



The August 2008 MTUN ~ tax education for the thinking tax professional

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

Taxmap™Taxmap™Taxmap™ Taxmap™Taxmap™Taxmap™ Table of Contents

1	INCOME TAX	5
1.1	Politicians, Boards & Statutory Authorities	5
	(1) *** Keep Your Receipts!! Education Tax Refund Starts (Swan)	5
	(2) *** New Family Trust Bill Introduced (Bowen)	6
	(3) * Appointment of Second Commissioner of Taxation (Bowen)]	6
1.2	Courts & Tribunals	7
(a)	Courts	7
	(1) *** Same business test failed –business must be identical (Lilyvale Hotel Pty Limited v C of T)	7
	(2) ** Was the lawyers' body a tax exempt body? (Victorian Women Lawyers' Association v C of T)	10
(b)	Tribunals	16
	(1) *** The taxpayer finessed what he told the Tax Office about the legal expenses claim (Cachia & C of T)	16
	(2) ** Were the self education expenses deductible? (Southwell-Keely and C of T)	20
	(3) ** Commissioner refuses to transfer PAYG payment made to incorrect account ICA (Command Recruitment Group (Qld) Pty Ltd and C of T)	21
	(4) ** Original decision disappears from view and is replaced (Roche Products Pty Limited and C of T)	23
	(5) ** Was the taxpayer a charitable institution?(Aid/Watch Incorporated v C of T)	28
(c)	Decisions which are listed only – No extracts provided	33
	(1) Was the Commissioner entitled to a winding up order?(D C of T v Eurama Vision Australia Pty Ltd)	33
	(2) Taxpayer tries to limit the C of T's use of evidence (Bonnell v DC of T (No. 3))	33
	(3) Could the Commissioner have the taxpayer's proceedings dismissed? (Bonnell v D C of T (No. 5))	34
1.3	Featured ATO interpretations	35
(a)	TR Series - including TR series in draft form	35
	(1) ** TR 2008/4 ~ Clarification of the replacement basis write off	35
(b)	TD Series - including TD Series in draft form	37
	(1) ** Car limit ~ TD 2008/17	37
	(2) ** TD 2008/18 ~ Reasonable travel allowance amounts	37

We have revised the format of the MTUN from 1 July 2008 so as to clearly highlight the risks to practitioners who rely upon ATO publications that are not intended to be relied upon and which, in the eyes of the ATO, do not provide a Reasonably Arguable position. These documents are now listed separately at Section 7 of the MTUN.

We have made other changes as follows:

- ◆ The Appeal Cases report is now published electronically on the [Taxmap™](http://www.taxmatrix.com.au) website and updated more regularly than monthly.
- ◆ The State Taxes section including State Taxes legislation is now published electronically on the [Taxmap™](http://www.taxmatrix.com.au) State Taxes website and updated progressively during the month rather than monthly.

Tax Matrix Pty Ltd has operated independently of Hall & Wilcox Lawyers since July 2002.

③	** TD 2008/19 ~ Decision 7A benchmark interest rate	37
④	** TD 2008/20 ~ Related party funding from offshore – debt or equity? ~	38
⑤	* TD 2008/21 ~ What is a deferred Purchase Agreement warrant?	38
⑥	** TD 2008/22 ~ When does CGT event C2 occur under a DPA Warrant?	39
(c)	Decision Impact Statements	40
(1)	Main residence & moving in as soon as practicable (Summers v C of T [2008] AATA 152)	40
(2)	Penalty tax if taxpayer's purpose was not to obtain tax benefit [O'Brien v C of T]	41
2	GST	42
2.1	Politicians, Boards & Statutory Authorities [NIL]	42
2.2	Courts & Tribunals [NIL]	42
(a)	Courts [NIL]	42
(b)	Tribunals [NIL]	42
(c)	Decisions which are listed only [NIL]	42
2.3	Featured ATO interpretations	42
(a)	GSTR Series – including GSTR series in draft form [NIL]	42
(b)	GSTD Series – including GSTD series in draft form [NIL]	42
(c)	Decision Impact Statements [NIL]	42
3	FBT ~ UPDATE MATERIAL IS ACCESSED ON LINE THROUGH TAXMAP™	43
3.1	** Consultation on FBT - Jointly Held Assets (Bowen)	43
4	STATE TAXES ~ UPDATE MATERIAL IS ACCESSED ON LINE THROUGH TAXMAP™	43
5	SUPERANNUATION, ETP'S & PENSIONS	44
5.2	Courts & Tribunals	44
(c)	Decisions which are listed only	44
(1)	Were the amounts paid to superannuation “contributed” amounts?(Clarke v C of T)	44
6	OTHER IMPOSTS, OFFSETS & REBATES	45
6.2	Courts & Tribunals	45
(b)	Tribunals	45
(1)	** Can the fully employed ex student defer student assistance repayments? (Bak and C of T)	45
(c)	Decisions which are listed only	46
6.3	Featured ATO interpretations	46
(a)	TR Series - including TR series in draft form [NIL]	46
(b)	TD Series - including TD Series in draft form	46
(1)	** LCTD 2008/1 ~ What is the luxury car tax threshold for the 2008-2009 financial year?	46
7	LISTED ATO PUBLICATIONS FOR THE MONTH	48
7.1	ATO Publications that you can rely upon	48
(a)	TR Series - including TR series in draft form [NIL]	48
(b)	TD Series - including TD Series in draft form [NIL]	48
(c)	Class Rulings	48
(d)	Product Rulings	48
(e)	Decision Impact Statements	48
(f)	Addenda, Errata and Withdrawals affecting publications that are intended to be relied upon	48
(a)	MT Series - including MT series in draft form [NIL]	49
(b)	ATO ID's	49
(c)	Practice Statements [NIL]	49
(d)	Speeches & Press Releases ~ Commissioner & Assistant Commissioners [NIL]	49
(e)	Other ATO publications	49

(1)	TPAL	49
(2)	RCTI	49
(3)	SGR	49
(4)	LCTD	49
(5)	SMSFR	50
(1)	ATO IDs Withdrawn – Income Tax	50
(2)	ATO's Withdrawn - Rental Property	51
(3)	ATO IDs Withdrawn – GST	52
(4)	ATO IDs Withdrawn – Superannuation	52
(5)	ATO IDs Withdrawn – Other imposts, offsets and rebates	52

~ TAX EDUCATION FOR THE THINKING TAX PROFESSIONAL

1 INCOME TAX**1.1 Politicians, Boards & Statutory Authorities****(1) *** Keep Your Receipts!! Education Tax Refund Starts (Swan)**

Source: Press Release No 77 - Keep Your Receipts!! Education Tax Refund Starts Tomorrow [30/06/2008] (Swan)

The Education Tax Refund will provide parents with help for education expenses, with refunds of up to:

- ◆ \$375 per primary school student; and
- ◆ \$750 per secondary school student.

