direct interest in the entity; and
 - ~ can qualify for both the 15 year concession and the retirement exemption if an individual has a small business participation % in excess of 20% in the entity;

- an interposed entity can dispose of an interest in an underlying entity and access the concessions in relation to the interest it has disposed.
- the maximum net asset value test will be easier to satisfy:
 - ~ assets with a negative net value (ie where liabilities exceed current value) can be offset against the value of other assets counted in the test.
 - ~ provisions (annual leave/LSL), unearned income and FITB, can be recognised on the basis they are recognised as liabilities for accounting.
 - ~ partners in a partnership will not longer be disqualified merely because the partnership has more than \$5m in CGT assets.
- an asset can be an active asset for the purposes of the small business concessions under either of two tests despite not being an active asset just before the time of the CGT event:
 - ~ if an asset has been held for less than 15 years the asset must have been active for at least half the ownership period;
 - ~ if an asset has been held for more than 15 years the asset must have been active for at least 7 ½ years;
- the “80% active asset” test for shares and companies has been simplified.
- the 15 year exemption can be used in respect of a company (where the shareholders are selling shares or the company is selling active assets) if it has a controlling individual for a total period of 15 years. This does not need to be a consistent 15 year period and it does not need to be the one individual.
- the assets of a taxpayer (but not the assets used by the taxpayer and held by another entity) will retain the status they held at the time of the taxpayer’s death for a period of two years after the taxpayer’s death;
- the status of assets used by a taxpayer will be preserved for two years after the death of the taxpayer.

(2) *** Tax Laws Amendment (2007 Measures No. 1) Bill 2007

Introduced to House on 15 February 2007 and passed House on 28 February 2007.

Introduced to the Senate on 1 March 2007.

[Bill:](#)

[EM](#)

The Bill proposes to make the following amendments:

- Schedule 1 ~ amends the secrecy and disclosure provisions in the Taxation Administration Act 1953 to allow the Commissioner of Taxation to make disclosures of taxpayer information to Project Wickenby taskforce officers and to officers in other taskforces that may be prescribed in the regulations.
- Schedule 2 ~ amends the Superannuation Guarantee (Administration) Act 1992 to enable the Commissioner of Taxation or an officer of the Australian Taxation Office to provide information to an employee in response to a complaint that an employer has not complied with its obligations under the Act.
- Schedule 3 ~ amends the ITAA 1936 and other tax Acts to extend the employee share scheme (ESS) concessions and related capital gains tax treatment to certain stapled securities that include an ordinary share, and that are listed for quotation on the official list of the Australian Securities Exchange.

7.3 State and Territory Parliaments

Source: Various State and Territory Parliament Websites

*unless otherwise indicated

www.dms.dpc.vic.gov.au

www.parliament.qld.gov.au

www.parliament.tas.gov.au

www.parliament.wa.gov.au

www.parliament.sa.gov.au

www.legassembly.act.gov.au

www.nt.gov.au

www.parliament.nsw.gov.au

(a) Australian Capital Territory

www.legislation.act.gov.au

Please Note: Australian Capital Territory only has one house of Parliament

(b) South Australiawww.parliament.sa.gov.au**(c) Tasmania**www.parliament.tas.gov.au**(d) Victoria**www.dms.dpc.vic.gov.au**(e) Western Australia**www.parliament.wa.gov.au**(1) * Stamp Amendment (First Home Owner) Act 2006**

Introduced into the Legislative Assembly on 30 August 2006.

This Bill proposes to establish a complete exemption from duty in certain circumstances, and to increase the existing concessional exemption threshold from \$350,000 to \$420,000 for land with a home, and for vacant land the exemption is increased to \$200,000.

