

Monthly Tax Update Notes eVersion

The MTUN can be stored on your server for distribution throughout your firm. Each summary contains a direct link to the underlying source document.

May 2007

Table of Contents

1	INCOME TAX	5
1.1	Politicians, Boards & Statutory Authorities	5
	(1) ** Help For Primary Producers (Mr Dutton)	5
	(2) ** Simplified Superannuation – Transitional Integrity Measure (Mr Dutton)	5
1.2	Courts & Tribunals	5
(a)	Courts	5
	(1) *** What use is accountant's privilege? (White Industries Aust Ltd v C of T)	5
	(2) ** What was the source of the distribution? (Condell v C of T)	8
	(3) ** Could the Tax Agent be re-registered (Toohey v Tax Agents Board of Victoria)	11
	(4) ** Small business capital gain - did the Tax Office act in bad faith? (Haritopoulos Pty Ltd v D C of T)	14
	(5) ** Who received the capital gain – the company or the taxpayer? (Gerard Cassegrain & Co Pty Ltd v C of T)	16
	(6) ** How judges react when a solicitor does not turn up to Court (Seller v C of T)	20
	(7) [Listed Only] ~ Austvin Vineyards 1997 Project (Iddles v C of T)	20
	(8) [Listed only] ~ Bankruptcy (Joossé v C of T)	20
	(9) [Listed only] ~ Winding-up (D C of T v Vallod Pty Ltd)	20
	(10) [Listed only] ~ Winding up application (D C of T v De Simone Consulting Pty Ltd)	21
	(11) [Listed Only] Forensic accounting report prevents liquidation (D C of T v Guardian Group Australia Pty Ltd)	21
	(12) (Listed only) ~ Taxpayer withheld 0.5117% of his tax liability that would fund medicare payments for abortions (Daniels v D C of T)	21
(b)	Tribunals	21
	(1) ** Extension of time for lodging an application for review of a Objection Decision (Spencer and C of T)	21
	(2) ** Not a fit and proper person to be a tax agent (Bevan and Tax Agents' Board of NSW)	23
1.3	Tax Office Interpretations	24
(a)	Taxation Rulings & Draft Rulings	24
	(1) ** TR 2007/D2 ~ Registered agricultural managed investment schemes	24
(b)	Determinations & Draft Determinations	25
	(1) ** TD 2007/3 ~ Are insurance premiums deductible for an SMSA	25
	(2) ** TD 2007/4 ~ What is a 'policy of insurance' on the life of an individual for CGT purposes?	26
	(3) ** TD 2007/5 ~ When does the decline-in-value allowance commence?	26

(4)	** TD 2007/D3 ~ Can a share be a convertible interest	27
(5)	** TD 2007/D4 ~ When the base penalty amount is increased?	27
(6)	** TD 2007/D5 ~ How far does the single entity rule reach?	28
(c)	**Class Rulings – New	29
(d)	Product Rulings	29
(e)	ID's – New	30
(f)	Other Tax Office Statements, Addenda, Errata and Withdrawals	30
(1)	*** A trustee can register as a tax agent (Tax Agents Board)	30
(2)	Addenda, Errata, Withdrawals	31
(3)	Decision Impact Statements	31
2	GST	33
2.1	Politicians, Boards & Statutory Authorities [NIL]	33
2.2	Courts & Tribunals [NIL]	33
2.3	Tax Office Interpretations [NIL]	33
(a)	Rulings & Draft Rulings [NIL]	33
(b)	Determinations & Draft Determinations [NIL]	33
(c)	ID's – New	33
(1)	ID's ~ New	33
(2)	ID's ~ Withdrawn	33
(d)	Other Tax Office Statements, Addenda, Errata and Withdrawals [NIL]	34
3	FBT	35
3.1	Politicians, Boards & Statutory Authorities [NIL]	35
3.2	Courts & Tribunals	35
(1)	** Labour Hire Company incurs FBT liability ~ Do GST rulings have application to FBT issues? ("The Taxpayer" and C of T)	35
3.3	Tax Office Interpretations	38
(a)	Rulings & Draft Rulings [NIL]	38
(b)	Determinations & Draft Determinations	38
(1)	** TD 2007/6 ~ Non remote housing indexation factors for FBT year	38
(2)	** TD 2007/7 ~ FBT Exemption threshold	39
(3)	** TD 2007/8 ~ Cents per kilometre for a motor vehicle other than a car	39
(4)	** TD 2007/9 ~ Reasonable food allowance for LAFHA	39
(5)	** TD 2007/10 ~ The FBT benchmark interest rate	40
(c)	ID's [NIL]	40
(d)	Other Tax Office Statements, Addenda, Errata and Withdrawals [NIL]	40
4	STATE AND TERRITORY TAXES	41
4.1	Politicians, Boards & Statutory Authorities [NIL]	41
4.2	Courts & Tribunals	41
(1)	** Land tax on Queensland property (Chew & Singh v. C of Land Tax)	41
(2)	** Was there an error 30 years ago that could be corrected duty free? (Pryke & Ors v. C of SR)43	

4.3	Revenue Office Interpretations	45
(a)	New South Wales	45
(1)	** Exemption from duty – charitable & benevolent bodies (DUT 34) (NSW)	45
5	SUPERANNUATION, ETP'S & PENSIONS	47
5.1	Politicians, Boards & Statutory Authorities[NIL]	47
5.2	Courts & Tribunals[NIL]	47
5.3	APRA, ASIC & Tax Office Interpretations	47
(a)	Rulings & Draft Rulings[NIL]	47
(b)	Determinations & Draft Determinations[NIL]	47
(c)	ID's	47
(d)	ID's ~ Withdrawn	47
(e)	Other Tax Office Releases Other Tax Office Releases[NIL]	47
6	OTHER IMPOSTS, OFFSETS & REBATES	49
6.1	Politicians, Boards & Statutory Authorities[NIL]	49
6.2	Courts & Tribunals	49
6.3	APRA, ASIC & Tax Office Interpretations	49
(a)	Rulings & Draft Rulings	49
(1)	** FTR 2007/D1 ~ The meaning of acquire, manufacture & import	49
(b)	Determinations & Draft Determinations [NIL]	49
(c)	ID's - New	49
(d)	ID's - Withdrawn	50
(e)	Other Tax Office Statements, Addenda, Errata and Withdrawals [NIL]	50
7	LEGISLATION	51
7.1	Australian Parliament at 1 May 2007	51
(a)	Acts receiving Royal Assent in the last month	51
(1)	*** Tax Laws Amendment (2006 Measures No. 7) Act 2007 – Act Number 55 of 2007	51
(2)	Tax Laws Amendment (2007 Measures No. 1) Bill 2007	51
(b)	Bills before Parliament	52
(1)	Tax Laws Amendment (2007 Measures No. 2) 2007	52
7.2	State and Territory Parliaments – as at 27 April 2007	53
(a)	Australian Capital Territory	53
(b)	South Australia	53
(c)	Queensland	53
(d)	Tasmania	53
(1)	* Revenue Measures Amendment 14 of 2007	53
(e)	Victoria	53
(1)	* Pay-roll Tax Amendment (Bushfire and Emergency Service) Act 2007 (Number 5 of 2007)	53
(f)	Western Australia	53
(1)	* Stamp Amendment (First Home Owner) Act 2006	53
8	APPEALS TO THE FULL COURT OF THE FEDERAL COURT	54

1 INCOME TAX

1.1 Politicians, Boards & Statutory Authorities

(1) ** Help For Primary Producers (Mr Dutton)

[Source Month 04-2007 81 ~ Mr Dutton press release NO.036](#)

Taxation changes that were passed by both Houses of Parliament on 29 March 2007 (and which now await Royal Assent) in Tax Laws Amendment (2006 Measures No. 7) Bill 2006 will assist farmers as follows:

Depreciation of tractors and harvesters

Tractors and harvesters used in the primary production sector will benefit from a statutory cap of 6 $\frac{2}{3}$ years. This cap will apply in the situation where the Commissioner of Taxation has determined a longer effective life and the taxpayer chooses not to self assess the effective life.

The statutory cap preserves the current safe harbour period over which such tractors and harvesters are depreciated.

Farm management deposits

The Government is increasing the non-primary production income threshold for making farm management deposits from \$50,000 to \$65,000; and the total deposit limit will increase from \$300,000 to \$400,000.

This amendment will apply from the income year in which the Bill receives Royal Assent.

(2) ** Simplified Superannuation – Transitional Integrity Measure (Mr Dutton)

[Source Month 04-2007 – 82~ Mr Dutton Press Release Number 037](#)

The Treasurer's Press Release No. 131 of 7 December 2006 indicated that the Government would act to address any avoidance activities that are undertaken in Simplified Superannuation, with the date of effect backdated to 7 December 2006.

The Minister for Revenue and Assistant Treasurer, announced a transitional integrity measure to support the Simplified Superannuation reforms.

The Government will amend the Income Tax (Transitional Provisions) Act 1997 to address contributions made by a person on behalf of another person.

The contributions to be addressed are not Government co-contributions or contributions made on behalf of a spouse, child or employee (for example, those made by a friend) and are taxed in the hands of a superannuation fund, generally at 15 per cent. However such contributions are not included in any cap during the transitional period of 10 May 2006 to 30 June 2007.

This issue, if not addressed, could have resulted in people circumventing the contribution caps by giving large amounts of money to another person to contribute to a superannuation fund on their behalf prior to 1 July 2007.

The amendment will ensure these contributions made between 7 December 2006 and 30 June 2007 are included in the \$1 million cap on non-concessional contributions.

This measure will be included in the Taxation Laws Amendment Bill (No.3) 2007, scheduled for introduction and passage through Parliament in the Winter sittings.

1.2 Courts & Tribunals

(a) Courts

(1) *** What use is accountant's privilege? (White Industries Aust Ltd v C of T)

[Source Month 04-2007 ~ White Industries Aust Ltd v Commissioner of Taxation \[2007\] FCA 511 \(11 April 2007\)](#)

What was the issue?

Were certain documents constituting advice from an accountant privileged under guidelines issued by the Tax Office?

Were the documents source documents or restricted source documents as those terms are used in the Tax Office guidelines?

What was the outcome?

The Court held that a challenge to the Commissioner's decision to seek access to documents categorised as either "restricted source documents" or "non-source documents" under the Commissioner's "Guidelines to Accessing Professional Accounting Advisers' Papers":

- ◆ made by a taxpayer under the ADJR Act, was incompetent because the decision was not "made under" an enactment as it did not affect legal rights and obligations to which the taxpayer was entitle;
- ◆ made by the taxpayer under s 39B(1) of the Judiciary Act 1903 could be pursued by the taxpayer.

Does the outcome affect your firm's current practices?

If you rely on the Commissioner's Administrative Practice, or accountant's privilege, as it is called by most practitioners, this decision should provide a jolt. We need to wait and see the outcome of the s.39B challenge.

What were the facts?

Commissioner published guidelines to effect that he would concede confidentiality in respect of, and deny himself access to, certain advising papers of external accountants, unless he or an officer of a certain rank of the Australian Taxation Office ("ATO") should decide that there were "exceptional circumstances" – whether guidelines were "an enactment" – scope of "matter ... arising under any laws made by the Parliament" within s 39B(1A)(c) of Judiciary Act.

What was the decision?

- [7] On 3 August 2004 the applicants gave discovery in their respective appeals by the filing of a single list of documents. They claimed that the documents referred to in Pts 2(a) and (b) of Schedule 1 to the list were privileged from production. As to the documents listed in Part 2(a), being documents numbered 202 to 225, legal advice privilege was claimed. I am not concerned with them. As to the documents listed in Part 2(b), being documents numbered 226 to 238, the claim was that they were advice from accountants privileged pursuant to guidelines issued by the Commissioner. Specifically, the documents were:

either restricted source documents or non-source documents within the meaning of those words in ... the Australian Taxation Office's Access Manual.

The present proceeding relates to these "restricted source documents" and "non-source documents" listed in Part 2(b) ("Documents 226 to 238").

- [8] Entitled "Guidelines to Accessing Professional Accounting Advisers' Papers" ("the Guidelines"), the Guidelines formed part of the Australian Taxation Office's Access Manual referred to in the passage quoted above. I will digress from this chronological account of the facts of the present case to refer to the Guidelines now.
- [9] ...In sum, although professional accounting advice does not attract a privilege known to the law, the Commissioner was prepared to grant a concession in respect of it in the circumstances and for the reasons identified in the Guidelines.
- [11] The Guidelines are addressed to officers of the Australian Taxation Office ("ATO") but have been well publicised. "Source documents" are defined in the Guidelines as "all documents which record a transaction or arrangement entered into by a taxpayer", to which full and free access by ATO officers is essential in order for the Commissioner to carry out his responsibilities under the tax laws. Source documents include "papers prepared in connection with the conception, implementation and formal recording of a transaction or arrangement" and which explain its setting, context and purpose. They are called "source documents" because, "in effect, they explain the basis and form part of the fabric of the transaction or arrangement".
- [12] The Guidelines state that during the course of an audit, ATO officers will seek full and free access to source documents other than "restricted source documents".
- [13] "Restricted source documents" are defined as advisings and advice papers prepared by an external accounting advisor solely for the purpose of advising a client on taxation matters, which have been completed in connection with the conception, implementation and completion of the transaction.

- [14] "Non-source documents" are defined as all other advice and advice papers.
- [15] Importantly, s 5 of the Guidelines states that access to restricted source documents and non-source documents may be sought only in "exceptional circumstances" with the (personal) written approval of a Deputy Commissioner or another appropriate ATO Senior Executive Service ("SES") officer. In such cases, ATO officers will specify, to the extent practicable, the relevant documents applicable to the issue under review. Section 5 continues as follows:

In a litigated case before the courts and the AAT [Administrative Appeals Tribunal], the ATO recognises the rights of the courts or the AAT to inform themselves about the issues in dispute. However, the ATO will not seek to inspect or obtain documents listed in litigation procedures except with the (personal) written approval of a Deputy Commissioner or another appropriate ATO SES officer.

Mr O'Neill is an ATO SES officer who did not have operational responsibility for the appeal proceedings. His only involvement has been that of deciding, pursuant to s 5 of the Guidelines, to lift the concession in respect of Documents 226 to 238. It is Mr O'Neill's decision that the applicants attack in this proceeding.

- [16] On 18 April 2006, Mr O'Neill wrote to Maddocks, the solicitors for the applicants in the appeal proceedings (and in the present proceeding) advising that his approval had been sought by officers of the Commissioner under s 5 of the Guidelines to allow access to, inter alia, Documents 226 to 238. Mr O'Neill stated that they appeared to be "restricted source documents" and "non-source documents", and that approval would be granted to access such documents only in exceptional circumstances. He invited the applicants to make any submission they wished to make on the question of approval of access to the documents.
- [17] There followed a course of correspondence extending down to 3 July 2006 when Mr O'Neill recorded his decision to approve access.
- [18] The next day, 4 July 2006, the Australian Government Solicitor ("AGS") wrote to Maddocks enclosing a document recording Mr O'Neill's decision to "approve access" to Documents 226 to 238 "pursuant to the Guidelines", and stating his reasons for his decision.
- [20] In relation to the AD(JR) Act, the applicants' amended application for an order of review states:
- that a breach of the rules of natural justice occurred in connection with the making of the decision for the purposes of s 5(1)(a) of the AD(JR) Act;
 - that Mr O'Neill's making of his decision was an improper exercise of the power conferred by the Guidelines within the meaning of s 5(1)(e) of the AD(JR) Act because:
 - (a) Mr O'Neill took into account an irrelevant consideration or irrelevant considerations, and failed to take into account a relevant consideration or relevant considerations;
 - (b) further and alternatively, the power was exercised for a purpose other than that for which it was conferred, or, alternatively, was exercised in bad faith; and
 - further and alternatively, that the decision was an improper exercise of the power conferred by the Guidelines for the purposes of s 5(1)(h) of the AD(JR) Act because it was based on certain facts that did not exist, or, alternatively, that there was no evidence or other material "to justify the existence of those facts".
- [21] The grounds under the Judiciary Act as stated in the amended application were that by reason of the above, Mr O'Neill's decision was an improper exercise of the power to make the decision to grant access under the Guidelines and involved an error or errors of law. No particulars of the error or errors of law are given.

Section 5 of the AD(JR) Act

- [61] Was Mr O'Neill's decision "a decision of an administrative character made ... under an enactment"? The Guidelines plainly provide for the making of decisions of the kind made by Mr O'Neill.
- [67] The ITAA does not expressly or impliedly provide for the making of guidelines or the making of a decision excluding particular documents from their scope. Moreover, the ITAA does not give legal force or effect to the Guidelines or to Mr O'Neill's decision.
- [68] The proper analysis is that the Guidelines have been made by the Commissioner pursuant to his general power of administration under s 8 of the ITAA; the granting of the concession and the discretion to exclude particular documents from it are attributable only to that general power of administration; and it is O 33 r 12 of the FCRs that imposes a procedural obligation on the applicants as an adjunct to the appeal proceedings.