By keeping their receipts, eligible families will be able to claim a 50 per cent refund every year for key education expenses up to:

- ◆ \$750 for each child undertaking primary studies (maximum refund of \$375 per child, per year); and
- ◆ \$1,500 for each child undertaking secondary studies (maximum refund of \$750 per child, per year).

For example, Sarah and Michael have two children, Petra, who is in secondary school and Jack, now in grade three. Through the Education Tax Refund, Sarah and Michael are able to claim 50 per cent of the cost of a \$1,500 laptop computer they bought for Petra, a refund of \$750.

They will also be able to claim Jack's education software and school textbooks up to the value of \$750, receiving a refund of up to \$375.

Where a family has educational costs in excess of the refund limit, these costs can be carried over to the next financial year.

Eligible expenses for the Education Tax Refund include:

- ◆ laptops;
- ◆ home computers and associated costs;
- ◆ home internet connections;
- ◆ printers;
- ◆ education software;
- ◆ trade tools for use at school;
- ◆ school text books; and
- ◆ stationery.

Parents are for the Education Tax Refund:

- ◆ if they are entitled to Family Tax Benefit (FTB) Part A for children in primary or secondary school for the relevant financial year.
- ◆ if they have children in primary or secondary school who would be eligible children for FTB Part A purposes, but for the fact that the child receives certain payments or allowances, for example:
 - ~ Youth Allowance;
 - ~ Disability Support Pension; and
 - ~ ABSTUDY Living Allowance.

Parents will then be able to claim 50 per cent of these expenses through their tax return at the end of the financial year.

For those who are not required to complete an income tax return, a separate form will be available from the Australian Taxation Office.

Editor

Firms should circularise their clients with the news of this development and the attendant requirement that receipts be retained. It is important that clients be made aware earlier rather than later, of the requirement to keep receipts, more so in the context of the more onerous requirements on tax practitioners that will be introduced in the near future.

(2) *** New Family Trust Bill Introduced (Bowen)

Source: [Press Release No 53 - New Tax Laws Bill Introduced \[21/07/2008\] Bowen](#)

On 21 July the Government introduced Tax Laws Amendment (2008 Measures No. 4) Bill 2008 to implement a number of improvements to Australia's taxation system, including the following:

- ◆ providing relief from CGT for private health insurance policyholders when their insurer demutualises to a for profit insurer so that policyholders who receive shares in the insurer or a cash payment will not be subject to CGT at the time they receive the shares or the cash payment;
- ◆ reversing two of the family trust changes introduced by the previous government in the Tax Laws Amendment (2007 Measures No. 4) Act 2007 by:
 - ~ restoring the previous definition of 'family' in the family trust election rules;
 - ~ by limiting lineal descendants to children or grandchildren of the test individual or of the test individual's spouse;
- ◆ by preventing family trusts from making a variation to the test individual specified in a family trust election (other than specifically in relation to the 2007-08 income year or in the case of a marriage breakdown);
- ◆ as part of the Government's commitment to the care and maintenance of the tax system by implementing:
 - ~ various minor amendments to the law; and
 - ~ some general improvements of a minor nature.

Further information about this new legislation (and the new legislation and explanatory memorandum is available on line at www.taxmatrix.com.au/taxmap at the legislation button in the first column. The online service is free and allows more timely updating than is possible in a printed format.

(3) * Appointment of Second Commissioner of Taxation (Bowen)]

Source: [Press Release No 50 - Appointment of Second Commissioner of Taxation \[30/06/2008\] Bowen](#)

The Governor-General approved the appointment of Mr David Butler to the position of Second Commissioner of Taxation.

In his most recent role as Division Head, Tax Administration and Consumption Taxes Division with the OECD in Paris, Mr Butler has been responsible for driving international best practice in tax administration.

Prior to this, he was the Chief Executive and Commissioner of Inland Revenue for New Zealand.

1.2 Courts & Tribunals

(a) Courts

(1) *** Same business test failed –business must be identical (Lilyvale Hotel Pty Limited v Cof T)

Source: Lilyvale Hotel Pty Limited v Commissioner of Taxation [2008] FCA 1031 (10 July 2008) ~ Stone J

What is the issue?

Could the company pass the same business test so as to enable it to use carried forward tax losses?

What was the outcome?

The Court held that:

- ◆ Lilyvale needed to show that the business it carried on after the share sale was **identical** to the business that it carried on in the relevant period before the share sale;
- ◆ a business is not a thing or things but is a course of conduct carried on for the purpose of profit and involves notions of continuity and repetition of actions.

What were the facts?

The taxpayer, Lilyvale Hotel Pty Limited, constructed a hotel on land leased for 99 years from the Sydney Cove Redevelopment Authority (now the Sydney Harbour Foreshore Authority in the area known as the Rocks).

The lease commenced on 30 April 1993.

The hotel commenced operations in September 1992 and was named as follows:

- ◆ originally the ANA Hotel Sydney; and
- ◆ later the ANA Harbour Grand Hotel;
- ◆ now the Shangri-La Hotel.

Lilyvale ('Management Agreement') entered into an agreement with ANA Enterprises Australia Pty Limited ('Enterprises Australia'), an Australian resident company for a term of 20 years under which Enterprises Australia would:

- ◆ supervise, direct and control the management and operation of the hotel including sales and marketing and for that purpose would employ a General Manager;
- ◆ supervise and control the performance of all services and everything necessary for the proper operation of the hotel; and
- ◆ be entitled to a management fee based on the gross revenue and gross operating profit of the hotel.

In 2002 Reco Harbour Grand Pte Ltd ('Reco'):

- ◆ a company owned by the Government of Singapore Investment Corporation Pte Ltd ('GIC'), acquired, either directly or indirectly, all the shares in Lilyvale;
- ◆ the Management Agreement with Enterprises Australia was terminated; and

Lilyvale operated and managed the hotel for a short period after the sale under the pre-sale name of the ANA Harbour Grand.

Eventually the new owners changed the name of the hotel to the Shangri-La and appointed a General Manager.

What impact will this decision on your firm's practices?

The same business test is generally not well understood. Although this decision does not re-interpret the law it makes it abundantly clear that the business being conducted before and after the change of ownership must be identical.

Very few clients would ever be able to provide the relevant documentation to establish the identical nature of the business before and after.

What were the contentions?