Bill: [http://www.parliament.wa.gov.au/parliament/bills.nsf/130FAA45BB4028ED482571D90043D96A/\\$File/Bill156-1.pdf](http://www.parliament.wa.gov.au/parliament/bills.nsf/130FAA45BB4028ED482571D90043D96A/$File/Bill156-1.pdf)

Explanatory Memorandum:

[http://www.parliament.wa.gov.au/parliament/bills.nsf/130FAA45BB4028ED482571D90043D96A/\\$File/EM-Bill156.pdf](http://www.parliament.wa.gov.au/parliament/bills.nsf/130FAA45BB4028ED482571D90043D96A/$File/EM-Bill156.pdf)

8 APPEALS AS AT 20 FEBRUARY 2007

Source: Federal Court Website (857202)

http://www.fedcourt.gov.au/ctlists/ctlists_appeals.html

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| <p>(1) Barnes v Commissioner of Taxation [2007] FCA 3
Topic: Taxation
Filed: WAD25/2007; 05/02/2007
Status: Examination/Settlement of Index
Next Listing Date: 22/02/2007</p> <p>(2) Cameron Brae Pty Ltd v Commissioner of Taxation [2006] FCA 918
Topic: Taxation
Filed: VID892/2006, VID904/2006; 10/08/2006, 11/08/2006
Status: No future listing</p> <p>(3) Commissioner of Taxation of the Commonwealth of Australia v Indooroopilly Children Services (Qld) Pty Ltd
Topic: Judicial Review
Filed: QUD253/2006; 05/07/2006
Status: Full Court Hearing
Next Listing Date: 15/02/2007</p> <p>(4) Commissioner of Taxation v Condell [2006] FCA 1047
Topic: Taxation
Filed: QUD349/2006; 05/09/2006
Status: Full Court Hearing
Next Listing Date: 07/03/2007</p> <p>(5) Commissioner of Taxation v Word Investments Ltd [2006] FCA 1414
Topic: Taxation
Filed: VID1300/2006, 24/11/2006
Status: Settlement of Index
Next Listing Date: 21/02/2007</p> <p>(6) Cumins v Commissioner of Taxation [2006] FCA 43
Topic: Taxation
Filed: WAD53/2006; 27/02/2006
Status: Judgement Reserved</p> <p>(7) Day v Commissioner of Taxation [2006] FCA 655
Topic: Taxation
Filed: NSD1191/2006; 20/06/2006
Status: No Future Listing</p> <p>(8) Duncan v Commissioner of Taxation; in the matter of Trader Systems International Pty Ltd (in liq) [2006] FCA 885
Topic: Corporations
Filed: VID874/2006; 01/08/2006
Status: Full Court Hearing
Next Listing Date: 02/03/2007</p> <p>(9) Fowler and Commissioner of Taxation [2006] FCA 1096
Topic: Taxation
Filed: NSD2117/2006; 30/10/2006
Status: First Directions
Next Listing Date: 12/12/2006</p> <p>(10) Futuris Corporation Limited (ACN 004 336 636) v Commissioner of Taxation [2006] FCA 1096
Topic: Taxation
Filed: SAD212/2006; 08/09/2006
Status: No Future Listing</p> <p>(11) R & D Holdings Pty Ltd v Deputy Commissioner of Taxation (No 2)[2006] FCA 1149
Topic: Taxation
Filed: NSD1790/2006; 18/09/2006</p> | <p>Status: Full Court Hearing
Next Listing Date: 05/03/2007 - 06/03/2007</p> <p>(12) R & D Holdings Pty Ltd v Deputy Commissioner of Taxation [2006] FCA 981
Topic: Taxation
Filed: NSD1798/2006 and NSD1799/2006; 19/09/2006
Status: Full Court Hearing
Next Listing Date: 05/03/2007 - 06/03/2007</p> <p>(13) Rangdon Pty Ltd v The Commissioner of Taxation of the Commonwealth of Australia [2006] FCA 546
Topic: Taxation
Filed: WAD150/2006; 02/06/2006
Status: Full Court Hearing
Next Listing date: 23/11/2006</p> <p>(14) Rio Tinto Ltd v Commissioner of Taxation [2005] FCA 1336
Topic: Taxation
Filed: VID1205/2005; 29/09/2005
Status: No Future Listing</p> <p>(15) Spassked Pty Ltd ACN 003 255 847 v Commissioner of Taxation
Topic: Not supplied
Filed: NSD2050/2006; 20/10/2006
Status: No Future Listing</p> <p>(16) Starr v Commissioner of Taxation of the Commonwealth of Australia [2007] FCA 23
Topic: Not supplied
Filed: WAD28/2007; 12/02/2007
Status: Settlement of Index and Callover
Next Listing Date: 06/03/2007 and 26/04/2007 respectively</p> <p>(17) Tey v Commissioner of Taxation [2006] FCA 1237
Topic: Taxation
Filed: WAD24/2007; 31/01/2007
Status: Directions
Next Listing Date: 21/02/2007</p> <p>(18) W R Carpenter Holdings Pty Ltd v Commissioner of Taxation [2006] FCA 1252
Topic: Taxation
Filed: NSD1895/2006 and NSD1896/2006; 27/09/2006
Status: Full Court Hearing
Next Listing Date: 07/03/2007 - 08/03/2007
Weyers v Commissioner of Taxation [2005] FCA 818
Topic: Judicial Review
Filed: QUD394/2006 and QUD395/2006; 11/10/2006
Status: No Future Listing</p> |
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Interpretation