- [74] I do not accept this particular submission. Mr O'Neill's decision was in a different position from that with which Hutchins was concerned. Lockhart J was emphasising that the Commissioner's decision to vote against the motion could not advance matters until the motion was voted upon at the meeting of creditors. In the present case, a decision to lift the concession was provided for in the Guidelines and it was within the power of the Commissioner alone to access Documents 226 to 238. In substance, it was the Commissioner who decided both to lift the concession and to enforce his right, as a litigant, of access to Documents 226 to 238. If the Guidelines had been an Act, the provision for the decision to lift the concession would have been comparable to the provision of the making of a finding that a licensee was no longer a fit and proper person to hold a commercial licence, for which the Broadcasting Act 1942 (Cth) s 88(2) provided as the foundation of a decision to suspend or revoke such a licence, that was one of the decisions considered in *ABT v Bond*.
- [75] What is important, however, is that the Guidelines are not an "enactment", and the decision does not, by reason of them or of any enactment, immediately affect legal rights and obligations.
- [76] Mr O'Neill's decision would be reviewable as "a decision of an administrative character made ... under an enactment" if:
- the ITAA provided for (in the relevant sense) the making of the Guidelines granting the concession;
 - the Guidelines provided for the granting of the concession and for the making of the decision to lift it as a condition precedent to the taking of action to compel the giving of access;
 - the Act or the Guidelines (the latter, within power) provided for the compelling of the giving of access.
- [82] The Commissioner had issued "Guidelines for the Exercise of Access Powers in Relation to Accountants' Papers" ("the guidelines"). The title and the content were not identical with those of the Guidelines, but the substance of them was similar. Under the guidelines, a decision was made approving of access to certain documents of external accountants on the basis that exceptional circumstances existed.
- [99] For the reasons given above, the application is incompetent in so far as it relies on the AD(JR) Act. Sections 39B(1) and (1A) of the Judiciary Act
- Sections 39B(1) and (1A) of the Judiciary Act
- [100] In this case the jurisdictional question under s 39B(1) is whether the proceeding is a matter in which certiorari or an injunction is sought against an officer of the Commonwealth. It is not suggested that the Commissioner and Mr O'Neill (an Assistant Commissioner of Taxation) are not such officers. The applicants seek an order quashing or setting aside Mr O'Neill's decision and an injunction restraining the respondents "from seeking access to" Documents 226 to 238. The Court therefore has jurisdiction under s 39B(1) of the Judiciary Act.
- [101] The question that remains in relation to s 39B(1) is whether the applicants have no reasonable prospect of successfully prosecuting the proceeding (ie gaining the order and injunction they seek). In the present state of the evidence and exploration of the legal issues involved, I am not persuaded that they have no reasonable prospects of success of doing so.
- [106] On a broad view, the Commissioner is exercising public power in relation to the assessment and recovery of tax, although the right to issue a notice to produce under the FCRs is not itself such a power. The assessment and recovery of tax is radically different from, for example, conduct leading to the making of contracts and the making of them: see *General Newspapers Pty Ltd v Telstra Corporation*. I am not satisfied that the broad view referred to has no reasonable prospects of prevailing.
- [107] There should be a final hearing, as soon as practicable, of the claim under s 39B(1) of the Judiciary Act.
- [113] It is not shown that the applicants' claims, in so far as they are based on s 39B(1) and (1A) of the Judiciary Act, do not have reasonable prospects of success.

CONCLUSION

- [114] The application should be dismissed pursuant to s 31A of the FCA Act in so far as it is made under the AD(JR) Act, but not so far as it is made under s 39B(1) and (1A) of the Judiciary Act.

(2) ** What was the source of the distribution? (Condell v C of T)

[Source Month 04-2007 -30 ~ Part 1-3\(a\) Condell v C of T \[2007\] FCAFC 44 \(28 March 2007\)](#)

What was the issue?

Were the shares that were distributed as dividends "paid" out of profits derived by the company.

What was the outcome?

The majority (Kenny and Allsop JJ) found that value of the shares distributed represented a payment out of profits notwithstanding that balance of the retained earnings account was a significantly smaller amount than the value of the paid out.

Gyles J took a different approach and concluded that "this was an affair of capital not revenue".

Does the outcome affect your firm's current practices?

The decision highlights the importance of the accounting records in determining whether a payment is a payment of capital or a payment of a dividend.

What were the facts?

On 2 June 2000 the Hewlett-Packard Company (Hewlett-Packard), a Delaware corporation, issued the taxpayer, Gregory Condell, with 1327 shares in Agilent Technologies Inc (Agilent).

On 28 October 2003 the Tax Office, gave Condell notice of amended assessment for the year ended 30 June 2000 adjusting the previous assessment by adding \$168,961.00 as assessable foreign income representing the value of those shares.

The taxpayer:

- ◆ unsuccessfully objected;
- ◆ successfully sought review at the AAT.

The Tax Office appealed against the AAT decision and on 15 August 2006 the primary Judge ordered that the appeal be allowed, set aside the decision of the AAT and, in lieu, determined that the Tax Office objection decision be affirmed ([C of T v Condell \[2006\] FCA 1047](#)).

In the present hearing the taxpayer appeals from that decision.

What was the decision – Kenny and Allsop JJ?

- [3] The primary judge concluded that there was no reason for the Tribunal to doubt that the Hewlett-Packard accounts and notes accurately reflected what had occurred within Hewlett-Packard and its subsidiaries or to doubt the statements made by Hewlett-Packard that the retained earnings represented profits. Her Honour said that the relevant question was to understand the source of the distribution of shares, that is, how the company accounted for the making of the distribution. It did so by debiting one account only, the retained earnings account. That being so, the dividend was paid (that is the shares were distributed) out of (that is only out of) profits.
- [4] We agree with this approach.
- [5] There was no issue on appeal about the distribution of shares in specie being a dividend. "Dividend" is defined in s 6(1) of the ITAA 1936 to include any distribution made by a company to any of its shareholders whether in money or other property. There was no issue on appeal that the only account of Hewlett-Packard debited by reason of the distribution of the shares in Agilent to the Hewlett-Packard shareholders was an account representing profits. There was no suggestion that the Hewlett-Packard accounts in evidence were other than true and fair and completed according to proper United States accounting principles and practice. This was not a case where there was an issue about the legitimacy of the accounts or about the need to rewrite or "look through" the accounts to ascertain the true source, from the company's perspective, of the payment of the dividend, or, here, the distribution of the shares: cf *MacFarlane v Federal Commissioner of Taxation* (1986) 13 FCR 356.

- [6] Against that background, the relevant question is whether the shares (the dividend) were distributed ("paid" in s 44(1)(a) being defined in s 6(1) in relation to dividends as including distributed) out of profits derived by the company.
- [7] The correct perspective to answer the above question is the identification of the source, from Hewlett-Packard's point of view, from which the distribution of shares was made: Federal Commissioner of Taxation v Slater Holdings Ltd (1984) 156 CLR 447 at 457. It was accepted in argument that the dividend must be paid (that is here, the shares must be distributed) wholly out of profits: cf Slater Holdings 156 CLR at 459. The accounts of Hewlett-Packard reveal that the source, from its point of view, of the distribution of the shares was, and was only, the retained earnings account. That account was debited with somewhat over US\$4 billion. The market value of the shares distributed on the day of distribution was somewhat over US\$29 billion. It can be readily concluded, and it was the basis upon which the parties approached the appeal, that this discrepancy did not represent any inadequacy, error or lack of truth and fairness in the accounts. Rather, the shares in Agilent and the assets that were transferred to Agilent had been carried in Hewlett-Packard's books and accounts at less than current market value.
- "HP distributed substantially all of its remaining interest in Agilent Technologies through a stock dividend to HP stockholders on June 2, 2000, resulting in the elimination of the net assets of discontinued operations and a \$4.2 billion reduction of retained earnings..."*
- [8] The shares were distributed out of a profit account. That was the complete explanation given by Hewlett-Packard for the distribution of shares. The difference between the market value of the shares and the extent of the adjustment in the accounts does not, in our view, require a further explanation of the source of that additional value to understand what, from the company's perspective, is the source of the distribution of the shares. The terms of s 44(1)(a), applied here to the distribution in specie of shares, do not require that the source of the fund "liberated" or distributed (cf Davis Investments Pty Ltd v Commissioner of Stamp Duties (NSW) (1958) 100 CLR 392 at 407) in the hands of the shareholder be explained. Rather, one must ascertain, from the company's perspective whether the shares were distributed out of profits. The accounts reveal the answer to that question – the retained earnings account.
- [9] A question arose in argument concerning s 44(7) of the Administrative Appeals Tribunal Act 1975 (Cth). It is clear that her Honour properly addressed the two questions (set out in the reasons of Gyles J) arising on the appeal under s 44(1). In so doing, her Honour held that the Tribunal had regard to an irrelevant consideration (the market value of the distributed Agilent shares) and asked itself the wrong question (what was the nature of the receipt from the taxpayer's perspective). Having so concluded, it followed, on the evidence before the Tribunal and the facts it found, that the dividend was necessarily paid out of the profits of Hewlett-Packard. In this circumstance, it was and remains unnecessary to consider s 44(7), because it has no relevant operation.
- [10] The appeal should be dismissed. The Court was asked to note that the [taxpayer] was provided with funding under the ATO Test Case Litigation Program, to assist the [taxpayer] to meet his costs of the proceedings. We would also order, by consent, that there be no order as to costs

What was the decision – Gyles J?

- [12] The reasons for the original decision given on behalf of the Commissioner and the contentions advanced on behalf of the Commissioner thereafter depended upon the application of s 44(1)(a) of the Income Tax Assessment Act 1936 (Cth) (the 1936 Act) in combination with the definition of 'dividend' in s 6 and with s 21. ...
- [16] The assets and liabilities of the relevant part of the Hewlett-Packard business were transferred to Agilent which, immediately after the separation date, began operating as a separate company. The assets were transferred at a value of USD3.533 billion. Some surplus assets of the discontinued business were sold by Hewlett-Packard to external parties for approximately USD1 billion. The initial public offering (IPO) of approximately 15.9 per cent of Agilent's common stock was launched on 18 November 1999. Hewlett-Packard retained the balance of the common stock at that time. Following the successful IPO, Agilent distributed proceeds of USD1.335 billion to Hewlett-Packard which was credited as paid in capital.
- [17] On 7 April 2000 the board of directors of Hewlett-Packard approved the distribution of 380 million shares of Agilent common stock to holders of Hewlett-Packard common stock on 2 June 2000 on the basis of 0.3814 Agilent shares for each Hewlett-Packard share that was held on 2 May 2000. On that date, the [taxpayer] held 3483 shares in Hewlett-Packard and, on that basis, was entitled to receive 1327 shares in Agilent. No fractional shares were issued and a cash adjustment was to be made. On 2 June 2000 Hewlett-Packard issued the [taxpayer] with 1327 shares in Agilent and then posted a share certificate to him. On that date, the shares

had a market value of USD77.0068 each. The Commissioner assessed the value of those shares at market value AUS \$168 961.68 by reference to an exchange rate of USD0.68048. The Hewlett-Packard balance sheet account for retained earnings was debited with USD4.239 billion for the total stock dividends. The total market value of the Agilent shares distributed by Hewlett-Packard was approximately USD29.3 billion.

- [19] The notice of objection proceeded upon the basis that the stock dividend had a value of USD24 457, being a pro rata amount of the USD4.239 billion by which the retained earnings of Hewlett-Packard were reduced by reason of the transaction. The AAT held that the distribution of the shares was a dividend within the meaning of s 6 of the 1936 Act. However, it held that the distribution of the shares was not wholly paid from profits derived by Hewlett-Packard. Although the retained earnings account of Hewlett-Packard represented profits, the amount debited was much less pro rata than the amount assessed. The AAT went on to refer to the overall nature of the transaction, being a company restructure, and found that a significant component of the distribution of the shares was in the nature of a capital receipt on general principles, rather than wholly from profits. The AAT went on to consider other matters. It is only necessary to mention that the AAT held that there was no 'transaction' within the meaning of s 21 of the 1936 Act. The objection decision was set aside and the objection allowed.
- [20] The questions of law raised by the Commissioner on the appeal from the AAT to the Court were as follows:
- (1) Whether the distribution of Agilent shares by Hewlett-Packard to Gregory Condell was a dividend paid out of profits derived by Hewlett-Packard within the terms of s 44(1)(a) of the 1936 Act as applicable for the year ended 30 June 2000; and
 - (2) Whether the distribution of the Agilent shares to Gregory Condell was a transaction for the purposes of s 21 of the 1936 Act. ...
- [22] The primary Judge was of the view that the only available outcome of further consideration by the AAT would be favourable to the Commissioner and so, rather than remit the matter to the AAT, affirmed the objection decision
- [27] The primary Judge was correct in finding that the issue of payment out of profits derived by Hewlett-Packard under s 44(1)(a) requires consideration only from Hewlett Packard's point of view. However, in my opinion, the AAT approached that issue in that way. It identified USD4.239 billion as the total amount of ascertained profits that were distributed by the company – which, on a pro rata basis, was well below the amount assessed. Although the stock dividend was distributed and received otherwise than in cash, it is to be treated as if it were cash – that is the consequence of s 21 of the 1936 Act. It was open to the AAT to find as it did. In my respectful opinion, the primary Judge was not correct in finding that the AAT fell into error of law by taking into account the nature of the receipt by the taxpayer. Receipt by the taxpayer of the dividend paid to him was essential to assessment. After all, the taxpayer was assessed for the deemed amount of the dividend at market value. It is that amount that must have been wholly paid out of the company's profits to be assessable.
- [28] Furthermore, in my opinion, the primary Judge was not correct in finding that the AAT fell into error of law by seeking to identify non-profit sources for the distribution. That topic was not the gravamen of the AAT's decision. It does not strictly matter how the difference in value (pro rata) between USD29.3 billion and USD4.239 billion is categorised. It is not caught by s 44(1)(a). However, it is a feature of the case worthy of comment. The increment in question represented value passed from Hewlett-Packard to Agilent. The [taxpayer] was a shareholder of Hewlett-Packard and so suffered the diminution in value consequent upon the transfer of assets out of that company upon demerger and deconsolidation. In a real sense the distribution of the shares restored that value. This was a demerger by split of assets. If the shareholders of Hewlett-Packard were not to be disadvantaged they had to become shareholders in the new company or otherwise be advantaged. The diluting effect of the demerger for those not entitled to Agilent shares such as holders of employee entitlements is noted in the public Hewlett-Packard documents and it is recognised that it had to be adjusted. This is not a case where a company pregnant with excess profits distributed them to shareholders by way of a stratagem. I agree with the AAT in thinking (as a post script) that, in general terms, this was an affair of capital not revenue.
- [29] In truth, it is the Commissioner's contention which departs from the 'proper account' of Hewlett-Packard in ascertaining whether the amount assessed was wholly paid out of profits derived by Hewlett-Packard. It categorises the difference between the amount assessed and the amount debited in the books of Hewlett-Packard as paid from profits derived by it although not so dealt with by the company in its accounts.
- [30] The appeal should be allowed. The orders of the Court should be set aside and, in lieu thereof, the appeal to the Court dismissed and the orders of the AAT restored. As the [taxpayer] was provided with funding under

the Test Case Litigation Program to assist the [taxpayer] to meet his costs of the proceedings, there should be no order as to the costs of this appeal or of the primary hearing.

(3) ** Could the Tax Agent be re-registered (Toohey v Tax Agents Board of Victoria)

[Source Month 03-2007- 32 -- Toohey v Tax Agents Board of Victoria \[2007\] FCA 431 \(21 March 2007\)](#)

What was the issue?

Did the Tax Agents Board correctly make their decision not to re-register the Tax Agent?

What was the outcome?

The court decided that the Tax Agents Board did not make the decision correctly and remitted the re-registration back to a differently constituted Tribunal.

Does the outcome affect your firm's current practices?

If you are unlucky enough to have difficulty in re-registering you can take heart from the words of Justice Middleton - the relevant time for making the required assessment of the Applicant is the time of making the determination.

What is the relevant legislative provision?

Section 251BC

Fit and proper persons to prepare income tax returns

- (1) *Without limiting the generality of an expression used in this Part, but subject to this section, a person is not a fit and proper person to prepare income tax returns and transact business on behalf of taxpayers in income tax matters, as at a particular time, if:

 - (a) *the person is not a natural person;*
 - (b) *both of the following conditions are satisfied:*
 - (i) *the person was not registered as a tax agent, or as a nominee, for the purposes of this Part immediately before the commencement of section 39 of the Taxation Laws Amendment Act (No. 2) 1988 ;*
 - (ii) *the person does not hold such qualifications (whether academic, by way of experience or otherwise) as are prescribed;*
 - (c) *the person has not attained the age of 18 years;*
 - (d) *the person is not of good fame, integrity and character;*
 - (e) *the person has been convicted of a serious taxation offence during the previous 5 years;*
or
 - (f) *the person is under sentence of imprisonment for a serious taxation offence.**
- (2) *Nothing in paragraph (1)(e) or (f) limits the generality of paragraph (1)(d).*
- (3) *Where:*
 - (a) *a Board is required, in considering an application for:*
 - (i) *re-registration as a tax agent; or*
 - (ii) *re-registration of a nominee of a tax agent;**to decide whether the Board is satisfied that a particular person is a fit and proper person to prepare income tax returns and transact business on behalf of taxpayers in income tax matters;*
 - (b) *the person is not under sentence of imprisonment for a serious taxation offence; and*
 - (c) *the Board is satisfied that, because of special circumstances:*
 - (i) *a conviction of the person;*
 - (ii) *the doing of an act or thing by the person; or*
 - (iii) *an omission of the person;**should be disregarded;*

the Board may, in making the decision referred to in paragraph (a), disregard the conviction, the doing of the act or thing or the omission, as the case requires.
 - (4) *For the purposes of this section:*

- (a) *a person who has been released from serving a part of a sentence of imprisonment on parole or upon licence to be at large shall be taken to be under sentence of imprisonment during any period during which action can be taken by way of requiring the person to serve the whole or a part of the remainder of that sentence; and*
 - (b) *a person who has been released by a court from serving the whole or a part of a sentence of imprisonment upon the person giving a good behaviour security shall be taken to be under sentence of imprisonment during any period during which action can be taken for a breach of a condition of that security.*
- (5) *A reference in subsection (4) to a good behaviour security given by a person is a reference to a security given by the person, with or without sureties, by recognizance or otherwise, that the person will comply with conditions relating to his or her behaviour.*

What was the decision?