Mr Slater QC, who appeared for Lilyvale:

- ◆ characterised its business, both before and after the sale, as carrying on "the business of hotelier or innkeeper at the premises in the Rocks";
- ◆ submitted that in carrying on its business Lilyvale *"provided accommodation for guests, provided restaurant facilities and meals for guests, and food and beverages in bars and so forth, convention facilities, parking facilities, laundry facilities and all the other things that a hotel provides to its customers or guests ... with three exceptions, it employed all the staff engaged in that enterprise"*;

The Commissioner submitted that Lilyvale's business consisted of the following:

- ◆ the provision of the physical asset ie., the Hotel;
- ◆ the maintenance of an operating bank account in the name of Lilyvale Hotel Pty Ltd in which Enterprises Australia deposited receipts and from which Enterprises Australia made payments of operating expenses, and from which Lilyvale transferred excess amounts from time to time;
- ◆ the procurement of Enterprises Australia, pursuant to the Management Agreement, to operate and manage the hotel but with a veto on capital expenditure;
- ◆ the procurement of ANA Enterprises (later ANA Hotels), pursuant to the Licence Agreement, to allow Enterprises Australia to operate and manage the hotel using the trademarks associated with ANA and the ANA Hotels Systems Services.

What was the decision?

- [3] The question for determination in this proceeding is whether, in the income period ending on 31 March 2003, Lilyvale carried on the same business as it carried on immediately before August 2002, the critical date, being either 8 or 30 August, according to the [Taxpayer] and the [Commissioner] respectively. An affirmative answer to this question would mean that Lilyvale would be entitled to claim prior year tax losses as a deduction in its income tax return for the 2003 income year. In passing, I note that the income tax assessment for Lilyvale for the income period ending on 31 March 2003 covers the 15 month period from 1 January 2002 to 31 March 2003. ...
- [4] In its 2003 tax return Lilyvale showed, before deduction of losses, a taxable income of \$10,579,458. It claimed a deduction for carried forward losses of the same amount, the effect being to reduce its taxable income to nil. On 1 November 2005 the Commissioner issued a notice of assessment disallowing the whole of the deduction for the tax losses. Lilyvale lodged an objection to this assessment on 9 December 2005. The [Commissioner] disallowed the objection and consequently, on 11 July 2006, Lilyvale appealed the objection decision to this Court under s 14ZZ(a) of the Taxation Administration Act 1953 (Cth).

SUBMISSIONS AND REASONING

- [59] Whether Lilyvale carried on the same business from 1 January 2002 to 31 March 2003 as it did immediately before either 8 or 30 August 2002 requires careful consideration of Lilyvale's activities and responsibilities both before and after the critical date in August 2002. The question is one of fact; *Avondale Motors (Parts) Pty Ltd v Federal Commissioner of Taxation* (1971) 124 CLR 97 per Gibbs J at 104. There are two elements to the concept of a taxpayer "carrying on the same business" and both must be addressed. First, it is necessary to have a clear understanding of the concept of carrying on a business, taking into account the relevant statutory and commercial context. Then, having established that before

the critical date the taxpayer is carrying on a business and the nature or characterisation of that business, it is necessary to ask if the taxpayer carried on the same business after the critical date.

- [60] In *Avondale Gibbs J* rejected a submission that the word "same" in the phrase "same business" meant "similar" or "analogous" rather than "identical". His Honour accepted that the meaning, as with any ambiguous phrase, depends on context and held that in the context of s 80E(1) of the Income Tax Assessment Act 1936-1968 (Cth), a predecessor of the provision presently under consideration, the meaning was that of "identity". *Gibbs J*, at 105, found support for his view in a consideration of the purpose of the legislation:

This restriction is imposed to prevent persons from profiting by the acquisition of control of a company for the sole purpose of claiming its accrued losses as a tax deduction. However the restriction if imposed absolutely would lead to injustice in cases where a company, notwithstanding substantial changes in the ownership of its shares, continued to carry on the same business. No injustice would, in my opinion, result from a refusal to treat an accrued loss as a tax deduction where the company after the change carried on a different business, although one of a similar kind.

Lilyvale therefore needs to show that the business it carried on after the share sale was identical to the business that it carried on in the relevant period before the share sale.

- [61] There was no issue as to the fact that Lilyvale was carrying on a business before the share sale. The parties do differ, however, as to their characterisation of that business. ...
- [62] Whether a person is carrying on a business and the nature of that business involves a consideration of the activities in which that person is involved.

A business is not a thing or things. It is a course of conduct carried on for the purpose of profit and involves notions of continuity and repetition of actions.

- [63] Similarly the question whether a company is carrying on the same business before and after a certain date involves a consideration of the activities of that company before and after the critical date.

- [70] The same business test requires however, not merely that the same business be carried on, but that it be carried on by the taxpayer, in this case Lilyvale. I accept that after the share sale Lilyvale carried on the business of managing the hotel. The critical question remaining is whether the business that Lilyvale carried on before the share sale is properly characterised as the business of managing the hotel in the same way that the business it carried on after the share sale can be characterised.

- [71] The evidence shows that before the critical date Lilyvale and Enterprises Australia engaged in very different activities. It is true that Lilyvale's income (on which it was liable to income tax) was sourced from the hotel, however it was the activity of Enterprises Australia that generated that income. Lilyvale's involvement in the business of the hotel was so distant from the day to day activities of the hotel that, in my view, the course of conduct carried on in the hotel, bearing in mind the notions of continuity and repetition referred to in *Federal Commissioner of Taxation v Murry* (see [62] above), could not be said to be the conduct of Lilyvale.

- [72] As mentioned above, in the pre-sale period the Management Agreement between Lilyvale and Enterprises Australia provided that Enterprises Australia would operate and manage the hotel for a period of 20 years and would also be responsible for sales and marketing. After the sale Enterprises Australia was no longer involved with the hotel, and yet the operation of the hotel continued seamlessly. It must be assumed that Lilyvale had stepped into the shoes of Enterprises Australia. To the extent that the tasks that Enterprises Australia performed before the sale, continued to be carried out after the sale, the evidence indicates that they were carried out by Lilyvale.

CONCLUSION

- [73] In my view the business carried on by Lilyvale in the relevant period before the share sale was not the same as the business that it carried on in the relevant period after the sale. It follows that the present application must be dismissed and the objection decision of the [Commissioner] must be affirmed. The [Taxpayer] must pay the [Commissioner]'s costs.

I certify that the preceding seventy-three (73) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Stone.

(2) ** Was the lawyers' body a tax exempt body? (Victorian Women Lawyers' Association v C of T)

[Source Month 07-2008-31 ~ Part 1-2\(a\) - Victorian Women Lawyers' Association Inc v C of T \[2008\] FCA 983 \(27 June 2008\) French J](#)

What was the issue?

Was the Victorian Women Lawyers' Association ('VWL') a charitable institution and therefore a tax exempt body?

What was the outcome?