In these Tax Update Notes a reference to the:

- ◆ AAT is a reference to the Administrative Appeals Tribunal
- ◆ Administration Act is a reference to the Taxation Administration Act 1953
- ◆ ADJR is a reference to the Administrative Decisions Judicial Review Act
- ◆ ITAA 1936 or the 1936 Act is a reference to the Income Tax Assessment Act 1936
- ◆ ITAA 1997 or the 1997 Act is a reference to the Income Tax Assessment Act 1997
- ◆ ITR is a reference to the Income Tax Regulations
- ◆ FBTA is a reference to the Fringe Benefits Tax Assessment Act (1986)
- ◆ GST Act means is a reference to the A New Tax System (Goods and Services Tax) Act 1999
- ◆ GST Regulations is a reference to the A New Tax System (Goods and Services Tax) Regulations 1999
- ◆ SGAA means Superannuation Guarantee (Administration) Act 1992
- ◆ The SIS Act is a reference to the Superannuation Industry (Supervision) Act
- ◆ Tribunal is a reference to the Administrative Appeals Tribunal
- ◆ The Regulations is a reference to the Income Tax Regulations

Status of ATO Documents

TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.

Status of a draft Taxation Ruling:

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

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.

Status of a Product Ruling:

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

Status of an ID and Private Binding Ruling:

ATO IDs are published on ATO law as precedential ATO views for ATO officers. ATO officers must search for, identify and apply relevant ATO IDs in resolving technical interpretative issues (see Law Administration Practice Statement PS LA 2003/3).

Accordingly, an ATO ID must be followed where:

- ◆ there is no material difference between the facts of the arrangement upon which a decision is required and a current ATO ID; and
- ◆ the decision maker considers that the outcome of the issue would be correct if the ATO ID were applied.

The database of ATO IDs serves a different purpose to the Register of Private Binding Rulings. Entries to the Register are made for purposes of integrity and transparency only and do not constitute precedential ATO views. Accordingly, entries on the Register cannot be relied upon as indicative of the ATO view.

Status of a GST Ruling

Generally a GST Ruling is expressed to be a ruling for the purposes of section 37 of the Administration Act.

DISCLAIMER

The material in these Tax Update Notes is published on the basis that the opinions expressed are not to be regarded as the official opinions of Tax Matrix Pty Limited. These Tax Update Notes should not be used or treated as professional advice and readers should rely on their own inquiries in making any decisions concerning their own interests.

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- *** indicates the item is in the "must read category - will impact on your current practices" (legislation will not receive ***rating unless it has received Royal Assent.)
- ** indicates the item is in the "should read category".
- * indicates the item is in the "read if you have plenty of time" category.

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