- [1] This is an appeal from the decision of the Administrative Appeals Tribunal ('the Tribunal') affirming the decision of the respondent ('the Board') to refuse re-registration of the applicant as a registered tax agent under [s 251JC](#) of the [Income Tax Assessment Act 1936](#) (Cth) ('the Act'). ...
- [6] A registered tax agent may apply to the Board by which the tax agent was registered for re-registration: s 251JB(1) of the Act.
- [7] Section 251JC(1)(a) of the Act relevantly provides that:
- The Board shall re-register the applicant as a tax agent if the applicant satisfies the Board that:
- (a) *if the applicant is a natural person:*
 - (i) *the applicant is a fit and proper person to prepare income tax returns and transact business on behalf of taxpayers in income tax matters; and*
 - (ii) *the applicant is not an undischarged bankrupt; ...*
- [8] Section 251BC(1) sets out a number of factors which disqualify a person as being a fit and proper person to prepare income tax returns.
- [9] Therefore, the Board is required, in essence, to consider and determine whether the applicant is the prescribed fit and proper person. In determining the matter, the Board is directed by the legislature that a disqualifying factor for a person not being the prescribed fit and proper person is, relevantly, if the person is not of 'good fame, integrity and character': s 251BC(1)(d). This appeal does not require a consideration of the elements of whether or not a person is the prescribed fit and proper person, although the generality of the phrase 'good fame, integrity and character' is not to be limited by reference to whether the applicant has certain disqualifying convictions or is under sentence of imprisonment (see s 251BC(2) of the Act). The enquiry is whether the applicant is the prescribed fit and proper person, and the disqualifying factors set out in s 251BC(1) do not limit the generality of that enquiry (see s 251JC(1)), although it may well inform that inquiry. The fact that a person is not of good fame, integrity and character means that that person cannot be regarded as the prescribed fit and proper person. However, even if this or other disqualifying factors do not apply, the applicant may still not satisfy the Board that he or she is the prescribed fit and proper person. If not satisfied, the Board 'shall refuse' to re-register the applicant: s 251JC(2).
- [10] The provisions of s 251BC(3) do not detract from this ultimate issue of whether the applicant is the prescribed fit and proper person, and should not be confused with it. ...
- [11] Pursuant to s 251BC(3), in the course of deciding the ultimate issue, certain matters may be disregarded because of special circumstances. Once disregarded, those matters are no longer considered in the enquiry, and then a decision as to whether the applicant is the prescribed fit and proper person is made by the Board. If a conviction, act or omission of the applicant is not disregarded, it will need to be assessed, along with other factors, in order to determine whether the applicant is a fit and proper person if that inquiry can still be made where the disqualifying factors do not apply. It may well be that a particular conviction (other than a disqualifying conviction) is to be taken into account and not 'disregarded', but that, for one reason or another, taking into account all the circumstances, the Board may still be satisfied that the applicant is the prescribed fit and proper person. Again, of course, it is clear that if there is a disqualifying factor, there cannot be a finding in favour of the applicant allowing re-registration.
- [12] The other matter to observe is that the relevant time for the assessment of whether a person is the prescribed fit and proper person, is at the time of the relevant determination. This is made clear by the Act itself, for it is in considering the application that the Board needs to be satisfied that the applicant is the prescribed fit and proper person. I note the Act specifically uses the present tense. There is no express or implied legislative

indication which provides for the assessment of the facts at any other particular date. I refer also to *A Solicitor v Council of the Law Society (NSW)* (2004) 216 CLR 253 at 268.

- [13] In view of s 43(1) of the AAT Act, where the matter comes before the Tribunal, the Tribunal must be satisfied that the applicant is the prescribed fit and proper person at the time of the Tribunal's determination. In reaching its decision, the Tribunal should consider for itself, as though it was performing the function of the relevant decision-maker, whether the applicant has satisfied the Tribunal he or she was the prescribed fit and proper person.

CONSIDERATION

- [14] In my view, reading the Tribunal's reasons as a whole and fairly, the Tribunal did not approach the matter by directing itself to the ultimate issue it needed to resolve, namely whether the applicant was the prescribed fit and proper person.
- [15] Upon an analysis of the structure and reasons of the Tribunal, in my view the Tribunal did not address the ultimate issue for its consideration and determination, but in reality only considered the question of the operation of s 251BC(3).
- [16] After setting out the relevant provisions of the legislation, the Tribunal then set out aspects of the applicant's circumstances, including 'Applicant's Practice Circumstances', 'The Applicant's Health', 'Delay in Lodgement' of Income Tax Returns', and 'Failure to Respond to Letters of the Board'. Under the heading 'Summary of Tribunal and Federal Court Decisions', the Tribunal then considered a number of cases on the content of the phrase 'fit and proper person' and the discretion under s 251BC(3).
- [17] The Tribunal then under the heading 'Conclusion and Reasons for Decision' stated at [56]:

Section 251BC of the Act allows certain conduct or events on the part of a tax agent to be disregarded in an application for re-registration if special circumstances exist.

It was in this context and this context only that the Tribunal, in my view, considered the evidence. The Tribunal kept returning throughout its reasons to the phrase 'special circumstances', which could only be referable to its consideration of the operation of s 251BC(3). Such references are made throughout the reasons of the Tribunal at [59], [65], [74], [77], [78], which precede or follow analysis of various matters pertaining to the applicant.

- [18] In my view, although there are also references to the phrase 'fit and proper person' and 'good fame, integrity and character', these matters were not considered in the context of the ultimate issue of whether the applicant was the prescribed fit and proper person, but in the context only of whether 'special circumstances' existed for the purposes of s 251BC(3).
- [19] Significantly, nowhere in its reasons does the Tribunal conduct the enquiry itself as to whether the applicant was the prescribed fit and proper person either at the time of its determination or at all.

(4) ** Small business capital gain - did the Tax Office act in bad faith? (*Haritopoulos Pty Ltd v D C of T*)

[*Source Month 04-2007 – 33 ~ Month 04-2007 – 33 ~ Haritopoulos Pty Ltd v Deputy Commissioner of Taxation \[2007\] FCA 394 \(23 March 2007\)*](#)

What was the issue?

Was the Tax Office entitled to issue a default assessment?

In issuing the default assessment did the Tax Office:

- ◆ act in bad faith?
- ◆ breach the terms of section 166?

The underlying issue was whether the trust was liable to tax on a \$4.4m capital gain.

What was the outcome?

The Court decided the Tax Office:

- ◆ was entitled to issue a default assessment;

- ◆ the taxpayer had not produced sufficient evidence to establish that the Tax Office had acted in bad faith.

Does the outcome affect your firm's current practices?

The tax office would be unlikely to pass up an audit opportunity on a \$4.4m gain for which protection was sought under the small business concessions given the \$5m NAV test cap under those provisions.

Presumably the tax payer had reason to pursue allegations that the Tax Office had acted in bad faith rather than to pursue the generally more productive course of lodging an Objection.

This case highlights the need to nail down deadlines and KPI's in writing when dealing with the Tax Office.

What were the facts?

The taxpayer:

- ◆ is the trustee of the Charitopoulos Family Trust;
- ◆ acquired at property at 91 Exeter Terrace in 1994 and sold it on 16 May 2002;
- ◆ filed an income tax return in respect of the year ended 30 June 2002, disclosing the fact that it had made a capital gain of \$4.4 million as a result of the sale of the property (s 104-10) the 1997 Act calculated (under s 102-5) as follows:
 - ~ Capital proceeds from the disposal of the property- \$5,900,000.00;
 - ~ Cost base of the property - \$1,500,000.00;
 - ~ Capital gain calculated under 104-10(4)- \$4,400,000.00;
- ◆ reduced the capital gain of \$4.4 million:
 - ~ by 50 per cent under step 3 of the method statement;
 - ~ by a further 50 per cent under Subdivision 152-C.
 - ~ then rolled the resulting figure over under Subdivision 152-A.
- ◆ made a resolution distributing any income of the trust for the year ended 30 June 2002 to beneficiaries of the trust.

Between November 2004 and November 2005 the Tax Office carried out an audit of the taxpayer's affairs for taxation purposes.

On 17 October the taxpayer (by Mr Hariopoulos) had a phone conversation with Tax Officer Mr Zoumaris

On 20 October 2005 the taxpayer met with Mr Zoumaris and agreed to provide material to the tax office.

The Tax Office told the taxpayer that the Tax Office would receive the information and would issue an assessment in any event and hold any information provided in the event that the applicant lodged an objection to the notice of assessment.

On 26 October and 7 November 2005 the taxpayer sent emails to Mr Zoumaras and in the email of 7 November 2005 Mr Hariopoulos advised Mr Zoumaras that a package of information was lodged at the Australian Taxation Office at Waymouth Street on 3 November 2005.

On 8 November 2005 Mr Zoumaras, on behalf of the respondent, wrote to Mr Charitopoulos and said, relevantly:

- '1. You are advised that as previously discussed with you and your accountant (KPMG), default assessments are in the process of issuing. The decision to issue default assessments was only taken after repeated efforts by the Australian Tax Office to obtain the relevant information was unsuccessful.
2. You are reminded that at the meeting of the 20th October 2005, you were advised that the Australian Tax Office was issuing default assessments due to the repeated delays in providing the required information. You were also advised that the assessments would take at least six to more than eight weeks to issue. Further your accountant at KPMG was similarly advised on 17 October 2005.

On 8 November 2005 the Tax Office issued a notice of assessment. The Tax Office determined that the capital gain derived by the trust for the year ended 30 June 2002 was \$5,800,000.

In March 2006 the taxpayer lodged a notice of objection with the Tax Office and on 5 May 2006 the Tax Office wrote to the taxpayer acknowledging receipt of the objection.

On 12 May 2006 the Tax Office wrote to the taxpayer advising it that it did not have all the information it needed to make a decision on the objection.

What was the decision?

- [27] The substance of the [taxpayer]'s claim can be reduced to four groups of allegations.
- [28] First, the [taxpayer] claims that the [Tax Office] failed to provide particulars of the assessment and the penalty assessment. ...
- [29] Secondly, the [taxpayer] claims the penalty assessment is invalid because it is affected by a lack of independence, objectivity and impartiality and that arose because the [Tax Office] assesses the tax to be paid and that amount and the penalty assessment have to be paid before the [taxpayer] has the opportunity to seek judicial relief. ...
- [30] Thirdly, the [taxpayer] claims that for some reason the [Tax Office] gave an intimation that it would take six to eight weeks for the assessment to issue and yet it made the assessment well before the expiration of the six to eight-week period. ...
- [31] Fourthly, the [taxpayer] claims that it provided to the [Tax Office] what it calls a package of information relevant to the assessment. That was done before the assessment was made. What was in the package of information is unclear, but on this application it is appropriate that I assume that it was information relevant to the assessment. No undertaking was given by the [Tax Office] prior to the making of the assessment that the package of information would be considered; in fact, it was made clear that it would not be considered, but held by the [Tax Office] pending an objection to the assessment. ...
- [32] Cases in which bad faith is established will be rare and extreme and claims of bad faith must be clearly particularised. I do not think the fact that the [Tax Office] did not consider the package of information before making the assessment constitutes an arguable case of bad faith. More would be required to give the [Tax Office]'s conduct even the flavour of bad faith. There is nothing to suggest that the [Tax Office] did not genuinely believe that it was entitled to proceed to make the assessment.
- [33] In the alternative, the [taxpayer] submitted that it was arguable that the [Tax Office] had acted in breach of s 166. ...
- [34] ...First, s 166 does not in terms impose an obligation on the [Tax Office] to consider all information in his possession. He may make his assessment from the return and from any other information in his possession, or 'from any one or more of these sources'. Secondly, even if there was an obligation on the [Tax Office] to consider the information, it was an obligation imposed by the Act, and s 175 expressly provides that failure to comply with such an obligation does not affect the validity of the assessment.

(5) ** Who received the capital gain – the company or the taxpayer? (Gerard Cassegrain & Co Pty Ltd v C of T)

Source Month 04-2007 - 35 ~ Part 1-3(a) - Gerard Cassegrain & Co Pty Ltd v C of T [2007] FCA 415 (23 March 2007)

What was the issue?

Was the settlement sum a capital gain received by the taxpayer or by one of its shareholders?

What was the outcome?

The Court determined that the settlement sum was received by the company.

Does the outcome affect your firm's current practices?

The case illustrates very clearly the absolute need for settlements to be based on real evidence rather than fleeting fancy once the money is on or nearly on the table. The basis for tax effective receipts must be laid at the time of making the claim. The manner in which the shareholder's activities oppressed other shareholders provided the judge a ready reason to conclude that the taxpayer "would do whatever was necessary".

What were the facts?

On 27 September 1993, CSIRO paid \$9.5 million ("the Settlement Sum") as part of a settlement.

GCC disclosed \$5.25 million of this amount as assessable income in its return for the year ended 30 June 1994.

The Commissioner included the balance of \$4.25 million in the assessable income of GCC by an amended assessment resulting in a taxable income of GCC of \$3,186,712 for the 1994 year.

The taxpayer unsuccessfully objected and then sought review at the Tribunal.

What were the background facts as found by the Tribunal

The central question before the Tribunal was whether GCC showed that its amended assessment for 1994 was excessive by this amount of \$4.25 million or by some other amount.

In about May 1987, representatives of GCC and CSIRO began discussions on the possible application of a soil improvement technology that CSIRO was developing, known as "slotting", to land on which GCC proposed to develop vineyards.

On or about 10 July 1987, CSIRO and GCC entered into a written agreement for the conduct of research and development concerning slotting and associated activities.

Soon afterwards, a joint venture company called Cassiro Pty Limited ("Cassiro") was formed.

Later, there was a falling out between GCC and CSIRO.

On 8 April 1992, GCC commenced proceeding (NG 3062 of 1992) against CSIRO, its wholly owned subsidiary, Sirotech Limited ("Sirotech"), and Cassiro.

On 7 May 1992, CSIRO commenced a second proceeding (NG 3095) of 2002 in this Court seeking to have GCC wound up on the just and equitable ground.

GCC alleged in its amended statement of facts and contentions before the Tribunal that, by April 1993, the legal advisers of GCC and Claude Cassegrain were considering amending the pleadings in proceeding NG 3062 of 1992 to include "claims for tort and exemplary damages for the damage caused by the CSIRO parties to the reputation of Mr Cassegrain", but in his statement of facts issues and contentions before the Tribunal, the Commissioner disputed that consideration was being given to including a claim for damage to the reputation of Mr Cassegrain.

The two proceedings were heard together before Olney J commencing in early 1993.

Prior to a mediation Claude Cassegrain did not join in or apply to join in as a party to GCC's proceeding, and he did not institute any separate proceeding against either of them for damages for defamation.

In a letter dated 5 May 1993 Claude Cassegrain wrote as company secretary of GCC to Professor Clarke ("the Cassegrain Letter"), and set out details of GCC's claim "from a practical rather than legal viewpoint", and included an item reading as follows:

- "5. *Damage to the name, reputation and standing of GC & Co, Cassegrain Family name, Cassegrain Group of companies, and Claude Cassegrain and his family as a result of being publicly associated with a failed venture involving bitter litigation and disruption to the family and their associated companies' business activities – \$5,000,000". (my emphasis)*

Claude Cassegrain claimed \$56,033,000 in his letter. The concluding sentence in the letter was: "It is always understood that any settlement would involve some adequate means to restore the reputation of the family, the company and myself personally".

The letter:

- ◆ did not refer to such "adequate means" or subsequently.
- ◆ did not threaten (expressly) that Claude Cassegrain, his family and their companies would sue CSIRO for defamation and injurious falsehood.

On 29 June 1993 Garrett & Walmsley wrote to Blakes (solicitors for the CSIRO) advising that they were instructed to seek leave to amend in proceeding NG 3062 of 1992 to include:

"counts in defamation and injurious falsehood in relation to communications between servants and agents of CSIRO and Sirotech on the one hand and the State Bank of NSW on the other".

The State Bank of New South Wales ("the Bank") had financed GCC and held a mortgage debenture registered as a charge over its assets.

Garrett & Walmsley's letter of 29 June 1993 to Blakes did not suggest any proposal to introduce Mr Cassegrain as a second applicant or otherwise suggest that the threatened claims of defamation and injurious falsehood were his, as distinct from GCC's.

A mediation before Sir Lawrence Street was held over three days from 28 June to 2 July 1993. The parties agreed on a settlement in principle with CSIRO paying \$9.5 million, and both proceedings were adjourned.

On Friday 2 July 1993, Sir Lawrence Street recorded in a memorandum that he had chaired lengthy mediation discussions that had resulted in an offer of \$9.5 million by CSIRO to GCC and expressed the opinion that the proposal settlement agreement was a "soundly based commercial compromise of the dispute".

On Saturday 3 July 1993, there was a discussion between Claude Cassegrain, his parents, Gerard Cassegrain and Françoise Cassegrain, and GCC's solicitor, Andrew Walmsley.

Claude and Gerard Cassegrain agreed on an apportionment of the sum of \$9.5 million, as to \$5.2 million to GCC and as to \$4.25 million to Claude Cassegrain ("the Apportionment Agreement").

On 6 July 1993:

- ◆ a letter, written on the letterhead of GCC to John Garrett of Garrett & Walmsley and was apparently signed by Gerard Cassegrain and his son Patrick Cassegrain although neither of them was a director of GCC, each was a shareholder:

"It was resolved at an extraordinary meeting held by the shareholders on Saturday 3 July 1993 that the following offer in settlement of the dispute would be accepted by Gerard Cassegrain & Co Pty Ltd –

- \$5.2m to Gerard Cassegrain & Co Pty Ltd (\$4.32 in respect of damages \$930m sale of GC&Co's share in Cassiro Pty Ltd)
- \$4.25m personal damages payable to Claude Cassegrain.

The legal costs will be apportioned in a manner that is yet to be discussed between the company and Claude Cassegrain."

- ◆ Claude Cassegrain also wrote to Mr Garrett advising him that he (Claude Cassegrain) was "prepared to accept in settlement of the proceedings \$4.25m as personal damage" stating that:

"This has been discussed with the company at an extraordinary meeting held by the shareholders on Saturday 3 July 1993".

and later :

"The company and myself will agree on the apportionment of the legal expenses".

The letter purports to advise Mr Garrett of the making of the agreement three days earlier.

On 7 July 1993, CSIRO's solicitors submitted a draft deed of release that did not provide for the making of separate payments to GCC and Claude Cassegrain.

The next day, 8 July 1993, Mr Garrett replied on a "without instructions" basis. Mr Garrett's letter stated "settlement must be structured as far as practicable in a manner which is tax effective for GC&Co" and proposed that the agreement should require that CSIRO pay to GC&Co, or at its direction the sum of \$9.5 million together with interest thereon, a suggestion to which CSIRO's solicitors agreed.

On 5 August 1993, however, Claude Cassegrain wrote to GCC's solicitor, Mr Garrett, and counsel, Mr Tim Castle he asserting that the apportionment had been resolved at the meeting on 3 July 1993, and insisted that the settlement deed clearly reflect that result. However, his letter added:

"We are prepared to accede if CSIRO finds difficulty in embodying '... payment by cheque to GC & Co \$5.25m, Cassegrain \$4.2m' as 2.1 [see [41] below]; to the clause being amended to read "... the payment by cheque jointly to GC & Co and Cassegrain \$9.5m...". In the latter instance we shall account to our parties privately."