Justice French (recently appointed as the new Chief Justice of the High Court) found that:

- ◆ he "law reform" object in the VWL constitution, is not a significant element of the association's purposes such as to affect its characterisation;
- ◆ VWL's principal purpose was to remove barriers and increase opportunities for participation by and advancement of women in the legal profession in Victoria;
- ◆ the VWL fell within the description of a charitable institution within the meaning of s 23 of the ITAA 1936 and Item 1.1 in s 50-5 of the ITAA 1997;
- ◆ the activities of the VWL, including the social and networking functions, may have benefited its members but were, plainly directed to the larger object and in many cases to a larger audience, the legal profession in Victoria and as such were in aid of the principal objective.

Does the outcome affect your firm's current practices?

Given the thrust of the Commissioner's submissions the decision will no doubt be warmly welcomed by professional bodies that enjoy tax exempt status.

What were the facts?

In 2000 the Victorian Women Lawyers' Association Inc (VWL), an incorporated not for profit association, applied to the Commissioner for a private that it was exempt from any obligation to pay income tax on the basis that it is a charitable institution or an association established for community service purposes.

The request for the private ruling related the years ended 31 December 1996 and successive years up to and including that ended 31 December 2000.

The Commissioner declined to provide the ruling.

Eventually VWL and the Commissioner agreed that VWL would lodge income tax returns claiming exempt status, the Commissioner would reject the claim of exempt status and the question would be taken to the Court for hearing and determination on a test case funded basis.

VWL lodged company tax returns for the financial years up to and including the year ending 30 June 2001.

The Commissioner issued assessments to which VWL objected and ultimately the Commissioner disallowed those objections.

What are the contentions?

VWL contended that it was:

- ◆ an association established for community services not for political or lobbying purposes and not for profit or gain;

- ◆ a charitable institution; and
- ◆ a public educational institution.

The Commissioner submitted that:

- ◆ the concept of "community service" is similar to that of "public benefit" in the law of charitable trusts;
- ◆ it would not follow that receipt of a service by any group of persons should be regarded as the receipt of that service by a section of the community.
- ◆ "community service" requires the community or a section of the community to benefit by way of receipt of some identifiable help, benefit or advantage bestowed or provided directly by the putative benefactor;
- ◆ such a requirement is not satisfied, merely because an association's activities or some of them might have a tendency to benefit the community as a whole or a section of it.

In this regard the Commissioner relied upon the observation of Jessup J where he found that the community service requirement was not satisfied merely because the operations of the organisation had a tendency to promote the efficiency of the armed forces thereby benefiting the community as a whole.

The Commissioner contended that:

- ◆ VWL was not a charitable institution because not all purposes which are beneficial to the public are in fact charitable;
- ◆ the mere fact that a trust is for purposes which may tend to be of general public utility would not be sufficient but did not dispute that a trust for the promotion of the mental or moral improvement of the community could sometimes fall within the fourth class;
- ◆ the requirement of benefit to the public was said to commonly exclude from the status of charitable institutions organisations such as professional bodies established to help those persons who furnish the organisation's funds;
- ◆ if the main objects of an institution were the protection and advancement of persons practicing in a particular profession, the institution would not be regarded as charitable because the element of direct public benefit was lacking;
- ◆ on the facts VWL's main objects related to the advancement of women lawyers, including members of VWL, and that those objects did not manifest a charitable purpose and these objects were not the same as the second class of its objects for the advancement of women generally;
- ◆ the provision for "such other objects as the Association may in general meeting decide" was not limited to "charitable" objects;
- ◆ that since the purpose of VWL was to secure a change in the existing law, VWL's object "to work towards the reform of the law" was not charitable.

What was the relevant legislative provision?

The provisions which applied in the 1997 year of income did not apply after that year of income.

The ITAA 1997 applied to the income years 1998 to 2001. Section 50-1 of that Act provides:

The total ordinary income and statutory income of the entities covered by the following tables is exempt from income tax. In some cases, the exemption is subject to special conditions.

The tables are set out in ss 50-5 and 50-10 of the ITAA 1997. Section 50-5 provides:

<i>Charity, education, science and religion</i>

<i>Item Exempt entity Special conditions</i>
--

<i>1.1 Charitable institution See sections 50-50 and 50-52</i>
--

<i>1.2-1.3</i>

<i>1.4 Public educational institution See section 50-55</i>

Section 50-10 provides:

<i>Community Service</i>

<i>Item Exempt entity Special conditions</i>
--

<i>2.1 Society, association or club Established for community See sections 50-70 Service purposes (except Political or lobbying purposes)</i>

Section 50-50 provides:

An entity covered by item 1.1 or 1.2 is not exempt from income tax unless the entity:

- (a) *has a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia;*

....

Section 50-55 relevantly provides:

An entity covered by item 1.3, 1.4, 6.1 or 6.2 is not exempt from income unless the entity:

- (a) *has a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia;*

Section 50-70 of the ITAA 1997 provides:

An entity covered by item 1.7, 2.1, 4.1, 9.1 or 9.2 is not exempt from tax unless the entity is a society, association or club that is not carried on for the purpose of profit or gain of its individual members and that:

- (a) *has a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia; or*

What was the decision? [2] ...For the reasons that follow, I am satisfied that VWL is a charitable institution, being an organisation whose purposes are beneficial to the community according to the established definition of a "charitable institution". The appeals will be allowed.

[6] ... The Commissioner rejected, inter alia, the contention that VWL was exempt as a charitable institution, a public educational institution or as an association established for community service purposes.

[14] The income and property of VWL is to be applied solely towards the promotion of its objects and purposes. No portion is to be paid or transferred directly or indirectly to any member of the association except with the authority of the committee (clause 30.1). Nevertheless, the committee may pay to a member of VWL remuneration for services actually rendered or goods supplied to it by the member in the ordinary course of business or reimbursement of expenses incurred by the member on behalf of VWL (clause 30.8).

[113] Authority for the Court to take judicial notice, without proof, of matters of common knowledge is found in [s 144](#) of the [Evidence Act 1995](#) (Cth). That section provides:

- (1) *Proof is not required about knowledge that is not reasonably open to question and is:*
- (a) *common knowledge in the locality in which the proceeding is being held or generally; or*
- (b) *capable of verification by reference to a document the authority of which cannot reasonably be questioned.*

- (2) *The judge may acquire knowledge of that kind in any way the judge thinks fit.*
- (3) *The court (including, if there is a jury, the jury) is to take knowledge of that kind into account.*
- (4) *The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.*

[116] The Court is invited to take judicial notice of the disadvantage of women practitioners in the legal profession as a matter of "common knowledge ... generally" within the meaning of s 144(1)(a). VWL, in its written submissions, identified the social fact for which it contended. The Commissioner was thereby on notice and not unfairly prejudiced were the Court to act upon the submission. The social fact propounded was the historical and persisting disadvantage of women in relation to their participation and career advancement within the legal profession. At that level of generality there was no dispute. I am prepared to take judicial notice of it. It informs a consideration of whether the VWL was "established for community service purposes" or otherwise met the public benefit requirement of the common law understanding of a charitable institution. It is not, however, critical to the characterisation of the association for the purposes of the ITAA. Characterisation depends primarily upon the objects and, to a degree, upon the activities of VWL in the relevant years of income.

The advancement of women and women practitioners as a public benefit

[117] The question whether the purpose of an organisation is "beneficial" or of "service" to the community is relevant to characterisation under the applicable provisions of the ITAA. To the extent that the answer requires assessment of social norms or community values, it may sometimes rest upon an uncertain and shifting foundation. Nevertheless such judgments are often required of the courts in a variety of jurisdictions, civil and criminal. In the present case the task is made easier because there are clear statutory indications of community recognition of historical and persisting gender based discrimination and the need to take positive steps to overcome it.

Charitable institutions

[124] The term "charitable institution" used in the ITAA 1936 and the ITAA 1997 is to be understood in its long established technical legal sense. The origin of that technical legal sense appears in the Preamble to the Statute of Charitable Uses Act 1601 (UK) 43 Eliz 1, c 4. Under the Statute commissioners were appointed to supervise the administration of charities and to prevent abuses. The Preamble set out a variety of charitable purposes which, as Dal Pont has pointed out "... could be interpreted to deal with a range of philanthropic activities completely divorced from poor relief": Dal Pont G, *Charity Law in Australia and New Zealand* (Oxford University Press, 2000) p 47.

[125] The concept of charitable purposes was elaborated in a passage, which has literally acquired statutory status, from the judgment of Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 at 583. That case concerned the Income Tax Act 1842 (UK) 5 and 6 Vict. c 35 which provided for special allowances in relation to income tax on rents and profits of lands vested in trustees for charitable purposes so far as they were applied to charitable purposes. Lord Macnaghten said (at 583):

"Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly.

It is accepted that purposes which are "beneficial to the community" must also be "within the spirit and intendment of the preamble to the Statute of Elizabeth".

[126] The High Court recently reaffirmed the application of the technical meaning to the word "charity" and its derivatives used in statutes unless a contrary intention is evident. In *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 229 ALR 1, Gleeson CJ, Heydon and Crennan JJ referred, in a footnote, to the technical legal sense of "charitable" as that defined by Lord Macnaghten

in *Pemsel* [1891] AC 531 "by reference to the spirit and intendment of the preamble to the Statute of Charitable Uses Act 1601 (UK)". Their Honours referred also to "... the general rule that, the word "charitable" being a word that has a technical legal meaning, when it is used in a statute it should be understood in its legal sense unless a contrary intention appears". They noted that the general rule has been accepted as the law of Australia at least since the decision of the Privy Council in *Chesterman v Federal Commissioner of Taxation* (1925) [37 CLR 317](#). They further said (at [18] fn 6): ...

The word is commonly used in statutes. It is reasonable to assume that parliamentary counsel, taxpayers, revenue authorities, settlors, testators and others have acted on the faith of an understanding that the general rule applies.

The Full Court of the Federal Court in *Commissioner of Taxation v Word Investments Ltd* (2007) 164 FCR 194 at [8] accepted, and there was no dispute before it, that the word "charitable" in the relevant provisions of the ITAA 1997 bears its technical legal meaning. It relied upon *Bayside* 229 ALR 1 for that purpose.

Political purposes limitation

- [127] Charitable purposes generally do not include political purposes. Dal Pont observes that the limitation is largely a product of 20th century jurisprudence emanating principally from the dictum of Lord Parker in *Bowman v Secular Society Ltd* [1917] AC 406 at 442:

a trust for the attainment of political objects has always been held invalid, ... because the Court has no means of judging whether or not a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.

- [128] The political purposes limitation is not well defined and is more difficult of application today having regard to the change in social conditions since 1917 and the involvement of legislatures in areas unthought of at that time: see Santow GFK, "Charity in its Political Voice – A Tinkling Cymbal or a Sounding Brass?" (1999) 18 ABR 225. In *Public Trustee v Attorney-General* (1997) 42 NSWLR 600 at 602, Santow J observed of the High Court decision in *Royal North Shore Hospital of Sydney v Attorney-General (NSW)* (1938) 60 CLR 396 at 426:

The High Court's formulation suggests that a trust may survive in Australia as charitable where the object is to introduce new law consistent with the way the law is tending.

In his paper in the *Australian Bar Review*, Santow J also observed that a trust which has an undoubtedly charitable object does not lose its charitable status simply because it also has an object of changing the law or reversing policy (at 248):

The question is always whether that "political object" precludes the trust satisfying the public benefit requirement.

- [129] In my opinion however, despite argument from the Commissioner based on the "law reform" object in the VWL constitution, this is not a significant element of the association's purposes such as to affect its characterisation.

The nature of the characterisation inquiry

- [130] The general nature of the inquiries to be undertaken in ascertaining whether an entity is a charitable institution was discussed by Allsop J in *Word Investments Ltd* 164 FCR 194. ... These authorities demonstrated that the question as to the true nature or character of the entity is to be assessed having regard to its objects, purposes and activities (at [11]). Allsop J formulated the task of characterisation thus (at [14]):

The relevant task, as stated in the Surgeons' Case is to assess the true character or nature of the entity by reference to its objects, purposes and activities. It is an Whether VWL is a charitable institution – the contentions

- [134] VWL submitted that it fell within the category of charitable institution as having been established for a purpose "beneficial to the community". It identified the relevant community as:

- (a) the public as a whole;
- (b) alternatively, the Victorian legal profession;
- (c) alternatively, Victorian women in the law.

It submitted that it was not an association that benefited only its members. The only evidence of benefit received by members, as opposed to non-members, was the journal *Portia* and, on occasion, discounted entry fees to seminars and functions. The real benefit to VWL members was said to derive from their membership of the section of the community to which VWL's purposes were directed.

- [139] In relation to the political purposes question, VWL submitted that it was not formed for the purpose of changing a specific law or laws or government policy. One of its primary activities have been directed to maintaining and educating the community about and enforcing existing laws. The promotion of humanitarian objects and those relating to basic human rights were said to be charitable even though, on occasion, (although not in this case) they might involve or require a change in policy or law. The judgment of Santow J in *Public Trustee v Attorney-General* (1997) 42 NSWLR 600 was cited and, in particular, his Honour's observation that:

There is a range of activity from direct lobbying of the government, to education of the public on particular issues, in the interests of a climate conducive to political change. The line between an object directed at legitimate educative activity compared to illegitimate political agitation is a blurred one, involving at the margin matters of tone and style.

VWL submitted that, to the extent to which any of its purposes could be regarded as political, they were incidental to its principal objects. The organisation would not be eviscerated if any reference to legislative change were removed from its constituent documents.