What was the decision?

- [40] Mr Garrett said in evidence before the Tribunal that the CSIRO parties (CSIRO and Sirotech) and the Cassegrain parties (GCC and Claude Cassegrain) could not reach agreement that the \$5.25m/\$4.25m apportionment be recognised in the settlement deed. On 6 August 1993, he wrote to Claude Griffith and Winfred Gibson of Griffith Salloway Pty, the accountants who did the Cassegrain companies' financial and taxation work. He confirmed advice that he had previously communicated to Ms Gibson that CSIRO was

taking the position that, even if Claude Cassegrain had been a party to the litigation, he would not have received more than approximately \$500,000 in damages, and that, in those circumstances, CSIRO did not wish to be a party to a document that did not fully represent the true position as CSIRO saw it, and of which some criticism might be made. His letter stated: "They [CSIRO] say they are a Federal Government instrumentality and have to be mindful of their responsibilities".

- [41] Further amendments were discussed until 27 September 1993 when the "Deed of Settlement and Release" ("the Deed") was executed. The parties were GCC and Claude Cassegrain (in the Deed and hereinafter, the "Cassegrain Parties") and CSIRO and Sirotech (in the Deed and hereinafter, the "CSIRO Parties") and Cassiro.
- [44] In cross-examination before the Tribunal, Claude Cassegrain agreed that at no time did he in fact write a letter of demand for damages for defamation and that the closest he came to doing so was the Cassegrain Letter. He agreed that he had not received legal advice regarding the amount of damages he might receive for defamation. He said that the only discussion concerning apportionment of the \$9.5 million was the discussion with his parents on 3 July 1993. ...
- [45] Settlement also took place on 27 September 1993 immediately following execution of the Deed. The sum of \$8,835,083 referred to in cl 2.2(a) of the Deed (set out at [41] above) was paid by CSIRO in accordance with the terms of a Deed Poll, also dated 27 September 1993, executed by the Bank. In addition to a payment of \$8,309,502 to the Bank, CSIRO paid \$1,170,000 to Garrett and Walmsley, solicitors for GCC, on account of their legal costs and disbursements in the two proceedings mentioned earlier.
- [47] Claude Cassegrain claimed that the sum of \$8,309,502 paid to the Bank included his \$4,250,000 which he had lent to GCC to enable it to procure the release by the Bank.
- [61] As noted at [41] above, parts of the Settlement Sum, namely, \$503,667, \$155,000 and \$6,250 (totalling \$664,917) were allocated in the Deed to particular things that were being transferred by GCC and in which Claude Cassegrain had no interest. It is in respect of the balance of \$8,835,083 that s 160ZD(4) may have scope for operation. What is required is a careful identification:
- of the assets disposed of by GCC and Claude Cassegrain respectively under the Deed, and
 - of that part of the said sum of \$8,832,083 that might reasonably be attributed to the disposal of those assets.
- [110] The applicants submit that the Tribunal should have ignored the Apportionment Agreement. This is an odd submission in view of the fact that their returns were based fairly and squarely on it, and that it was referred to in their amended statement of facts issues and contentions. The Tribunal had to address the Apportionment Agreement in order to explain why it was putting to one side the possibility that the sum of \$4.25 million represented a capital gain that had accrued to Claude Cassegrain.
- [111] I agree with counsel for the applicants that a rejection of the Apportionment Agreement as a sham does not, without more, make the sum of \$4.25 million part of a capital gain that accrued to GCC.
- [112] My conclusions in relation to the Apportionment Agreement are as follows:
- the Tribunal did not err in applying the test of what is a sham, and its conclusion that the Apportionment Agreement was a sham was supportable in law;
 - if this is wrong, nonetheless the Apportionment Agreement was one made only between Claude Cassegrain and his father, not between Claude Cassegrain and GCC;
 - if this is also wrong, the Apportionment Agreement did not effectively apportion the Settlement Sum into amounts that CSIRO was paying to GCC and Claude Cassegrain respectively, because CSIRO (and, if it matters, Sirotech) was not a party to it, and the Apportionment Agreement was no more than an agreement between parties not at arm's length on one side of the transaction as to how they would divide up the sum of \$9.5 million between themselves.
- [113] There was no error in the Tribunal's identification of the test of a sham. The Tribunal asked itself whether the Apportionment Agreement was intended to have the legal effect that it gave an appearance of having, or, to express the same idea differently, whether the parties took steps having the form of a legally effective transaction, which they intended should not have the legal consequences that such a transaction would have. This was the correct question to ask: see *Cranstoun v Federal Commissioner of Taxation* (1984) 75 FLR 220 at 227–228; *Richard Walter Pty Ltd v Commissioner of Taxation* (1996) 67 FCR 243 at 257 – 258; *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 211 ALR 101 at 111. The Tribunal supportably answered this question in the negative.

- [121] It must be remembered that the Apportionment Agreement purported to relate only to the releases of the existing claims of GCC and Claude Cassegrain respectively, and not to the other contractual undertakings that they later gave in the Deed.
- [122] Another reason why the Apportionment Agreement was not effective in law is that the constitutional organ of GCC that had power to bind it to such an agreement had not done so. That constitutional organ was the directors. An extraordinary general meeting was not given power to do so by GCC's articles of association, and, in any event, no extraordinary general meeting of GCC was ever called. The directors of GCC at the time were Claude and John Cassegrain, but they did not make the Apportionment Agreement on behalf of GCC.
- [123] If the Apportionment Agreement was not a sham and was binding on GCC as well as on Claude Cassegrain, what then? The Apportionment Agreement related only to their releases of existing claims. But CSIRO was later to insist that the Deed contain the other contractual undertakings, and that Claude Cassegrain, as well as GCC, should be a party. The applicants now submit, in my view correctly, that those undertakings were significant and had some value. Yet GCC and Claude Cassegrain did not seek an increase in the amount of \$9.5 million. On one view, by entering into the Deed, GCC and Claude Cassegrain impliedly terminated the Apportionment Agreement: the Deed did not provide for payment of the \$9.5 million merely for the releases that had been the subject of the Apportionment Agreement.

(6) ** How judges react when a solicitor does not turn up to Court (Seller v C of T)

Source [Month 04-2007 – 44 ~ Seller v C of T](#)

What was the decision?

- [1] Each of these applications was filed on 13 October 2006. On 28 November 2006, an order was made in each matter that the [taxpayer] file and serve evidence upon which he or she intended to rely on or before 6 March 2007. That was not complied with and no application had been made to extend the time. On 13 March 2007, upon explanation on affidavit, the time was extended to 3 April 2007. No evidence has yet been filed by either applicant.
- [2] The matter was stood over to this morning at 9.30 am. It is now 9.50 am and there has been no appearance for either applicant. My chambers was not communicated with in any way about the failure to appear this morning. It is also worth noting that the [taxpayers] are married, and the applicant Seller is a solicitor practising in New South Wales.
- [3] I find the approach to this matter to have been totally unsatisfactory. The orders of the Court have been flouted without proper explanation, and there is no appearance this morning. In those circumstances, each application is dismissed. The [taxpayers are] to pay the costs of the proceeding of the Commissioner as between solicitor and client.

(7) [Listed Only] ~ Austvin Vineyards 1997 Project (Iddles v C of T)

Source [Month 04-2007 – 34 ~ Month 04-2007 – 34 ~ Iddles v C of T \[2007\] FCA 395 \(23 March 2007\)](#)

What was the issue?

What was the taxpayers dominant purpose in entering into a scheme?

What was the outcome?

The Court found as follows in dismissing the appeal:

- ◆ dominant purpose to be ascertained exclusively by reference to [s 177D\(b\)\(i\) to \(viii\) of the Act](#) – subjective motivation of taxpayer not a relevant consideration
- ◆ evidence of commercial purpose does not preclude finding of dominant purpose of obtaining a tax benefit
- ◆ tribunal member gave proper and genuine consideration to relevant matters regarding commercial benefits of scheme

(8) [Listed only] ~ Bankruptcy (Joossé v C of T)

[Source Month 04-2007 - 46 ~ Joossé v Commissioner of Taxation \[2007\] FCA 445 \(28 March 2007\)](#)

What was the issue?

Could a sequestration order be set aside?

(9) [Listed only] ~ Winding-up (D C of T v Vallod Pty Ltd)

[Source Month 04-2007 - D.C. of T v Vallod](#)

What was the issue?

Could the Order of the Court winding up Vallod Pty Limited and appointing Steve Sherman as liquidator be set aside?

(10) [Listed only] ~ Winding up application (D C of T v De Simone Consulting Pty Ltd)

[Source Month 04-2007 - 31 ~ -Deputy Commissioner of Taxation v De Simone Consulting Pty Ltd \[2007\] FCA 548 \(20 March 2007\)](#)

(11) [Listed Only] Forensic accounting report prevents liquidation (D C of T v Guardian Group Australia Pty Ltd)

[Source Month 04-2007 - 37- Deputy Commissioner of Taxation v Guardian Group Australia Pty Limited \[2007\] FCA 469 \(8 March 2007\)](#)

What was the issue?

Could the shareholders of the company have its winding up (initiated by the Commissioner) terminated on the grounds that all the creditors would be paid in full?

On the basis that the amount owing to the Tax Office was paid the Commissioner did not oppose the application. The application was supported by a favourable forensic accounting report.

What was the outcome?

The winding up was terminated.

(12) (Listed only) ~ Taxpayer withheld 0.5117% of his tax liability that would fund medicare payments for abortions (Daniels v D C of T)

[Source Month 04-2007 - 43 - Daniels v Deputy Commissioner of Taxation \[2007\] SASC 114 \(3 April 2007\)](#)

What was the issue?

The taxpayer withheld .5117 per cent of his tax (\$10.33) that he believed was disbursed to Medicare for costs associated with abortion, for want of a better term, an 'abortion levy'.

The taxpayer took the view that the matter should be taken to the High Court of Australia.

The taxpayer understood the ATO to have agreed to his deduction as a result of his stipulations in correspondence accompanying his payments to the effect that, should the ATO cash his cheques, the ATO will have agreed to receive the 0.5117 per cent reduced payments in full and final satisfaction of the taxpayer's debt.

The taxpayer therefore withheld all income tax payments in order to, he submits, 'force [the ATO] into either honouring their agreement or to enter the court room'.

In June 2005, the taxpayer instigated proceedings against the Tax Office in the District Court of South Australia. Those proceedings were determined against the taxpayer. The taxpayer then appealed.

The Tax Office made application by way of an interlocutory application to summarily dismiss the appeal to the Full Court of the Supreme Court against a decision of a judge of the District Court on the basis that the appeal cannot succeed..

(b) Tribunals**(1) ** Extension of time for lodging an application for review of a Objection Decision (Spencer and C of T)**

Source Month 04-2007 – 40 ~ Spencer and Commissioner of Taxation [2007] AATA 1194 (30 March 2007)

What was the issue?

Was the taxpayer entitled to an extension of time to lodge an application for review of Objection Decisions made in relation to:

- ◆ the year of income ended June 30 2002?
- ◆ the year of income ended 30 June 2006?

What was the outcome?

The Tribunal refused to extend the time for lodging and application to review the objection for the 2002 year.

Does the outcome affect your firm's current practices?

This is one more case which illustrates the importance of ensuring that the basis for a favourably taxed settlement payment must be incorporated in the settlement documentation.

What were the facts?

The taxpayer received an amount of compensation from a previous employer, Telstra, following protracted litigation.

In the course of the litigation, the taxpayer discharged his solicitor. Telstra reached an agreement with the discharged solicitor.

The Tax Office concluded that the payment was received in the 2001 year when the litigation was concluded and the discharged solicitor deducted their fees from the payment representing the settlement made to them by Telstra rather than in 2005 when the taxpayer banked the payment.

The 2002 Objection Decision disallowed in full Mr Spencer's objection to the Commissioner's decision to include the two ETPs in his assessable income for the year ended 30 June 2001.

The 2006 objection decision disallowed Mr Spencer's objection to an assessment issued in relation to the same financial year and relating to Termination Payments Tax (TPT).

Initially, the Commissioner opposed both applications for extension of time but subsequently withdrew his opposition in relation to the 2006 objection decision.

What was the decision?

- [1] ... I have decided to extend the time within which Mr Spencer may lodge an application to review the 2006 objection decision to 14 September 2006.
- [3] In relation to Mr Spencer's application to extend the time within which he may apply to review the 2002 objection decision, I have decided to refuse to extend the time. I set out my reasons below.
- [5] In January 2000, Mr Spencer was employed by Telstra Corporation Limited (Telstra) when he lodged a complaint with the Victorian Equal Opportunity Commission (VEOC) alleging discrimination in his employment. In July 2000, VEOC referred his complaint to the Victorian Civil and Administrative Tribunal (VCAT). VCAT made various directions during August and October 2000.
- [7] ... in November 2000, VCAT held mediation proceedings in relation to his first complaint. Following the proceedings, Telstra's solicitors sent a draft settlement agreement to Mr Spencer's counsel. That draft settlement agreement attached an amended settlement and release agreement, a draft letter of service and a draft letter of resignation.
- [57] ...In view of Telstra's denial of liability, all that Mr Spencer received was a payment relating to an allegation of discrimination. It cannot be put any higher than that and there is no obligation on the Commissioner, and so no obligation on the Tribunal, to conduct an enquiry and make a determination whether Mr Spencer

suffered discrimination and, if so, the amount of the payment that was reasonable for that discrimination. There is no obligation even on the assumption that a payment for discrimination can be regarded as a payment for personal injury. Therefore, Mr Spencer's case that the payment is not an ETP on the basis that it comes within s 27A(1)(n) of 1936 ITAA is without merit.

[58] I have also considered Mr Spencer's argument that he did not present the cheque that he had received from Ms Solicitor for 51 months. I understand him to be arguing that he could not have been said to have received it in relation to the 2001 year of income. I must, however, have regard to s 6-10(3) of the 1997 ITAA. Its effect is that an amount does not necessarily have to pass through the taxpayer's hands in order to be regarded as that person's statutory income. It is enough that it is applied or dealt with on the taxpayer's behalf or as the taxpayer directs. On Mr Spencer's view of the facts, Ms Solicitor banked the two cheques she received from Telstra's solicitors. She deducted an amount for her costs and sent the balance to Mr Spencer. I do not see an argument that can be raised that she had not applied or dealt with it on his behalf even though it would clearly not have been at his direction. The expression used in s 6-10(3) is "on your behalf". I am not aware of any authorities that have considered that expression although many have considered the expression "on behalf of". It seems to me that the latter expression is the same as the former. The only difference is that it is the expression chosen when writing in the third person whereas the former is chosen when writing in the first person.

(2) ** Not a fit and proper person to be a tax agent (Bevan and Tax Agents' Board of NSW)

[Source Month 04-2007 – 36 ~ Part 1-4\(b\) - Bevan and Tax Agents' Board of New South Wales \[2007\] AATA 1162 \(20 March 2007\)](#)

What was the issue?

Was Mr. Bevan entitled to be registered as a tax agent?

What was the outcome?

The Tribunal found that the tax agent satisfied neither the work experience nor the formal study requirements for registration.

What were the facts?

Mr Bevan asserts:

- ◆ that he is a fit and proper person because he is not a bankrupt and possesses sufficient qualifications.
- ◆ that he has relevant employment of more than 12 months duration in the past five years and has obtained the requisite academic qualifications for registration.
- ◆ that he has many years experience in the finance industry, being a certified financial planner, and is a member of the National Institute of Accountants with a Certificate of Public Practice.
- ◆ that he is well respected in the Turkish and Iranian communities.

What was the decision?

[8] Mr Bevan submitted that he successfully completed the Principles of Taxation Law course at the University of New England and therefore satisfies subregs 156(2)(d) and 156(4)(c). I do not agree. By his own account the purported 'course' was one unit that was part of a graduate Certificate or Masters course of study, which he had not completed. Completing one unit in a course of study may not satisfy the test set out in the Regulations. It is true that a course of study may comprise one or more studies in a series, where each step in the series may be considered to be a course.[21] On that construction the unit Mr Bevan completed may be within the meaning of 'a course of study'. However, what is required is the successful completion of 'a course of study' in Australian income tax law 'that is acceptable to the Board'. That test requires examination of the particular circumstances pertaining to Mr Bevan's case.[22] Relevantly, the particular post graduate unit was one part of a longer course concerning the study of Accounting. On the material before me it is not possible to determine the extent to which the unit of study Mr Bevan completed is consistent with a course of study in Australian income tax law.

[9] By Mr Bevan's own account to the Board he intended to "continue to study to complete my Master of Commerce majoring in Professional Accounting through the University of New England", including a unit "Advanced Taxation Law".[23] Similarly, Mr Bevan's completion of a TAFE unit 'Income Tax Law

Applications' was but one unit of study in the Advanced Diploma of Accounting course, that he has not yet completed.

- [10] Nevertheless, considering Mr Bevan's relevant employment experience and other studies, the question arises as to whether the completion of two separate units of study in Australian Taxation law in different institutions in the context of Accounting courses satisfies the prerequisite qualifications set out in the Regulations. I am satisfied that it does not. In all of Mr Bevan's studies he has completed only two units of study in Australian taxation law. In each case the unit was one part of a course of study in Accounting. The Board submitted that a 12 month course of study in Australian taxation law would be required to be acceptable. On the material before me there is no such mandatory requirement. However, in the circumstances of Mr Bevan's case, taking into account his previous employment, in particular his relevant employment dealing with taxation matters under the supervision of a suitable person, and his other studies and qualifications, I am not persuaded that the two units of study he completed in Australian taxation law are sufficient to be considered acceptable for present purposes.
- [11] Subregulations 156(2) and 156(4) set out a number of conjunctive qualification criteria. Failure to satisfy one of the conjunctive criteria means the qualification is not made out. Mr Bevan does not satisfy the criteria set out at paragraphs 156(2)(d) and 156(4)(c). ...
- [1] I am satisfied that Mr Bevan does not have more than 8 years relevant full-time employment in the past 10 years or has otherwise been engaged in relevant employment, or such other employment as satisfies the criteria set out at paragraph 156(5)(a). It follows that he does not meet the qualification at subreg 156(5).
- [13] It follows therefore that Mr Bevan does not satisfy the prescribed qualifications at Regulation 156. That being so, Mr Bevan was not a fit and proper person to prepare income tax returns and transact business on behalf of taxpayers in income tax matters on 16 March 2006. There is nothing in the material before me that was not available to the Board to contraindicate that conclusion.