- [140] The mere statement of purpose contained in clause 3.1(d) "to work towards the reform of the laws" was said not to be political. No political outcome was specified nor the reform of any law in a manner or by any means contrary to public policy or contrary to existing laws and government policies.

The character of VWL

- [146] The characterisation of VWL is to be assessed holistically. In making that assessment the primary focus must fall on its formal objects as stated in its constitution. But they are to be read in light of the history of its formation, together with the activities it has undertaken since its formation.
- [147] In my opinion, VWL's principal purpose was to remove barriers and increase opportunities for participation by and advancement of women in the legal profession in Victoria. ...
- [148] It was established to overcome a well-known social deficit, namely the substantial under-representation of women in the legal profession, in its upper reaches and in the judiciary. Having regard to the social norms reflected in the Sex Discrimination Act, cognate State legislation and Australia's membership of the Convention for the Elimination of all Forms of Discrimination Against Women, that objective was a purpose "beneficial to the community". It was within the spirit and intendment of the Statute of Elizabeth. The wider purposes of the AWL which were adopted and endorsed by clause 3.2 of the Constitution and also reflected in clause 3.1(f) placed the principal object which I have identified in the context of a larger purpose which is of itself beneficial to the community.
- [149] The activities of the association, including the social and networking functions, may have benefited its members. They were, however, plainly directed to the larger object and in many cases to a larger audience, the legal profession in Victoria. They were in aid of the principal objective. There was certainly a relentless push by the association for changes to attitudes and practices affecting women within the profession. There were representations and public positions taken from time to time on matters affecting the position of women generally. None of these things translated into a political purpose that would disqualify the organisation from being characterised as a charitable institution.
- [150] In my opinion the VWL fell within the description of a charitable institution within the meaning of s 23 of the ITAA 1936 and Item 1.1 in s 50-5 of the ITAA 1997.
- [151] On this basis the appeals of the VWL will succeed. I do not consider that there is any material difference between its activities in the various years of income with which this appeal is concerned that would affect its characterisation as a charitable institution.

Community service association

- [152] Section 23(g)(v) of the ITAA 1936 exempted from income tax the income of an association that:

Is established for community service purposes (not being political purposes or lobbying purposes).

- [153] Item 2.1 of s 50-10 of the ITAA 1997 is to like effect. The term "community service purposes" is not defined. The Explanatory Memorandum to the Taxation Laws Amendment Bill (No 2) 1990, which introduced s 23(g)(v), stated:

Among the institutions exempted from income tax under paragraph 23(e) are charitable institutions. However, many organisations that undertake a range of activities for the benefit or welfare of the community are not charitable, and so such bodies as the traditional community service clubs – Apex, Rotary, Lions, Zonta, Quota and the like – have not qualified for exemption. ... subparagraph 23(g)(v) ... will exempt from income tax the income of not-for-profit bodies established for community service purposes. The words "for community service purposes" are not defined but are to be given a wide interpretation. The words are not limited to those purposes beneficial to the community which are also charitable. They extend to a range of altruistic purposes. The words would extend to promoting, providing or carrying out activities, facilities or projects for the benefit or welfare of the community, or of any members of the community who have particular need of those activities, facilities or projects by reason of their youth, age, infirmity, or disablement, poverty or social or economic circumstances. An exclusion from the exemption will apply to bodies established for political or lobbying purposes.

- [163] In my opinion the concept of "community service" was intended to pick up a broader range of organisations than those covered by the concept of "charitable institution" and in particular that class of charitable institution falling within the rubric "beneficial to the community". However, an organisation may be beneficial to the community without delivering a "community service" in the sense contemplated by that term as explained in the Explanatory Memorandum. For the reasons I have already expressed, I am of the view that the purposes of VWL are beneficial to the community in the sense necessary to qualify it as a charitable institution. The concept of "community service" does seem to import the notion of the delivery of some practical "help, benefit or advantage" in the sense used by Jessup J. That criterion is not necessarily met by an organisation whose purpose is to change practices and attitudes in such a way as to facilitate the entry and advancement of women within the profession generally.
- [165] Having regard to my conclusions about the status of VWL as a charitable institution, it is unnecessary to make any findings in relation to whether certain elements of its receipts were income in the relevant years. The appeals will be allowed. The orders which were suggested by the Commissioner in that event are the orders which I will make in the following terms:

- 1 The appeal be allowed.
- 2 The respondent's notice of assessment the subject of the appeal be set aside.
- 3 There is no order as to the costs of the appeal.

(b) Tribunals

(1) *** The taxpayer finessed what he told the Tax Office about the legal expenses claim (Cachia & C of T)

[Source Month 07-2008-36 ~ Part 1-2\(b\) - Cachia and C of T \[2008\] AATA 569 \(3 July 2008\) Professor GD Walker, Deputy President](#)

What was the issue?

What was the appropriate penalty for the taxpayer who finessed the information provided on his tax return in relation to a claim for legal expenses?

When the taxpayer provided all the facts had he made a claim for an imaginative deduction?

What was the outcome?

The Tribunal found that:

- ◆ merely setting out the facts in full in the return and leaving it to the Commissioner to assess the tax payable reflects a misunderstanding of the true position under the current partial system of self-assessment;
- ◆ the individual taxpayer must make full disclosure, but on the basis that the facts disclosed are to be the grounds for the assessment made by the commissioner, subject to any later amendment by the Commissioner.

Does the outcome affect your firm's current practices?

The decision reflects the Tribunal's view of what is required in completing a return. While it is easy to accept the correctness of the outcome it is difficult to accept the reasoning that leads to the outcome – if the Tribunal reasoning had focused on the failure of the taxpayer to refer to the previous disallowance of the same expenses in his claim the decision could have been more easily accepted.

As it stands the phrasing of the decision is going to pose problems for many practitioners. The phrasing signifies the relatively common practice of providing all of the facts in a return but doing so in a manner that supports the implicit claim for a deduction or characterisation of a receipt being on income or capital account.

In short the decision addresses the impact of the taxpayer's relevant omissions and makes it clear that a relevant omission that leads to an incorrect tax return will justify the imposition of a penalty.

There were other more satisfactory reasons that would have allowed this same decision to be reached. The way the decision has been reasoned puts a heavy onus on practitioners in the proposed new tax practitioner regime to ask all the relevant questions for after this decision a practitioner's failure to ask a question that would have identified a client omission clearly forms the basis for a penalty. This imposes a requirement of audit by stealth.

This decision needs to be appealed and if not appealed made the subject of representations by the various professional bodies to the government to clarify the position of practitioners under the proposed new regime.

Alternatively we could hope that the Commissioner releases a decision impact statement that limits the interpretation to the facts of the case.

What were the facts?

The Taxpayer owned units in the Westpac Growth Unit Trust:

- ◆ which he had acquired before 20 September 1985;
- ◆ from which he derived income in the form of dividends.

In February 1992, Westpac Financial Services Ltd, as manager of the Westpac Growth Trust and Westpac Property Trust, obtained approval to merge the two trusts meaning the Taxpayer:

- ◆ no longer had an investment in the growth trust; and
- ◆ received units in the property trust.

The Taxpayer:

- ◆ took legal action seeking compensation for the loss of his initial units and income from that source.
- ◆ in his 2003 income tax return, claimed a deduction for legal expenses of \$108,376 incurred in pursuing an unsuccessful claim for additional compensation in relation to the redemption of his growth units (*Cachia v Westpac Financial Services Ltd* (2000) 170 ALR 65);

The Commissioner:

- ◆ determined that the nature of the advantage being sought through legal action was of a capital nature, being the further compensation for the loss of the Taxpayer's capital asset, the units in the Westpac Growth Unit Trust disallowed the deductions:
 - ~ on audit; and
 - ~ at the objection stage.

The AAT upheld the Commissioner's determination on 26 May 2005 (Cachia and Commissioner of Taxation [2005] AATA 479).

Subsequently in his 2005 income tax return, the Taxpayer claimed legal expenses of \$15,914 relating to the same legal action against Westpac Financial Services Ltd with regard to the Taxpayer's investment in units (as referred to in paragraph 3 above).

What are the contentions?

The Taxpayer:

- ◆ maintained that the AAT's decision on his 2003 return was based on a factual error as the tribunal had overlooked that he had earned income from the investment because the property trust had twice changed its name;
- ◆ the tribunal had considered only whether there was assessable income gained by the trust under its original name;
- ◆ the complexity of the law made it extremely difficult to determine what is taxable and what is not taxable in cases involving judgments and the associated costs of litigation;
- ◆ in light of the difficulty an ordinary taxpayer faces in making such determinations, he did exercise reasonable care in the presentation of the information that he included in his tax return;
- ◆ reiterated that he had explained in his return why he thought the ATO and AAT had made an error in relation to his 2003 return.
- ◆ he did not "claim" or "seek" a deduction when he prepared his return, he had simply disclosed certain facts.
- ◆ the commissioner was responsible for making an assessment on the basis of those facts.
- ◆ the eight-month time interval between his lodgement of his return in September and receipt of the assessment was excessive, because a taxpayer in such a situation received no reimbursement for loss of income, only interest at the low rate of 4.5 percent.
- ◆ once the earlier appeal had been determined, he had no practicable avenue for appeal as it would have been unwarranted to incur the expense of appealing to the Federal Court;
- ◆ another avenue available was the one that he chose, to take the issue in a subsequent year's return.

The Commissioner submitted that the Taxpayer had attempted to seek the same legal expenses as a deduction in his 2005 income tax return;

What was the decision?

- [26] In submitting that the penalty imposed under s 298-20 of Schedule 1 of the Act applies, the [Commissioner] no longer presses the argument that there was a false or misleading statement, but relies on the [Taxpayer]'s treating an income tax law as applying to a matter in a particular way that was not reasonably arguable, within the meaning of item 4 of s 284-90. That item attracts a base penalty of 25 percent of the shortfall amount, the equal lowest of the available rates.
- [27] I accept the [Commissioner]'s submission that the position the [Taxpayer] took was not reasonably arguable, given that the [Commissioner] and the AAT had ruled against his claim in relation to expenses for the very same piece of litigation, on the basis that the expense was related to capital and not to the derivation of assessable income. The [Taxpayer] did not appeal against the AAT decision.

- [28] The [Taxpayer] submits that he did not in fact claim a deduction but simply set out the material facts in full and left it to the [Commissioner] to assess the tax payable. That argument is based on a misunderstanding of the true position under the current partial system of self-assessment. It is for the individual taxpayer to make full disclosure, but on the basis that the facts disclosed are to be the grounds for the assessment made by the commissioner, subject to any later amendment by the [Commissioner]. Under s 169A of the Income Tax Assessment Act 1936 (Cth) (the ITAA), the commissioner is entitled to accept the taxpayer's statement in the return inter alia in relation to deductions to which the taxpayer claims to be entitled.
- [29] The self-assessment system places the onus on taxpayers to be honest and to ensure that their returns comply with taxation laws. Taxpayers should thus refrain from making "imaginative" claims, as was pointed out by Deputy President Todd in Case V10, 88 ATC 154 at p156:
- In the past taxpayers have been able to include imaginative if not bizarre claims in their taxation returns ... knowing that, at worst, the claims could be expected to be rejected at the time of assessment. Pursuant to self-assessment provisions, however, the assessments that issue will not be final, and in a number of years' time the taxpayer may be subjected to an audit following which, if the claims are disallowed, the taxpayer will be presented with penalties for late payment.*
- [30] Consequently, the [Taxpayer] did claim a deduction, not merely disclose material facts.
- [31] In view of my conclusion that the shortfall resulted from taking a position that was not reasonably arguable, it is not necessary to consider whether the same rate of penalty could have been imposed for a failure to take reasonable care within item 3 of s 284-90 of Schedule 1 of the Act.
- [32] The commissioner and this tribunal on appeal have the power to remit all or a part of a penalty so imposed (s 298-20 of Schedule of the Act). Guidance on the exercise of the discretion to remit is provided by taxation ruling TR94/7. The [Taxpayer]'s conduct does not fall within any of the categories or examples given in the ruling. While paragraph 6 of TR94/7 clarifies that "The list is not exhaustive", it goes on to add that:
- ... it should be borne in mind that it will be in only exceptional cases that remission of the prescribed penalties will be warranted.*
- [33] In my view remission is not warranted in the present case. The AAT had decided against his claim in relation to this very same piece of litigation. If dissatisfied with the result, the [Taxpayer] had other options available to him. He could have appealed to the Federal Court, or he could have sought a private ruling or an oral ruling, or could have included with his return a request for the commissioner to consider the question (CCH Australian Master Tax Guide, 40th edn, 2007, p1437). At the very least a prudent taxpayer would have sought professional advice on how to proceed in the face of a specific adverse ruling. Instead he relied on a course of action that essentially could only succeed if there were inadvertence or some lack of co-ordination on the part of the [Commissioner].
- [34] The decision under review is affirmed.

Editor

A concerning matter in Professor Walker's decisions is his penchant for referring to and adopting the position set out in Tax Office Rulings without laying the appropriate basis for doing so.

Professor Walker made no finding that the Taxpayer's claim was an imaginative claim yet applied the law as if the taxpayer had made an imaginative claim.

The Tribunal is supposed to make a decision on an issue from scratch rather than by adopting the Commissioner's rulings on the issue. The Tribunal is entitled to note that the decision the Tribunal reaches on the issue is a position that the reflected in a relevant Tax Office statement.