1.3 Tax Office Interpretations

(a) Taxation Rulings & Draft Rulings

(1) ** TR 2007/D2 ~ Registered agricultural managed investment schemes

[Source Month 04-2007 – 63 ~ TR 2007/D2](#)

What issue does the ruling consider?

The Ruling deals with:

- ◆ the application of section 8-1 of the ITAA 1997 to contributions by investors to registered agricultural managed investment schemes.
- ◆ the question of whether interim and final returns to investors are, either wholly or in part, an amount of ordinary income for the purposes of section 6-5, or an amount of 'statutory income for the purposes of section 6-10.

What was the ruling?

The Commissioner's view:

- ◆ in relation to expenditure by investors is that:
 - ~ the position in TR 2000/8 has been reviewed in light of recent case law, including that concerning the Corporations Act as it relates to managed investment schemes and the better view is considered to be that investor contributions should more properly be characterised according to the substance of the schemes in question.;
 - ~ the investors are beneficiaries of a trust, of which the responsible entity is trustee because the scheme is a registered managed investment scheme, where there is certain property employed in the operation of the scheme, which is 'scheme property', held by the responsible entity on trust for scheme members (see subsection 601FC(2) of the Corporations Act;

- ~ if the scheme as a whole otherwise has the hallmarks of a business, the nature of this property, the way it is used in conducting this business, and the relationship between the responsible entity as trustee and the members as beneficiaries, mean that it is the responsible entity as trustee which carries on the business, rather than the investor members.
- ~ the types of property considered to be scheme property in this regard include rights impliedly granted to the responsible entity, which are necessary for the conduct of the scheme as a whole, such as access to land and the capacity to deal with third parties in relation to pooled produce so that the gross income from the conduct of the scheme is derived by the responsible entity in its capacity as trustee;
- ~ the finding that the investors are beneficiaries of a trust, operated by the responsible entity as trustee, is consistent with the conclusion that investor contributions are more properly characterised as being for the acquisition of their interest in this trust, as constituted by their interest in the scheme;
- ~ investors in schemes to which this Ruling applies are not considered to carry on business as a result of their membership of the scheme rather on the basis that the weight to be given to an outward appearance of regular acts conducted on behalf of individual investors in the course of small businesses they are said to carry on, is much less than that to be given to the competing factors of:
 - it rarely, if ever, making commercial or agricultural sense to operate the scheme as a large number of separately managed smaller businesses, as distinct from one larger enterprise;
 - investors not having day to day control over the running of the scheme, and often being actively encouraged not to interfere in this respect, but instead giving wide-ranging and irrevocable powers of attorney to the same controlling entity;
 - a regulatory scheme operating in respect of them, whose design is premised on scheme members being passive investors;
 - calculation of investor returns occurring with respect to the operation of a scheme as a whole, rather than being confined to the operations of what is said to be an investor's individual business; and
 - the substance of the arrangement being one where the better characterisation of what the investors' contributions are for, is that they obtain for them their interest in the scheme.
- ~ alternatively, for some investors who do not carry on business, but their acts in relation to the scheme have a profit making purpose and are nevertheless conducted systematically and regularly (schemes like afforestation schemes, where no regular annual returns are contemplated and there is only one significant return, at the completion of the scheme), although there may be some incidental returns prior to this, they are not passive investors, but participants in a profit making undertaking or plan carried out on their behalf;
- ~ alternatively, if an investor's contributions are deductible under section 8-1 of the ITAA 1997, that expenditure may not be wholly deductible in the year in which it has been incurred (the 'expenditure year'), because a prepayment rule applies to apportion the deduction over that year and a later year(s); see sections 82KZME, 82KZMF and 82KZMG of the ITAA 1936;
- ◆ in relation to returns received by investors is that:
 - ~ the interim and final returns distributed to investors in relation to their right to share proportionately in the net proceeds from the scheme represent amounts to be included in their assessable income under section 97 of Division 6 of Part III of the ITAA 1936, being their share of the net income of a trust estate for a year of income;
 - ~ accordingly, provided that Division 6C of Part III of the ITAA 1936 does not apply, interim and final returns are '*statutory income' for the purposes of section 6-10 of the ITAA 1997;
 - ~ in some situations returns to investors will be 'unit trust dividends' within the meaning of this term in section 102M of the ITAA 1936, because they will be distributions by a trustee of a public trading trust to an investor as a unitholder in that trust;
 - ~ the unit trust dividend is assessable income of the investor under subsection 44(1) of the ITAA 1936, and will be statutory income for the purposes of section 6-10 of the ITAA 1997.;
 - ~ in the alternative, returns to investors are ordinary income from property, and form part of the investor's assessable income under section 6-5.

(b) Determinations & Draft Determinations**(1) ** TD 2007/3 ~ Are insurance premiums deductible for an SMSA**

[Source Month 04-2007 – 52 ~ TD 2007-3](#)

What issue does the determination consider?

Is a deduction allowable to a complying superannuation fund, under section 279, for insurance premiums attributable to the provision of benefits for members in the event of temporary disability longer than two years?

What was the background to the determination?

Section 279 has been repealed in the 1936 Act and re-enacted in the recent Simplified Superannuation System changes 295-465.

Death or disability benefit, were defined in subsection 267(1) as meaning a benefit provided in the event of the death, or the permanent or temporary disability, of the member.

A deduction is allowable under section 279 of the ITAA 1936 for so much of the premium for a temporary disability benefit as is incurred to provide for a benefit for a period less than two years that is:

- ◆ to be provided to the member for a period during which the member is unable to perform the normal duties of the member's employment; and
- ◆ is provided to a member by way of income.

No deduction is available to the extent that the benefit may be provided for a period exceeding two years, unless:

- ◆ there is in force at the beginning of the disability period an approval given in relation to the fund for the purposes of section 62 of the SIS Act and that approval specifies a maximum period for the provision of death or disability benefits; or
- ◆ if an approval is not given to the fund under section 62 of the SIS Act, the Commissioner may approve in writing a further period.

The words 'an approval in relation to the fund for the purposes of section 62 of the SIS Act' and the term 'maximum period' in the definition of death or disability benefit, in section 267 of the ITAA 1936, were considered in *MLC Ltd & Anor v. DFC of T 2002 ATC 5105; 51 ATR 283.*)

What was the determination?

The Commissioner's view is that a deduction is allowable:

- ◆ to a complying superannuation fund under section 279 for premiums on insurance policies where income payments may be made to members of that fund under such a policy during periods of temporary disability which last longer than two years.
- ◆ if the insurance premiums relate to benefits payable for a period potentially exceeding two years, provided that the benefits payable under the terms of the insurance policy comply with the requirements of the Superannuation Industry (Supervision) Act 1993 (SIS Act).

(2) ** TD 2007/4 ~ What is a 'policy of insurance' on the life of an individual for CGT purposes?

[Source Month 04-2007 – 53 – TD 2007/4](#)

What issue does the determination consider?

Is a 'policy of insurance on the life of an individual' in section 118-300 of the 1997 Act limited to a life insurance policy within the common law meaning of that expression?

What was the determination?

The Commissioner's view is that:

- ◆ The expression 'policy of insurance on the life of an individual' in section 118-300:

- ~ includes, but is not limited to, life insurance policies within the common law meaning of that term.
- ~ includes other life insurance policies as defined in subsection 995-1(1) but only to the extent that those policies provide for a sum of money to be paid if an event happens that results in the death of an individual.
- ◆ A 'policy of insurance on the life of an individual' also includes a life insurance policy to the extent that it provides for the payment of a 'terminal illness benefit'.

(3) ** TD 2007/5 ~ When does the decline-in-value allowance commence?

[Source Month 04-2007 – 51 ~ TD 2007/5](#)

What issue does the determination consider?

Does a tangible depreciating asset start to decline in value under section 40-60 from when it is acquired if the asset is acquired for the sole purpose of using it in a business that has not commenced to be carried on?

What is the impact of the determination?

The determination is of little use as the primary question remains – when does a business commence?

Does the business commence the day the first sale is made or does it commence at some earlier time?

What was the determination?

The Commissioner's view is that:

- ◆ A tangible depreciating asset that is acquired for the sole purpose of using it in a business that has not commenced to be carried on does not start to decline in value under section 40-60 from when the asset is acquired;
- ◆ the asset starts to decline in value under section 40-60 from when the holder first uses it, or has it installed ready for use, for any purpose;
- ◆ Holding a tangible depreciating asset in anticipation of using it in a business that has not commenced to be carried on does not constitute a use, or being installed ready for use, that would cause the asset to decline in value under section 40-60.

(4) ** TD 2007/D3 ~ Can a share be a convertible interest

[Source Month 04-2007 – 59 ~ TD 2007/D3](#)

What issue does the determination consider?

Can a share in a company be a convertible interest by satisfying item 4 of the table in subsection 974-75(1) of the 1997 Act?

What was the determination?

The Commissioner's view is that:

- ◆ a share that falls within item 1 of the table in subsection 974-75(1) of the 1997 Act will also be a convertible interest if it satisfies item 4 of the table;
- ◆ a share which converts (in the broad sense described in 974-165) into another share nominally falls within item 4 of the table in subsection 974-75(1) but whether it qualifies as a convertible interest depends on whether there is anything in Division 974 (or any other provision) of the ITAA 1997 which prevents a share satisfying both item 1 and item 4 of the table;
- ◆ there are no grounds to conclude that a share within item 1 could not also satisfy item 4 of the table, but there is support for the proposition that it could;
- ◆ subsection 974-75(3) provides that '[t]he interest referred to in item 2, 3 or 4 in the table in subsection 974-75(1) may take the form of a proprietary right, a chose in action or any other form.'
- ◆ the nature of items 2, 3 and 4 in subsection 974-75(3) go to the quality of rights rather than their legal form and indicate an overlap between them and item 1 of the table is possible.

(5) ** TD 2007/D4 ~ When the base penalty amount is increased?

[Source Month 04-2007 – 60 ~ TD 2007/D4](#)

What issue does the determination consider?

Does paragraph 284-220(1)(e) of Schedule 1 to the Taxation Administration Act 1953 apply to increase the base penalty amount applicable to a subsection 284-75(3) penalty where the entity was liable to the same penalty for a previous accounting period?

What was the background to the determination?

Where a penalty is imposed under subsection 284-75(3) of Schedule 1 to the Taxation Administration Act 1953 1 for an accounting period, paragraph 284-220(1)(e) applies to increase the base penalty amount by 20% if a penalty was imposed under that subsection for a previous accounting period.

What is the relevant legislative provision?

Section [284-75\(3\)](#) provides as follows:

- (3) *You are liable to an administrative penalty if:*
- (a) *you fail to give a return, notice or other document to the Commissioner by the day it is required to be given; and*
 - (b) *that document is necessary for the Commissioner to determine a * tax related liability of yours accurately; and*
 - (c) *the Commissioner determines the tax related liability without the assistance of that document.*

Note: You are also liable to an administrative penalty for failing to give the document on time: see Subdivision 286C.

Section 284-220 provides as follows:

284-220 Increase in base penalty amount

- (1) *The * base penalty amount for your * shortfall amount, or for part of it, for an accounting period is increased by 20% if:*
- (a) *you took steps to prevent or obstruct the Commissioner from finding out about the shortfall amount; or*
 - (b) *you became aware of the shortfall amount or part after a statement had been made to the Commissioner about the relevant * tax related liability and you did not tell the Commissioner about it within a reasonable time; or*
 - (c) *the base penalty amount was worked out using item 1, 2 or 3 of the table in subsection 284 90(1) and a base penalty amount for you was worked out under one of those items for a previous accounting period; or*
 - (d) *the base penalty amount was worked out using item 4, 5 or 6 of that table and a base penalty amount for you was worked out under that item for a previous accounting period; or*
 - (e) *your liability to a penalty arises under subsection 284 75(3) and you were liable to a penalty under that subsection for a previous accounting period.*
- (2) *The * base penalty amount for your * scheme shortfall amount, or for part of it, for an accounting period is increased by 20% if:*
- (a) *you took steps to prevent or obstruct the Commissioner from finding out about the scheme shortfall amount or the part; or*
 - (b) *a base penalty amount for you was worked out under section 284 160 for a previous accounting period.*

What was the determination?

The Commissioner's view is that: Subsection 284-75(3) imposes a liability to an administrative penalty if a person fails to lodge a return, notice or other document which is necessary to determine a tax-related liability, and the Commissioner determines the tax-related liability without the assistance of that document.

(6) ** TD 2007/D5 ~ How far does the single entity rule reach?

[Source Month 04-2007 – 61 ~ TD 2007/D5](#)

What issue does the determination consider?

Does the single entity rule in section 701-1 of the ITAA 1997 apply in determining whether distributions by the liquidator of a head company represent 'income derived' by the head company for the purposes of section 47 of ITAA 1936?

What was the determination?

The Commissioner's view is that:

- ◆ The single entity rule in section 701-1 applies only for the head company core purposes and entity core purposes described in that section.
- ◆ For other purposes of the income tax law, such as the application of section 47 to determine the income tax liability of a shareholder of a head company, the single entity rule does not apply.

(c) **Class Rulings – New

CR 2007/22	Income tax: return of capital: Incremental Petroleum Ltd
CR 2007/23	Income tax: assessable income: umpires and referees: Warwick Leisure Centre receipts
CR 2007/22	Income tax: return of capital: Incremental Petroleum Ltd
CR 2007/23	Income tax: assessable income: umpires and referees: Warwick Leisure Centre receipts
CR 2007/24	Income tax: assessable income: Rugby League Officials: Western Australia Rugby League Referees Association
CR 2007/25	Income tax: scrip for scrip roll-over: merger of Promina Group Limited with Suncorp-Metway Limited
CR 2007/26	Income tax: Leave - Deferred Salary Scheme - employees of Lutheran Schools and Kindergartens in the Northern Territory
CR 2007/27	Income tax: share buy-back: BHP Billiton Limited
CR 2007/28	Income tax: deductibility of employer contributions to the Australian Construction Industry Redundancy Trust
CR 2007/29	Income tax: capital gains - roll-over relief - acquisition of land for Traveston Crossing and Wyaralong Dams

(d) Product Rulings

Source: <http://law.ato.gov.au/atolaw/index.htm>

PR 2007/20	Income tax: ING Life Limited - OneCare Policy - Life Cover, Total and Permanent Disability Cover and/or Trauma Cover
RR 2007/21	Arafura Pearl Project 2007
PR 2007/22	Oak Valley Truffle Project 2007
PR 2007/23	Agriwealth 30 June 2007 Radiata Pine Project
PR 2007/24	Great Southern 2007 Diversified Olives Income Project - 2007 Growers

PR 2007/25	Kiri Park Project No. 2 - NCL
PR 2007/26	Deductibility of interest incurred on borrowings in relation to the Macquarie Fusion Funds - June 2007 Offer
PR 2007/27	Great Southern Plantations 2007 Project
PR 2007/28	PCM Shared Equity Contract
PR 2007/29	Brooklyn Park Organic Olive Groves Bonni-Foi Growers' Project
PR 2007/30	Tax consequences of borrowing in relation to the Momentum Investor Funding Product
PR 2007/31	Early Season Apple Project - Early Growers
PR 2007/32	Barossa Vines Project 2007 - Applicant Group 1
PR 2007/33	Olive Growers Australia Project 2007 - Applicant Group 1
PR 2007/34	Great Southern 2007 Almond Income Project
PR 2007/35	McLeod's Daughters 2007 Investment
PR 2007/36	Margaret River Watershed Premium Wine Project 2007 (Pre 15 June 2007 Growers)
PR 2007/37	WA Blue Gum Project 2007 not Joint Venture Growers
PR 2007/38	WA Blue Gum Project 2007 Joint Venture Growers
PR 2007/35	McLeod's Daughters 2007 Investment
PR 2007/36	Margaret River Watershed Premium Wine Project 2007 (Pre 15 June 2007 Growers)
PR 2007/37	WA Blue Gum Project 2007 not Joint Venture Growers
PR 2007/38	WA Blue Gum Project 2007 Joint Venture Growers

(e) ID's – New**(f) Other Tax Office Statements, Addenda, Errata and Withdrawals****(1) *** A trustee can register as a tax agent (Tax Agents Board)**

[Source Month 04-2007 – 28 ~ Letter regarding registration of tax agents and trusts \(19 April 2007\)](#)

Registration of Tax Agents and Trusts ~ From the Tax Agents' Board

For some time the Tax Agents' Boards have been concerned about the confusion that appears to exist on the ability to conduct a tax agent business through a structure involving a trust and the registration of individuals and companies as tax agents where those individuals and companies conduct or intend to conduct a business in the capacity as a trustee. The Boards have also been concerned about the perception in the community that it is not possible to seek such registration.

... Despite the confusion that arose in relation to the obtaining of digital certificates and the need for trusts to have a separate ABN, the view of all Boards is, and always has been, that an individual or company that otherwise meets the legislative requirements for registration as a tax agent can be registered as a tax agent irrespective of whether or not that person operates their business in the capacity of trustee of a trust.

The relevant provisions of the Income Tax Assessment Act 1936 dealing with the registration of tax agents only recognise individuals, partnerships and companies as entities that are capable of registration as tax agents. An appropriately qualified individual, partnership or company will be registered as a tax agent, as such, without the existence or otherwise of a trust being recorded in the register. The fact that an individual, partnership or company is a trustee and intends to conduct its business in that capacity will not and does not prevent registration.

... , generally speaking, where the registered tax agent is the trustee of the trust through which the business operates or is intended to operate, that business structure is within the scope of the legislation and will be accepted provided the trustee is a registered tax agent and carries on the business as the legal owner.

If a tax agency business is conducted through a trust and the registered tax agent is not the trustee, the business structure is outside the scope of the legislation, the agent would not be complying with the law and would need to rectify the structure through which the business is conducted to avoid that breach continuing.

You should also note that the use of a service trust where the registered tax agent is not the trustee to employ persons involved in the preparation of tax returns or objections or to conduct directly or indirectly any business relating to any income tax return or income tax matter is a breach of section 251N of the Income Tax Assessment Act 1936. In this respect, the Boards' view is that section 251N requires an employment relationship to exist between the registered tax agent and the person providing the service and that mere supervision and control by the registered agent or nominee is not sufficient to avoid a breach of its terms.

Where a service trust is so involved, the Boards are unable to ignore the breach of the law and generally write to the registered tax agent involved and advise the Commissioner of the breach for such action as the Commissioner may decide to take.

...
J E Faure
Chair Tax Agents' Board
Victoria

(2) Addenda, Errata, Withdrawals

2006/115W –	Withdrawal Income tax: Future Films Australia: 'Stranger' 28 March 2007
PR 2006/116W –	Withdrawal Income tax: Future Films Australia: 'The Boys are Back in Town' 28 March 2007
PR 2006/122A –	Addendum Income tax: Oak Valley Truffle Project Post 30 June Growers 21 March 2007
PR 2006/115W - Withdrawal	Income tax: Future Films Australia: 'Stranger'
PR 2006/115W - Withdrawal	Income tax: Future Films Australia: 'Stranger'
PR 2006/116W - Withdrawal	Income tax: Future Films Australia: 'The Boys are Back in Town'
PR 2006/116W - Withdrawal	Income tax: Future Films Australia: 'The Boys are Back in Town'
TD 95/52W –	Withdrawal Income tax: is depreciation allowable under subsection 54(1) of the Income Tax Assessment Act 1936 if income producing operations in a business have not yet commenced? 21 March 2007
TD 98/27W - Withdrawal	Income tax: is a deduction allowable to complying superannuation funds under section 279 of the Income Tax Assessment Act 1936, for insurance premiums attributable to the provision of benefits for members in the event of temporary disability longer than two years?
TD 98/27W - Withdrawal	Income tax: is a deduction allowable to complying superannuation funds under section 279 of the Income Tax Assessment Act 1936, for insurance premiums attributable to the provision of benefits for members in the event of temporary

	disability longer than two years?
WETR 2006/1A - Addendum	Wine equalisation tax: the operation of the producer rebate for producers of wine in New Zealand
WETR 2006/1A - Addendum	Wine equalisation tax: the operation of the producer rebate for producers of wine in New Zealand

(3) Decision Impact Statements

DIS S543/2005	Forsyth v Deputy Commissioner of Taxation
DIS VID 85 of 2004	Hostess Marine Pty Ltd v Commissioner of Taxation
DIS NSD121 of 2006	Keycorp Ltd and Telstra Payment Solutions Ltd v Commissioner of Taxation

2 GST

2.1 Politicians, Boards & Statutory Authorities [NIL]

2.2 Courts & Tribunals [NIL]

2.3 Tax Office Interpretations [NIL]

(a) Rulings & Draft Rulings [NIL]

(b) Determinations & Draft Determinations [NIL]

(c) ID's – New

Source: <http://law.ato.gov.au/atolaw/index.htm>

(1) ID's ~ New

ID 2007/49	Assessability of certain New Zealand workers' compensation payments made to an Australian resident
ID 2007/68	Assessable income: amount received for the transfer of 'know-how'
ID 2007/60	Capital Gains Tax: exemption for non-resident beneficiary of trust
ID 2007/67	Capital gains tax: third element of cost base - travel and accommodation costs relating to initial repairs
ID 2007/50	Consolidation - retained cost base assets - identification of
ID 2007/63	Consolidations: Foreign Branch Transactions - single entity rule
ID 2007/64	Consolidation: life insurance - head company treated as a life insurance company
ID 2007/62	PSO and a change to an item in the table in subregulation 4(1) within a claim period
ID 2007/52	Redeemable Preference Shares: accumulated dividends forming part of redemption amount
ID 2007/59	Trust Losses: control test - whether a group begins to control a trust after the death of an individual
ID 2007/69	Capital Allowances: balancing adjustment amount - whether patent used for a taxable purpose
ID 2007/66	Employee Share Scheme: rights to acquire shares subject to shareholder approval

(2) ID's ~ Withdrawn

ID 2001/260 (W)	Penalty tax for failure to exercise reasonable care and remission of General Interest Charge
ID 2002/127 (W)	Penalty tax for failure to exercise reasonable care
ID 2001/260 (W)	Penalty tax for failure to exercise reasonable care and remission of General Interest Charge
ID 2002/127 (W)	Penalty tax for failure to exercise reasonable care
ID 2002/359 (W)	Income Tax: Capital Gains Tax: transferring an individual's capital loss to a wholly-owned company

ID 2002/789 (W)	Capital Gains Tax - Averaging
ID 2002/789 (W)	Capital Gains Tax - Averaging
ID 2001/693 (W)	Capital Gains Tax : Marriage Breakdown - Annual payments to former spouse
ID 2002/359 (W)	Income Tax: Capital Gains Tax: transferring an individual's capital loss to a wholly-owned company
ID 2003/799 (W)	Division 974: taxpayer's right to object against the determinations of the Commissioner
ID 2003/799 (W)	Division 974: taxpayer's right to object against the determinations of the Commissioner
ID 2002/922 (W)	Commissioner's discretion under subsection 99A(2) of the Income Tax Assessment Act 1936 - Receiver and manager appointed to unit trust

(d) **Other Tax Office Statements, Addenda, Errata and Withdrawals [NIL]**

3 FBT

3.1 Politicians, Boards & Statutory Authorities **[NIL]**

3.2 Courts & Tribunals

(1) ** Labour Hire Company incurs FBT liability ~ Do GST rulings have application to FBT issues? ("The Taxpayer" and C of T)

[Source Month 04-2007 -47 ~ "The Taxpayer" and Commissioner of Taxation \[2007\] AATA 1185 \(23 March 2007\)](#)

What was the issue?

Was the taxpayer entitled to an extension of the period in which it could lodge objections?

Was an allowance paid to employees, a 'living away from home allowance' ("LAFHA")?

What was the outcome?

The allowance paid to oil rig workers was found to be a living away from home allowance and thus liable to fringe benefits tax rather than a travel allowance.

Does the outcome affect your firm's current practices?

The decision, the fourth FBT decision in a relatively short time, highlights the need to review clients who operate labour hire businesses not only for FBT but also for payroll tax, SGC and work cover liabilities.

It is clear that the relevant authorities are responding to the growth of labour hire or body shops by dedicating additional resources to auditing the business records of such businesses.

What were the facts?

The taxpayer:

- ◆ objected to assessments of FBT in respect of living away from home allowances paid to its employees for the years 1998 to 2002 but was out of time for the years 1998 and 1999;
- ◆ requested the [Commissioner] to treat them as lodged within time.

The Commissioner:

- ◆ disallowed the objections;
- ◆ denied the request in relation to the 1998 and 1999 years.

What was the decision?

[3] [The taxpayer] claimed:

- ◆ ...the cabin facilities on the mobile offshore drilling rigs are not residential accommodation so the allowance paid does not come under s 30(2).
- ◆ ...the allowance is a travelling allowance and constitutes salary and wages, and was not a living away from home allowance.

The [taxpayer] did not dispute in the objections that it paid the allowance as an employer to its employees.

[4] ...In this case, where the appeal is from an assessment of FBT, the burden is on the [taxpayer] to establish that the amount of FBT assessed by the [Commissioner] is excessive.

[9] In the Tribunal's view the key question is whether the relevant amounts paid to the employees were living away from home allowances as defined in s 30 of the FBTA.

THE EVIDENCE BEFORE THE TRIBUNAL

[18] The evidence before the Tribunal consisted of:

- ◆ "T" Documents under s 37 (1AB) of the AAT Act
- ◆ Oil Drilling Rig Workers' (Offshore Mobile Drilling Rigs) Award, 1984 (as amended at 17 December 2001)(the award)

- ◆ Total Marine Enesco 56 Enterprise Agreement (dated 7 July 2000) (the agreement)
 - ◆ Witness statement and oral evidence of Malcolm Thomas Wardle, the [taxpayer]'s managing director
 - ◆ Witness statement of Raymond Douglas Meadowcroft, the [taxpayer]'s general manager
- [19] The Tribunal notes that the [taxpayer] has not provided any of the contracts between itself and Enesco or Sedco or any individual contracts with employees.
- [20] On the evidence it appears that the [taxpayer] is best described as a labour hire company which at the relevant times supplied the services of various personnel to its customers which, in this case, were Enesco and Sedco, the owners or operators of oil rigs.

THE PAYMENT OF SALARY, WAGES AND ALLOWANCES

- [21] The award: the [taxpayer]'s evidence is that it was a [Commissioner] to the award as amended from time to time. Only the award from December 2001 is in evidence. The [taxpayer] is named in the Schedule of [Commissioner]s as an employer. Under that award, the employee is entitled to receive wages and the [taxpayer] pays and is liable to pay them.
- [22] The agreement: similarly the agreement names the [taxpayer] as the employer. By that agreement, the employees are entitled to receive wages and the [taxpayer] is liable to pay them.
- [23] The witness statements - (the statements of Malcolm Thomas Wardle and Raymond Douglas Meadowcroft are essentially the same, so reference here is only to the statement of Mr Wardle) which relevantly set out the following:
- ◆ Par 3.6-3.7; 4.6-4.7 Total Marine (the [taxpayer]) charges Enesco and Sedco (the [taxpayer]'s customers, being the rig owners or operators) for the actual cost of employing the personnel, including salaries, allowances and the like. A labour hire management fee was charged in addition.
 - ◆ par 10.16- when a contract finished the rig owner would cease the contract with the [taxpayer] and the [taxpayer] would terminate the employment of the employees unless they were required for another rig.
 - ◆ Par 11.7 – rig worker employees are paid on a monthly basis on return from the rig.
- [24] In the Tribunal's opinion it is clear that the [taxpayer] paid and was liable to pay the wages and allowances to the rig workers at all relevant times.

THE LIVING AWAY FROM HOME ALLOWANCE

- [25] The award: simply provides in cl 11.2 for a living away from home allowance (LAHA) on a daily rate. It provides also in cl 11.7 for reimbursement of fares.
- [26] The agreement provides in cl 9.5 for a LAHA in lieu of that in the award which "forms part of the salary for all purposes of the award." The LAHA is a flat rate for all workers, and is independent of the base salary of the employee. The agreement separately provides a "margin to compensate for all time taken to travel to and from the designated assembly point and the workplace and return." (see cl 10.2);

THE [TAXPAYER]'S OBJECTIONS AND THE CONTENTIONS FILED IN THE TRIBUNAL PUT 6 MATTERS IN ISSUE IE:

ISSUE 1: WAS THE [TAXPAYER] THE EMPLOYER (S 30(2)(A))

- [28] In the Tribunal's view the evidence clearly shows that at all relevant times the [taxpayer] was the employer of the relevant employees, for the purposes of s 30(2)(a) of the FBTA 1986.
- [33] In particular, the FBTA 1986 requires regard to be had to who pays or is liable to pay salary and wages. ...

ISSUE 2: TAXATION RULING TR2003/11

- [35] The [taxpayer] sought inter alia to support its agreement by referring to this Taxation Ruling. ... In particular, par 5 expressly states that the ruling does not deal with the definition of 'employer' for PAYG withholding tax purposes, or for any other purposes relating to income tax, and does not deal with fringe benefits tax. In the Tribunal's opinion TR2003/11 lends no support to the [taxpayer]'s case.

ISSUE 3: WERE THE EMPLOYEES PROVIDED WITH RESIDENTIAL ACCOMMODATION FOR PURPOSES OF SECTION 30(2)(C) OF THE FBTA

- [36] In the Tribunal's view contrary to the [taxpayer]'s contentions, the task in this matter is not to interpret the words "residential accommodation" or "residential premises" out of the context of s 30(2) of the FBTA 1986. ...
- [37] Further, as the Explanatory Memorandum shows, s 30(2) was introduced for the purpose of meeting a particular problem arising out of an offshore oil industry award.
- [38] The [Commissioner] contends that the decision of the Tribunal in AAT Case 10,476 (1995) 31 ATR 1264... was correct.
- [39] The [Commissioner] contends further that nothing in the judgment of the Full Federal Court in *Marana Holdings Pty Ltd v FCT* (2004) 214 ALR 190, on which the [taxpayer] sought to rely, casts doubt on the reasoning in that case. The Court noted the Tribunal's decision "concerned accommodation offered at a place of employment. Such usages may reflect the special meaning (noted in the dictionaries) of dwelling in a particular place for the purpose of occupying an office or performing duties there." (at [49])
- [40] The [Commissioner] submitted also that the legislature could not have intended that the term "residential accommodation," in a provision which applies only to employees on an oil rig or other installation at sea, was limited to "residence" involving a degree of permanent or long-term commitment to the occupation of the premises in question.
- [41] The Tribunal notes that the [Commissioner]'s contentions are consistent with the view expressed in Taxation Determination TD95/49 where it is accepted that accommodation in a ship, vessel or a floating structure is residential accommodation for the purposes of s 47(7) of the FBTA 1986 and the Tribunal accepts the above contentions of the [Commissioner].

ISSUE 4: WAS THE WHOLE OF PART OF THE ALLOWANCE IN THE NATURE OF COMPENSATION FOR DISADVANTAGES TO WHICH THE EMPLOYEES ARE SUBJECT BY REASON OF THE REQUIREMENT TO LIVE AWAY FROM THEIR USUAL PLACE OF RESIDENCE

- [42] Both the award and the agreement refer to the allowance as a living away from home allowance.
- [43] On the evidence, including the evidence of the nature of the accommodation while the employees were on the rig and the presence in the award and the agreement of other allowances for fares and the like, the Tribunal is of the view that the whole of part of the LAHA was in the nature of compensation for disadvantages to which the employees were subject by reason of their being required to live away from their usual place of residence in order to perform their employment duties.
- [45] There is, in the opinion of the Tribunal, nothing to support the [taxpayer]'s contention that the employees were travelling in the course of their employment rather than living away from home.

ISSUE 5: DOES GST PUBLIC RULING GST 2000/20 APPLY TO S 74A OF THE FBTA 1986

- [46] Section 74A(2) provides, in relation to a public ruling:
- (2) *Subject to section 74C, if:*
- (a) *there is a public ruling on the way in which a fringe benefits tax law applies to a person in relation to an arrangement (ruled way); and*
- (b) *that law applies to that person in relation to that arrangement in a different way; and*
- (c) *the amount of fringe benefits tax under an assessment in relation to that person would (apart from this section and section 74C) exceed what it would have been if that law applied in the ruled way;*
- the assessment and amount of fringe benefits tax must be what they would be if that law applied in the ruled way.*

- [47] The term public ruling has the same meaning as in Part IVAAA of the TAA 1953.
- [48] In the Tribunal's view it is clear that s 74A(2) of the FBTA 1986 applies only to a public ruling on the way in which a fringe benefits tax law applies. The term fringe benefits tax law is defined in s 14ZAAA of the TAA 1953 as follows:
- "fringe benefits tax law means a law under which the extent of liability for tax imposed by the Fringe Benefits Tax Act 1986 is worked out."*
- [49] The [taxpayer] placed substantial reliance on the definitions contained in GSTR 2000/20 and the GST Private Ruling referred to further below. In the Tribunal's view GSTR 2000/20 is clearly not a public ruling on the way in which a fringe benefits tax law applies to any person. It states the Commissioner's view on the

definition of “residential premises” and provides guidance on “residential premises” for the purposes of s 195-1 and Subdivision 40-B of the A New Tax System (Goods and Services) Tax Act 1999 (GST Act) and only for those purposes.

ISSUE 6: DOES THE GST PRIVATE RULING APPLY IN RELATION TO S 74B(2) OF THE FBTAA

- [50] Section 74B of the FBTAA is in similar terms to s 74A, save that it refers to private rulings. Relevant terms are defined in the TAA 1953 as set out above.
- [51] On 19 September 2002, the Commissioner issued a private ruling to the [taxpayer]. (the GST Private Ruling). That ruling was on 4 questions, relating to the supply of accommodation, under ss 40-35 and 9-5 of the GST Act:
- [53] That private ruling was subsequently withdrawn by the Commissioner and then later re-issued.
- [54] Section 74B(2) of the FBTAA only applies to “a private ruling on the way in which a fringe benefits tax law applies”.⁹ In the Tribunal’s view the GST private ruling is clearly not a private ruling which falls within the terms of section 74B(2) of the FBTAA.
- [55] Section 74C(3) of the FBTAA applies where there are rulings on different ways in which the same fringe benefits tax law applies which give rise to conflicting requirements under either s 74A or s 74B or both. As neither GSTR 2000/20 nor the GST private rulings are rulings on the way in which a fringe benefits tax law applies, s 74C(3) can in the view of the Tribunal have no application to the issues in this matter, and the [taxpayer] cannot place any reliance thereon.

DECISION—

- [59] It follows that in the Tribunal’s view the [taxpayer] has failed to discharge the onus which it bears and the decisions of the [Commissioner] under review are affirmed.

3.3 Tax Office Interpretations

(a) Rulings & Draft Rulings **[NIL]**

(b) Determinations & Draft Determinations

(1) ** TD 2007/6 ~ Non remote housing indexation factors for FBT year

[Source Month 04-2007 – 54 ~ Part 3-2\(b\) – TD 2007-6](#)

What issue does the determination consider?

What are the indexation factors for valuing non-remote housing for the fringe benefits tax year commencing on 1 April 2007?

What was the background to the determination?

The indexation factors are determined annually under section 28 of the FBT Act.

What was the determination?

The Commissioner’s determination is that the indexation factors for the purpose of valuing non-remote housing for the FBT year commencing 1 April 2007 are:

New South Wales	1.023	Western Australia	1.053
Victoria	1.019	Tasmania	1.049
Queensland	1.057	Australian Capital Territory	1.031
South Australia	1.034	Northern Territory	1.054

(2) ** TD 2007/7 ~ FBT Exemption threshold

[Source Month 04-2007 – TD 2007/7](#)

What issue does the determination consider?

What is the exemption threshold for the FBT year commencing on 1 April 2007?

What was the background to the determination?

Section 135C of the FBT Act requires the Commissioner to determine an exemption threshold for the year.

The Commissioner's determination is that:

- ◆ the exemption threshold for the FBT year commencing 1 April 2007 is \$6,614.
- ◆ This exemption threshold replaces the amount of \$6,391 that applied in the previous year commencing 1 April 2006.

(3) ** TD 2007/8 ~ Cents per kilometre for a motor vehicle other than a car

[Source Month 04-2007 – 58 ~ TD 2007-8](#)

What issue does the determination consider?

What are the rates to be applied on a cents per kilometre basis for calculating the taxable value of a fringe benefit arising from the private use of a motor vehicle other than a car for the fringe benefits tax year commencing on 1 April 2007?

What was the determination?

The Commissioner's view is that the rates to be applied where the cents per kilometre basis is used for the fringe benefits tax (FBT) year commencing on 1 April 2007 are:

Engine capacity	Rate per kilometre
0-2500cc	41 cents
Over 2500cc	49 cents
Motor cycles	12 cents

(4) ** TD 2007/9 ~ Reasonable food allowance for LAFHA

[Source Month 04-2007 – 57 ~ TD 2007/9](#)

What issue does the determination consider?

What amount represents a reasonable food component of a living-away-from-home allowance for expatriate employees for the FBT year commencing on 1 April 2007?

What was the determination?

The Commissioner's view is that the acceptable amounts for the food component of a LAFHA allowance for the FBT year commencing 1 April 2007. The amounts result from the indexation of the previous year's food component.

per week	
One adult	\$206
Two adults	\$330
Three adults	\$370

Two adults and one or two children	\$370
Two adults and three children	\$432
Three adults and one child	\$432
Three adults and two children	\$493
Four adults	\$493

('Adults' for this purpose are persons who had attained the age of 12 years *before* the beginning of the FBT year.)

(5) ** TD 2007/10 ~ The FBT benchmark interest rate

[Source Month 04-2007 – 10 ~ TD 2007/10](#)

What issue does the determination consider?

What is the benchmark interest rate to be used for the FBT year commencing on 1 April 2007?

What is the background to the determination?

The rate of 8.05 per cent is used to calculate the taxable value of:

- ◆ a fringe benefit provided by way of a loan; and
- ◆ a car fringe benefit where an employer chooses to value the benefit using the operating cost method.

What was the determination?

The Commissioner's view is that the benchmark interest rate for the FBT year commencing 1 April 2007 is 8.05 per cent per annum.

Editor:

A loan that is repaid on or before the lodgement day for the income tax year, and thus not a loan for the purposes of Division 7A, is still a loan for FBT purposes.

(c) ID's [NIL]

(d) Other Tax Office Statements, Addenda, Errata and Withdrawals[NIL]

4 STATE AND TERRITORY TAXES

4.1 Politicians, Boards & Statutory Authorities[NIL]

4.2 Courts & Tribunals

(1) ** Land tax on Queensland property (Chew & Singh v. C of Land Tax)

[Source Month 04-2007 – 42 ~ Chew & Singh v. C of Land Tax \[2007\] OCA 78 \(16 March 2007\)](#)

What was the issue?

Were the taxpayers entitled to leave to appeal against the decision made in their absence?

The underlying substantive issues were:

- ◆ Was land tax payable in respect to the land in Queensland?
- ◆ What land was held on June 30 for the purposes of assessing the land tax liability?

What was the outcome?

The taxpayers were refused leave to appeal.

Does the outcome affect your firm's current practices?

A client who is disposing of property in Queensland in order to take advantage of the \$1m superannuation opportunity before 30 June 2007 but who will not have completed the sale by June 30 (and will use borrowed funds to make the contribution) should consider land tax.

It might be advantageous for the client to negotiate an earlier settlement to achieve the result of both avoiding the need to borrow funds and to pay land tax.

What were the facts?

The taxpayers (husband and wife):

- ◆ were each assessed to land tax of \$20,867.55.
- ◆ lodged a notice of objection to the land tax assessments on a number of grounds.

The Tax Office disallowed the objections and effectively confirmed the assessments.

The taxpayers:

- ◆ lodged a Notice of Appeal to the Land Court on 28 March 2005.
- ◆ did not appear:
 - ~ when the appeal was called on for hearing in the Land Court on 22 August 2005 and the appeal was dismissed with costs.
 - ~ the taxpayers unsuccessfully appealed to the Land Appeal Court on 29 September 2005.

The taxpayers were the joint owners of six parcels of land:

- ◆ an island in Moreton Bay;
- ◆ three units on Hope Island; and
- ◆ two other properties on the Gold Coast.

The taxpayers had not received notices pursuant to s 41A of the Valuation of Land Act 1944 ("the VLA") with respect to the valuations used by the Tax Office in calculating the amount of land tax payable by the taxpayers.

By contract dated 2 June 2004, the taxpayers had agreed to sell Lot 130 (one of the Hope Island units) and that the sale was completed on 2 August 2004.

The Court intimated at the outset of the hearing that it would reserve the question of leave and hear submissions on the merits.

What was the relevant legislative provision?

Section 74 of the Land Court Act 2000 provides that a party to a proceeding in the Land Appeal Court may appeal, with leave of the Court of Appeal, to the Court of Appeal on the ground, inter alia, of error or mistake in law on the part of the Land Appeal Court.

Section 8 of the Act provides:

"Subject to this Act, land tax shall be levied and paid upon the relevant unimproved value of all lands within Queensland which are owned by taxpayers, and which are not exempt from taxation under this Act."

Section 12 of the Act provides:

"Land tax shall be charged on land as owned at midnight on 30 June immediately preceding the financial year in and for which the tax is levied."

Owner is then defined in s 3B(3) relevantly as follows:

"If an agreement has been made for the sale of land, whether or not the agreement has been completed by conveyance -

- (a) the seller is taken to be the owner of the land until possession of the land is delivered to the buyer; and*
- (b) the buyer is taken to be the owner of the land as soon as the buyer obtains possession of the land."*

What were the tax payers contentions?

The taxpayer contended that the Commissioner was not entitled to adopt valuation he used for land tax purposes unless the owner of the land had received notice of these valuations.

What was the decision?

WILLIAMS JA

- [6] Whilst the failure of the [taxpayers] to receive notice of the determination of unimproved value pursuant to s 41A of the VLA may well have the consequence that the time for objecting under that Act is extended (note, for example, s 44(2) of that Act), it does not affect the validity of the determination of unimproved value pursuant to that Act. Once the value is recorded in the valuation roll, s 47 of that Act presumes the valuation to have been duly made and to have force according to the particulars.
- [7] In the present case, as noted above, the [taxpayers] did object to the valuation of Garden Island after the initial land tax assessments were received and they were successful in having that valuation reduced; the consequence was amended notices of land tax assessments were issued. It is still possible for the [taxpayers] to raise objections under the VLA against the valuations relied on by the [Commissioner] for the Hope Island units on the basis that no notice of the relevant valuations were received. Should any of those valuations be reduced there would be a reduction accordingly in the land tax assessments and the [taxpayers] would be entitled to the appropriate refund.
- [8] However, that analysis of the provisions of the Act and the VLA demonstrates, in my view, that the [taxpayers] cannot resist payment of land tax in accordance with the amended assessments because they did not receive notices of the relevant valuations of the Hope Island units. If further confirmation of that is required it is to be found in s 58(5A) of the Act which provides that the "omission to give any notice of assessment shall not invalidate the assessment." The term "assessment" is defined in s 3 of the Act as including both the estimate of the value of land liable to taxation and the amount of land tax imposed thereon. Clearly it follows that the omission to receive a notice of valuation under the VLA does not invalidate an assessment of land tax based on those valuations.
- [11] The submission by the [taxpayers] was that the land tax assessment covered the period 1 July 2004 to 30 June 2005 and they were not the owners of Lot 130 throughout the whole of that period, and therefore they were not liable to be assessed for land tax with respect to Lot 130. That was said to vitiate the assessments.
- [12] That submission must be rejected given the wording of s 12 of the Act. If property on which land tax has been paid is sold during the currency of the taxation year then ordinarily there would be some adjustment as between vendor and purchaser on settlement. But so far as the [Commissioner] is concerned the tax is levied on the owner of the land as at midnight on 30 June in each year.
- [19] In the circumstances it is difficult to conclude that there was any denial of natural justice. The [taxpayers] were given every opportunity to be present and it was their own decision not to appear on that date. But, if

what transpired on 22 August 2005 did constitute a denial of a fair hearing, that was remedied by what took place when the [taxpayers] appealed to the Land Appeal Court. In that court the [taxpayer]s were given every opportunity of raising any matter in support of their contention that the notices of assessment were in some way bad and therefore unenforceable. All issues raised by the [taxpayer]s were then dealt with in the reasons for judgment of the Land Appeal Court delivered on 14 September 2006.

- [20] Further, this Court gave the [taxpayer]s every opportunity of raising any arguments in law which went to the validity or enforceability of the notices of assessment. The [taxpayer]s have not demonstrated that by not having a hearing in the Land Court they have been in any way prejudiced.
- [21] In this Court the [taxpayer]s did take issue with the fact that in the Land Court the [Commissioner] read and relied upon an affidavit of Paula Freeleagus which had not been served on them. However, all that affidavit did was place relevant correspondence between the [taxpayer]s and the [Commissioner] as to the hearing in the Land Court before that court. That in no way adversely affected the [taxpayer]s' position with respect to submissions as to validity of the assessments.
- [22] In support of the submission they were denied natural justice the [taxpayer]s referred to the decision of Lord Widgery CJ in *R v Thames Magistrates' Court; ex parte Polemis* [1974] 2 All ER 1219. There it was said at 1223 that where there had been a denial of natural justice resulting in an order being made, it was no answer to an application to have that order set aside that there was no merit in the applicant's case. That is undoubtedly correct, but it is not the position here. The order said to have been made in breach of the principles of natural justice was that the appeal of the [taxpayer]s be dismissed. But since then the issues the [taxpayer]s sought to raise at that hearing have been aired before the Land Appeal Court and in this Court and it cannot be said that the merits of the appeal have not been fully and properly explored.
- [23] Against all of that background leave to appeal should be granted but the appeal should be dismissed with costs.

MACKENZIE J: I agree, for the reasons given by Williams JA, that leave to appeal be granted but the appeal should be dismissed with costs.

MUIR J: I agree with the reasons of Williams JA and with his proposed orders.

(2) ** Was there an error 30 years ago that could be corrected duty free? (Pryke & Ors v. C of SR)

Source Month 04-2007 – 41 ~ Pryke & Ors v. Commissioner of State Revenue [2007] OCA 121 (13 April 2007)

What was the issue?

Had the taxpayer made an error in documenting a transfer of land 30 years ago that could be corrected without occurring a liability to duty?

Did a transfer contain an error in failing to record all the partners' names as transferees or, alternatively, in failing to record the fact that Robert Pryke took the land on behalf of or as trustee for the partnership?

What was the outcome?

The Court accepted that there was sufficient evidence before the trial judge to enable him to conclude that the taxpayers had made an error 30 years ago.

Does the outcome affect your firm's current practices?

The decision highlights the value of having good records (or depending on your view) no records of transactions and of the value of maintaining those records while you retain an asset.

What were the facts?

The original owners of the caravan park were Mr and Mrs Fiebig who executed the transfer of the land to Robert Pryke in 1973.

The 1973 transfer but reflected the option agreement the Fiebigs had entered into with Robert Pryke to the extent that it was a transfer to him.

The option anticipated that it would be accepted in writing and that the acceptance may also be made by any nominee of Robert Pryke, nominated by him in the letter of acceptance.

In his oral evidence Robert Pryke could recall any such nomination and his solicitor's evidence was that he was "never instructed by Mr Pryke of his nomination of his partners as transferees". The trial Judge was willing to infer that that may have been a conclusion the solicitor drew from the form of drafting of the transfer he prepared.

The trial judge's unchallenged findings about Robert Pryke's intention in respect of the transfer were as follows:

"[38] Looking at the transaction in context, it is plain that Mr Robert Pryke's intention was to convey Lots 1 and 2 to the partnership. He did not, I expect, think about how that was to be done, or appreciate that a transfer to one partner only did not truly reflect what he, or his partners, intended. I expect this was the result of inadvertence. I believe he did not turn his mind to the question of the identity of the transferees. I do not consider that he actually intended the transfer to be to him on the basis that he would hold the land on trust for the partnership, which is what happened."

The primary judge took the view that there was an error, so that no duty was payable on a transfer 30 years later from Robert Pryke.

The Commissioner of State Revenue brought this appeal against that decision.

What was the decision – Williams JA?

- [3] In those circumstances the primary judge made findings about Robert Pryke's intention with respect to the transfer and those findings were not challenged on the hearing of the appeal. I am satisfied that there was evidence to support the findings made.
- [4] Once those findings of fact were made the task of the [Commissioner] in contending that s 152 of the Duties Act 2001 (Qld) did not apply was rendered much more difficult.
- [5] I have ultimately concluded that the reasoning of Douglas J is correct and that, given the primary findings, an exemption from payment of duty based on s 152 was established.

What was the decision – Holmes JA?

- [7] I agree with the reasons of Douglas J and the order he proposes.

What is the decision for Douglas J?

- [8] In 1972 the [taxpayer]s, Robert Pryke, his wife Joan Pryke, his brother Daryl Pryke and Daryl's wife Carole Pryke, were members of a partnership proposing to operate a caravan park at Palm Beach. The land for the caravan park was transferred to Robert Pryke alone pursuant to an option agreement dated 21 May 1973 in favour of him "or...such person you may care to nominate". The transfer, dated 10 August 1973, was made in consideration of the payment of \$300,000. Stamp duty of \$3,737.50 was paid on it on 11 October 1973.
- [13] His Honour found that these were the facts despite the lapse of time between the original transfer and the rectification of it by the 2003 transfer. He relied, in particular, on Daryl Pryke's evidence to reach that conclusion.
- [14] The possibility of redevelopment of the land in recent years and the advancing age of the parties, encouraged them to look at transferring the land into all four names, as the other adjoining blocks were held. They were then advised that the passage of s 152 of the Duties Act 2001 (Qld) may assist such a transfer by negating the imposition of transfer duty. That section provided:

"152 Exemption—to correct error in previous dutiable transaction

Transfer duty is not imposed on a dutiable transaction to correct an error in a previous dutiable transaction about the same property if—

- (a) *no additional consideration is paid or payable; and*
- (b) *the beneficial interests in the property change only to the extent necessary to correct the error."*

- [17] Accordingly, on 24 November 2003, Robert Pryke executed a transfer of the land described to all four partners for a consideration described as: "Nil. Correction of Transfer previously recorded."
- [18] The Commissioner did not accept the accuracy of the consideration set out in the transfer and called for a valuation of the land. That came in at \$10,740,000. The value of the three-quarter interest transferred was \$8,055,000 on which duty was assessed at \$299,287.50, ironically almost precisely the amount paid for the land alone slightly more than 30 years earlier.

“Error in a previous dutiable transaction”

[19] The focus of the arguments was the meaning of the words “error in a ... transaction” in s 152. The learned

Discussion

[28] A recent useful summary of the proper approach to the construction of an exception to dutiability such as s 152 is to be found in Commissioner of State Revenue v Viewbank Properties Pty Ltd (2004) 55 ATR 501; [2004] VSC 127 at 513, [38] where Nettle J said:

“Despite developments in the law relating to the construction of taxing statutes — so that by and large one is now to approach their construction in the same way as any other statute — the starting point remains the plain natural and ordinary meaning of the words of the legislation and the discernment of the legislative intention from the terms of the legislation viewed as a whole. Within the limits which they impose it is appropriate to construe exemption and exception provisions like s 67A(3)(a)(i) in favour of those who claim that they come within the exception. But where the words of such a provision are clear, the mere fact that a liberal construction of the provision more closely accords with subjective perceptions of what is “equitable” will rarely if ever be sufficient basis to depart from the plain and ordinary meaning of the language that has been employed. Absent a drafting mistake of the kind which underscored the decision in Cooper Brookes or absurd irrational or capricious results or the use of language which as a matter of natural and ordinary meaning permits of a multiplicity of possibilities, or perhaps extrinsic materials which make plain that the language employed simply fails to achieve the result which was intended, it is not permissible to depart from the plain and ordinary meaning of the words.”

[29] When one adopts such an approach and characterises the error in the transaction relied on by reference to his Honour’s factual findings as the imperfect identification of the transferee, it seems to me that the error is “in the transaction” in the sense that it is reflected in the mistaken description of the transferee in the memorandum of transfer.

Conclusion

[35] In other words, it is my view that an error in the description of the transferee in a memorandum of transfer where the transferee had the power to nominate who could take the transfer and inadvertently failed to ensure that his proposed nomination took effect, has created a situation which in the plain and ordinary meaning of the language amounts to an error in that transaction.

[36] Accordingly, I would dismiss the appeal and order the [Commissioner] to pay the [taxpayer]s’ costs of and incidental to the appeal

4.3 Revenue Office Interpretations

(a) New South Wales

(1) ** Exemption from duty – charitable & benevolent bodies (DUT 34) (NSW)

[*Source Month 04-2007 – 70 ~ Part -.3\(a\) DUT 34 \(9 March 2007\)*](#)

What issue does the ruling consider?

What societies or institutions might be considered to be of a charitable or benevolent nature, so as to be eligible for stamp duty exemptions.

What is the legislative background?

Section 275 of the Duties Act 1997 provides that duty is not chargeable on certain transactions relating to charitable or benevolent bodies:

- ◆ Section 275 (3)(a) [formerly section 275(a)] applies generally to transactions entered into by societies or institutions for the relief of poverty or promotion of education.
- ◆ Section 275 (3)(b) [formerly section 275(b)] applies to a broader category of charitable or benevolent bodies, but is limited by reference to the purposes of the transaction or instrument or the use of the property, and those purposes or uses must be in accordance with guidelines approved by the Treasurer.
- ◆ Section 275A provides a partial exemption for transactions relating to land used partly for exempt purposes.

What is the ruling?

The Commissioner's view is that the following transactions or instruments are eligible for exemption:

- ◆ a transfer of dutiable property to an exempt charitable or benevolent body;
- ◆ an agreement for the sale or transfer of dutiable property to an exempt charitable or benevolent body;
- ◆ a declaration of trust over dutiable property held or to be held on trust for an exempt charitable or benevolent body;
- ◆ an instrument that declares a trust over unidentified property or non-dutiable property held or to be held on trust for an exempt charitable or benevolent body;
- ◆ an acquisition of an interest in a land rich landholder by an exempt charitable or benevolent body;
- ◆ a lease of dutiable property to an exempt charitable or benevolent body;
- ◆ a mortgage given by or on behalf of an exempt charitable or benevolent body;
- ◆ the society or institution exemption applies to 'any society or institution' but a distinction can be drawn between the society or institution and the legal entity involved in the transaction;
- ◆ an institution is an establishment, organisation or association, so that a trustee acting alone in exercising the powers conferred by the trust deed is not an institution [see *Sargents Charitable Foundation v Chief Commissioner of State Revenue* [2005] NSWSC 659];
- ◆ a fund raised by public contributions and administered by trustees for specific charitable purposes could be an institution [see *Stratton v Simpson* (1970) 125 CLR 138], so that a purchase of land by trustees who are actively involved in administration of a charitable trust fund could be eligible for exemption if the trust fund is itself an 'institution';
- ◆ registered charities or organisations approved under other legislation relating to charitable purposes are not automatically eligible for exemption.

5 SUPERANNUATION, ETP'S & PENSIONS

5.1 Politicians, Boards & Statutory Authorities[NIL]

5.2 Courts & Tribunals[NIL]

5.3 APRA, ASIC & Tax Office Interpretations

(a) Rulings & Draft Rulings[NIL]

(b) Determinations & Draft Determinations[NIL]

(c) ID's

Source: <http://law.ato.gov.au/atolaw/index.htm>

ID 2007/56	Self Managed Superannuation Funds: contracts for differences (CFDs) - no fund assets deposited with CFD provider
ID 2007/57	Self Managed Superannuation Funds: contracts for differences (CFDs) - fund assets deposited with CFD provider - charge over fund assets
ID 2007/58	Self Managed Superannuation Fund: trustee using a margin account for fund investments in listed shares
ID 2007/73	Superannuation guarantee: Ordinary hours of work for employees covered by both an award and an agreement

(d) ID's ~ Withdrawn

ID 2002/47 (W)	Superannuation, retirement and employment termination: Extension of time to lodge objections to claim a deductible amount and rebate for a superannuation pension
--------------------------------	---

(e) Other Tax Office Releases Other Tax Office Releases[NIL]

6 OTHER IMPOSTS, OFFSETS & REBATES

6.1 Politicians, Boards & Statutory Authorities **[NIL]**

6.2 Courts & Tribunals

6.3 APRA, ASIC & Tax Office Interpretations

(a) Rulings & Draft Rulings

(1) ** FTR 2007/D1 ~ The meaning of acquire, manufacture & import

Source Month 04-2007 – 62 ~ FTR 2007/D1

What issue does the ruling consider?

In the expression 'taxable fuel that you acquire or manufacture in, or import into, Australia to the extent that you do so for use in carrying on your enterprise' in the Fuel Tax Act 2006 what is the meaning of:

- ◆ 'acquire';
- ◆ 'manufacture'; and
- ◆ 'import'.

What was the ruling?

The Commissioner's view is that:

- ◆ 'Taxable fuel' is fuel in respect of which duty is payable under the Excise Act and the Excise Tariff Act or the Customs Act and the Customs Tariff Act but does not include fuel covered by:
 - ~ item 15, 20 or 21 of the Excise Tariff; or
 - ~ any imported goods that would be classifiable to item 15 of the Excise Tariff, if the goods had been manufactured in Australia.¹⁰
- ◆ for the purposes of the FT Act, the term 'Australia'¹¹ does not include any external Territory, but includes certain installations (for example, an oil rig) that fall within the meaning of 'installation'¹² in the Customs Act and which are treated as being part of Australia under section 5C of the Customs Act.
- ◆ the term 'acquire' is not defined in the FT Act. It therefore takes its ordinary meaning.
- ◆ if you enter into a contract for the sale and purchase of taxable fuel which, at the time of contract, is unascertained, you acquire the fuel when, in the absence of a contrary intention, the fuel in a deliverable state is unconditionally appropriated to the contract.

The ruling contains numerous examples, which in a break from recent practice, are incorporated in the binding section rather than in the non-binding explanation.

(b) Determinations & Draft Determinations **[NIL]**

(c) ID's - New

Source: <http://law.ato.gov.au/atolaw/index.htm>

ID 2007/51	Fuel Tax Credits: rate applicable in determining the amount of an increasing or decreasing fuel tax adjustment
ID 2007/53	Fuel Tax Credits: supply of kerosene for domestic heating
ID 2007/54	Fuel Tax Credits: attributing fuel tax credits by reference to the quantity of fuel actually used

ID 2007/55	Fuel Tax Credits: GST groups and membership of approved environmental programmes
ID 2007/61	Excise: licence conditions in relation to notification of change of trustee for a trust
ID 2007/65	Fuel Tax Credits: environmental criteria and motor vehicles used primarily on an agricultural property - relevance of time
ID 2007/70	Medical Expenses Tax Offset: cosmetic surgery - vocal chords
ID 2007/71	Fuel Tax Credits: assessability of fuel tax credits

(d) ID's - Withdrawn

ID 2003 /852(W)	Do the brewer's name and address need to appear on beer labels?
ID 2004 /669(W)	Excise: Distillation and alcohol concentration methods
ID 2003 /852(W)	Do the brewer's name and address need to appear on beer labels?
ID 2004 /669(W)	Excise: Distillation and alcohol concentration methods

(e) Other Tax Office Statements, Addenda, Errata and Withdrawals [NIL]

7 LEGISLATION

7.1 Australian Parliament at 1 May 2007

Revenue or Revenue Related Legislation only – Current to 27 April 2007

(a) Acts receiving Royal Assent in the last month

(1) *** Tax Laws Amendment (2006 Measures No. 7) Act 2007 – Act Number 55 of 2007

[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)

[Explanatory Memorandum:](#)

http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=EMS&Criteria=BILL_ID:r2680%3BEM_TYPE:EM%3BSOURCE:House%3B_Memorandum: Not available

Formerly known as the Tax Laws Amendment (2006 Measures No. 7) Bill 2006)

The Report of the Senate Economics Committee was delivered to the Senate on 27 February 2007 after which Schedule 2 dealing with interest withholding tax was excised from the Bill.

Royal Assent granted on 12 April 2007

The amendments made by the Act will increase the availability of small business capital gains tax concessions to more taxpayers.

The amendments made by the Act **do not** include the \$6m cap or the \$2m turnover threshold.

The Amendments made are effective from 1 July 2006 and include the following key changes:

- ◆ the “controlling individual” 50 per cent test is replaced with a “significant individual” 20 per cent test.
- ◆ the 20% interest can be held directly, or indirectly through one or more interposed entities (eg other companies or trusts) making the small business CGT concessions available to entities other than “mum-and-dad” owned businesses.
- ◆ trusts and other entities disposing of shares in an active business can use the small business CGT concessions if there are CGT concession shareholders (which would include the 20% significant individual and their spouse) who have an interest (capital or income) in the entity selling the shares of at least 90%.
- ◆ 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.
 - ~ liabilities taken into account under the test will include provisions (annual leave/LSL), unearned income and FITB, on the basis they are recognised as liabilities for accounting.
 - ~ as partners in partnerships holding more than \$5m of net assets will not automatically be precluded from the small business concession regime.
- ◆ the active asset test will be easier to satisfy:
 - ~ the relevant asset must be active for half the total time it was owned and if active for 7.5 years or more is regarded permanently as active as an asset no longer needs to be active just before the CGT event.
 - ~ the “80% active asset” look-through test for shares and companies has been simplified.
- ◆ the 15 year exemption can be used in respect of a company (if the shareholder selling shares or the company is selling active assets) if it has a significant individual for a total period of 15 years.
- ◆ the 15 year period need not be continuous and the significant individual can be more than a single person;
- ◆ the retirement exemption no longer requires the payment of an ETP and a payment from the company will be treated as a non-assessable non-exempt payment;
- ◆ the legal personal representative (executor) of a deceased estate can step into the shoes of the deceased owner and apply the concessions to their fullest extent.

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

Source:

[Bill: Tax Laws Amendment \(2007 Measures No. 1\) Bill 2007](#)

[EM: Tax Laws Amendment \(2007 Measures No. 1\) Bill 2007 EM](#)

Royal Assent 12 April 2007

This Bill proposes amendments as follows:

- ◆ **Project Wickenby** - amend 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.
- ◆ **Superannuation Guarantee** - 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.
- ◆ **Employee Share Schemesto** - amends the Income Tax Assessment Act 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 rather, rather than to tax those instruments under the FBT legislation.

(b) Bills before Parliament

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

Source:

Bill [Tax Laws Amendment \(2007 Measures No. 2\) Bill 2007](#)

EM [Tax Laws Amendment \(2007 Measures No. 2\) Bill 2007 EM](#)

Introduced to the House of Representatives on 29 March 2007.

Referred to the Senate Economics Committee on 29 March 2007, to be reported on by 30 April 2007.

This Bill proposes amendments as follows

- ◆ **Schedule 1** – to more closely align the decline in value deductions for mining, quarrying and prospecting rights with that for other depreciating assets to apply to assessments for the income year in which 1 July 2001 occurred, and to later income years.
- ◆ **Schedule 2** - change the taxation treatment of boating activities to allow taxpayers who cannot demonstrate that they are carrying on a business using a boat to claim deductions for boating expenses up to the level of their boating income with effect for the first income year year starting on or after the day on which this Bill receives Royal Assent, and to later income years.
- ◆ **Schedule 3** - to expenditure on R&D by clarifying and making 10 technical amendments to the provisions for the premium incremental concession and the refundable R&D tax offset with various dates of effect.
- ◆ **Schedule 4** - allows a tax deduction for donations of publicly listed shares, to eligible deductible gift recipients, acquired more than 12 months before gifting and valued at \$5,000 or less with effect in an income year commencing on or after the date of Royal Assent.
- ◆ **Schedule 5** - updates the list of deductible gift recipients (DGRs) as follows:
 - ~ American Australian Association Limited from 14 November 2006; and
 - ~ Bunbury Diocese Cathedral Rebuilding Fund from 19 December 2006 until 18 December 2008.
 - ~ extends the DGR listing of The Finding Sydney Foundation to 27 August 2007.
- ◆ **Schedule 6** - extends the eligibility for tax deductions for contributions to deductible gift recipients, where an associated minor benefit is received for an eligible fund-raising event with effect for contributions made on or after 1 January 2007.
- ◆ **Schedule 7** - addresses a defect in the definitions of 'exempt entity' in the ITAA 1997 and 'excepted trust' in the ITAA 1936 and corrects some minor technical errors in Division 58 of the ITAA 1997 with effect from 1 July 2005 subject to Transitional rules to ensure that taxpayers are not retrospectively disadvantaged.
- ◆ **Schedule 8** - amends the venture capital regime by:
 - ~ relaxing the eligibility requirements for concessional taxation treatment for foreign residents investing in venture capital limited partnerships (VCLPs) and Australian venture capital funds of funds (AFOFs); and
 - ~ providing taxation concessions for Australian residents and foreign residents investing in early stage venture capital activities through a new investment vehicle called an early stage venture capital limited partnership (ESVCLP). Amendments are made to close the pooled development fund (PDF) scheme to new applications as a result of the introduction of the ESVCLP investment vehicle.
 - ~ makes a technical amendment to the regime in relation to the conditional registration of VCLPs and AFOFs.

Schedule 8 Amendments:

- ◆ in Parts 1 to 4 apply to the 2007-08 income year and all later years.

- ◆ in Part 5 applies from the commencement of the Venture Capital Act 2002.

7.2 State and Territory Parliaments – as at 27 April 2007

Revenue or Revenue Related Legislation only – Current to 27 April 2007

(a) Australian Capital Territory

www.legislation.act.gov.au

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

(b) South Australia

www.parliament.sa.gov.au

Nil

(c) Queensland

<http://www.parliament.qld.gov.au/view/legislativeAssembly/legislativeAssembly.asp?area=legislation&LIndex=5&SubArea=current>

Nil

(d) Tasmania

www.parliament.tas.gov.au

(1) * Revenue Measures Amendment 14 of 2007

House of Assembly First reading 17/04/07. Legislative Council First reading 19/04/07

(e) Victoria

www.dms.dpc.vic.gov.au

(1) * Pay-roll Tax Amendment (Bushfire and Emergency Service) Act 2007 (Number 5 of 2007)

Royal Assent 20 March 2007

(f) Western Australia

[Parliament of Western Australia - Bills - Current](#)

(1) * Stamp Amendment (First Home Owner) Act 2006

Introduced into the Legislative Assembly on 30 August 2006. Private Member's Bill (Mr Buswell) and second reading not agreed to.

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 TO THE FULL COURT OF THE FEDERAL COURT

Current as at 24 April 2007

[Source: http://www.fedcourt.gov.au/ctlists/ctlists_appeals.html](http://www.fedcourt.gov.au/ctlists/ctlists_appeals.html)

- | | |
|---|--|
| <p>(1) Barnes v Commissioner of Taxation [2007] FCA 3
Topic: Taxation
Filed: WAD25/2007; 05/02/2007
Status: Full Court Hearing
Next Listing Date: 17/05/2007</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: Full Court Hearing
Next Listing Date: 07/05/07 – 08/05/07</p> <p>(3) Commissioner of Taxation v Guest
Topic: Interest deductibility
Filed: 13 April 2007
Status: Callover
Next listing date: 24 April 2007</p> <p>(4) <u>Commissioner of Taxation v Slade Bloodstock Pty Ltd [2007] FCA 188</u>
Topic: FBT ~ repayments of a credit loan
Filed: VID206/2007; 14/03/07
Status: Settlement of Index and Callover
Next Date of Listing: 24/04/07</p> <p>(5) <u>Commissioner of Taxation v Word Investments Ltd [2006] FCA 1414</u>
Topic: Taxation
Filed: VID1300/2006, 24/11/2006
Status: Full Court Hearing
Next Listing Date: 10/05/07</p> <p>(6) <u>Cumins v Commissioner of Taxation [2006] FCA 43</u>
Topic: Bankruptcy
Filed: WAD361/2006; 13/12/2006
Status: Full Court Hearing
Next Listing Date: 18/05/07</p> <p>(7) <u>Day v Commissioner of Taxation [2006] FCA 655</u>
Topic: Taxation
Filed: NSD1191/2006; 20/06/2006
Status: Full Court Hearing
Next Listing Date: 09/05/07</p> <p>(8) <u>Epov v Commissioner of Taxation [2007] FCA 267</u>
Topic: Taxation
Filed: NSD249/2007; 21/02/07
Status: Settlement of Index and Callover
Next Listing Date: 02/04/07 and 26/04/07</p> <p>(9) 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>(10) <u>IEL Finance Limited v Commissioner of Taxation [2006] FCA 267 and FCA 1293</u>
Topic: Taxation
Filed: NSD2053/2006 and NSD2058/2006; 20/10/06
Status: Full Court Hearing
Next Listing Date: 07/05/07</p> <p>(11) IEL Finance Limited v Commissioner of Taxation [2006] FCA 1293
Topic: Taxation
Filed: NSD2057/2006; 20/10/06
Status: Full Court Hearing
Next Listing Date: 07/05/07 – 08/05/07</p> <p>(12) Lend Lease Custodian Pty v Deputy Commissioner of Taxation [2006] FCA 1790
Topic: Taxation
Filed: NSD119/2007; 23/02/07
Status: Callover</p> | <p>Next Listing Date: 26/04/07</p> <p>(13) <u>Price Street Professional Centre Pty Ltdv Deputy Commissioner of Taxation (No 2)[2006] FCA 1149</u>
Topic: Taxation
Filed: QUD 100/2007
Status: Settlement of Index
Next listing date: 21 May 2007</p> <p>(14) 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: Judgement Reserved</p> <p>(15) R & D Holdings Pty Ltd v Deputy Commissioner of Taxation (No 2)[2006] FCA 1149
Topic: Taxation
Filed: NSD1799/2006; 19/09/2006
Status: Judgment Reserved</p> <p>(16) <u>Rio Tinto Ltd v Commissioner of Taxation [2005] FCA 1336</u>
Topic: Taxation
Filed: VID1205/2005; 29/09/2005
Status: No Future Listing</p> <p>(17) Spassked Pty Ltd ACN 003 255 847 v Commissioner of Taxation
Topic: Not supplied
Filed: NSD2050/2006; 20/10/2006
Status: Full Court Hearing
Next Listing Date: 07/05/07 – 08/05/07</p> <p>(18) Starr v Commissioner of Taxation of the Commonwealth of Australia [2007] FCA 23
Topic: Not supplied
Filed: WAD28/2007; 12/02.2007
Status: Callover
Next Listing Date: 26/04/2007</p> <p>(19) Tey v Commissioner of Taxation [2006] FCA 1237
Topic: Taxation
Filed: WAD24/2007; 31/01/2007
Status: Directions
Next Listing Date: 9 May 2007</p> <p>(20) 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: Judgment reserved</p> <p>(21) Weyers v Commissioner of Taxation [2006] FCA 818
Topic: Judicial Review
Filed: QUD394/2006 and QUD395/2006; 11/10/2006
Status: Hearing
Next Date Listing: 08/05/07 – 09/05/07</p> <p>(22) <u>Weyers v Commissioner of Taxation [2006] FCA 818</u>
Topic: Judicial Review
Filed: QUD394/2006 and QUD395/2006; 11/10/2006
Status: Hearing
Next Date Listing: 08/05/07 – 09/05/07</p> <p>(23) <u>White Industries Aust Ltdv Commissioner of Taxation [2007] FCA 511</u>
Topic: Judicial Review
Filed: NSD 676/2007; 18/04/2007
Status: Hearing
Next Date Listing: 08/05/07 – 09/05/07</p> |
|---|--|

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.

© 2007 Tax Matrix Pty Limited. These Tax Update Notes are not to be reproduced in whole or part without the written permission of Tax Matrix Pty Limited ABN 33 101 349 900.

As a guide to readers the following rating system has been applied at the front of the title of an article (the context being the section within which the article appears):

- *** 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.

An electronic version of these notes (pdf format) can be downloaded from our website on the first of each month except January.

The electronic version contains fully functional links to all primary sources. The electronic version can be stored on your server.
 Tax Matrix Pty Ltd
 Tax Education & Tax Updating for Professionals
 Mail Address PO Box 228 South Yarra VIC 3141
 Ph (03) 9820 0082
 Manager Research: Rachel Ritchie

E-mail: rachel.ritchie@taxmatrix.com.au

Please Note: Tax Matrix Pty Ltd has operated independently of Hall & Wilcox Lawyers since 2002.