(2) ** Were the self education expenses deductible? (Southwell-Keely and C of T)

Source: Southwell-Keely and Commissioner of Taxation [2008] AATA 606 (3 July 2008) ~ Senior Member M D Allen

What is the issue?

Were the self education expenses deductible?

What were the facts?

The taxpayer claimed self education expenses as a deduction.

The education expenses comprised fees paid to Southern Cross University for a Bachelor of Business in Hotel Management.

The degree required initially 500 hours of practical experience which the taxpayer undertook at the Hotel Intercontinental, Sydney.

After completion of his compulsory 500 hours industry placement, the taxpayer continued employment at the Hotel Intercontinental whilst at the same time completing his degree.

During his time at the hotel, the taxpayer progressed, starting as a waiter cleaning tables then progressively becoming a food and beverage attendant at the Café Opera, moving then to Sketches Bar and Bistro which was a promotion, became an attendant at banquets and finally a guest relations officer. Currently he is an events manager at the Swiss Hotel, Bondi, which hotel is part of the worldwide Accor chain of hotels.

What was the decision?

- [1] At the conclusion of the hearing of the above matter the terms of the decision intended to be made and the reasons therefore were stated orally. After service upon the [Commissioner] of a copy of the decision that was in fact made, the [Commissioner] pursuant to sub-section 43(2A) of the Administrative Appeals Tribunal Act 1975 requested the Tribunal to furnish to the [Commissioner] statement in writing of the reasons of the Tribunal for its decision.
- [2] The oral reasons for decision have been transcribed by Auscript, the Commonwealth Reporting Service. Whereas those oral reasons may reflect the inelegance of an extempore decision, they are in fact the reasons for the said decision.

The [taxpayer], in evidence, stated that he thought that the course of study undertaken by him was relevant to his progression at the Intercontinental Hotel. He pointed out that to undertake a career in Hotel Management a degree was essential. The Tax Office disallowed the claimed deduction.

Expenses of self-education are deductible for taxation purposes only if they fall within the general deductions provision in section 8-1 of the [Income Tax Assessment Act 1997](#). That means that if you are an employee expenses must be incurred in gaining or producing your assessable income. Subsection 8-1 subsection (1) of the [Income Tax Assessment Act 1997](#) states that you can deduct from your assessable income any loss or outgoing to the extent that (a) it is incurred in gaining or producing your assessable income. There are numerous cases dealing with the meaning of this provision and its forerunner, the first limb of subsection 51(1) of the [Income Tax Assessment Act 1936](#).

For current purposes it is sufficient to note the following two principles that have been identified by the High Court:

- (1) The outgoing must be incidental and relevant to the gaining or producing of assessable income (see *Ronpibon Tin N.L v Federal Commissioner of Taxation* 1949 [78 CLR 47](#) at 56)
- (2) The expenditure must have the essential character of an outgoing incurred in gaining assessable income or, in other words, of an income producing expense (see *Lunney v Commissioner of Taxation* (1958) [100 CLR 478](#) at 497, 498.

Exhibit R3 is a copy of a letter to the [Commissioner] from the Human Resources Coordinator of the Hotel Intercontinental, Sydney. It is in reply to questions asked by the [Commissioner] The letter reads, inter alia, commencing roman paragraph (iv):

Employment was initially part of an internship program in 2003 and then casual employment continued until termination date 6 May 2007.

- (v) *There were no conditions to Mr Southwell-Keely's employment in relation to ongoing participation in his bachelor course.*
- (vi) *It is not a requirement for all staff members to undertake or hold a degree.*
- (vii) *The completion of the course did not lead to any increase in wages.*
- (viii) *The completion of the course was not a guarantee of an offer of a managerial position within the hotel.*
- (ix) *Mr Southwell-Keely's studies did not get him a promotion nor would it guarantee a promotion within the industry.*
- (x) *Mr Southwell-Keely's studies enabled him to maintain and improve his skills and knowledge within his role and within the industry.*

...In this matter, given exhibit R3, I find that the [taxpayer] has not shown that the expense was either incidental and relevant to the gaining of assessable income nor did it have the essential character of an outgoing incurred in gaining assessable income. To my mind the expenses were, as were the expenses in *Maddalena* (supra) concerned with the getting of work in the future. The decision under review is therefore affirmed.

(3) ** Commissioner refuses to transfer PAYG payment made to incorrect account ICA (Command Recruitment Group (Qld) Pty Ltd and C of T)

[Source: Command Recruitment Group \(Qld\) Pty Ltd and Commissioner of Taxation \[2008\] AATA 619 \(16 July 2008\) ~ Professor GD Walker, Deputy President](#)

What is the issue?

Did the Tribunal have power to review a decision by the Tax Office not to transfer to the taxpayer's running balance account and integrated client account certain PAYG withholding payments made to the credit of the integrated client account of a related, but separate, corporation, Command Recruitment Group Pty Ltd.

What were the facts?

The taxpayer incorrectly credited \$118,000 in payment of PAYG withholding payments to the wrong account as the result of using an incorrect EFT code to remit the funds to the Tax Office.

The Tax Office:

- ◆ refused to transfer the incorrectly credited payment to the taxpayer's running balance account and integrated client account ;
- ◆ took the position that:
 - ~ the decision was not reviewable by the tribunal; and
 - ~ consequently that the tribunal had no jurisdiction.

The account to which the funds were incorrectly credited was held by Command Recruitment Group Pty Ltd which:

- ◆ is based in Sydney; and
- ◆ is subject to a deed of company arrangement;

- ◆ is not trading.

What is the impact of this decision on your firm's practices?

The decision is more important than might be realised at first read. The directors of the company that made the payment of the PAYG are left exposed during the time the payment was credited to the incorrect account.

Care must be taken to invoke the correct procedure whenever you believe the Tax Office has made an error. As it is unlikely the client who made the error would realise that an error had been made most tax practitioners would have their first involvement with this type of fact situation only when the director penalty notices are served upon the directors.

What were the contentions?

The taxpayer:

- ◆ acknowledged that its objection to the Tax Office decision was not an objection to an assessment;
- ◆ maintained that its objection was to a decision within the meaning of [s 14ZL\(1\)](#) of the [Taxation Administration Act 1953](#) (Cth) (the TAA).

What was the decision?

- [1] This tribunal is authorised to review decisions in respect of which an enactment authorises an application to it ([s 25](#) of the [Administrative Appeals Tribunal Act 1975](#) (Cth) (the AAT Act)).
- [8] The right to apply to this tribunal for review of an objection decision by the commissioner is conferred by [s 14ZZ](#). Under [s 14ZY](#), an “objection decision” means a decision by the commissioner to allow or disallow a taxation objection. The phrase “taxation objection”, as was noted above, includes an objection to a “decision”. The weakness in the [taxpayer]’s argument, however, is that [s 14ZL\(1\)](#) makes it clear that the tax objection, review and appeal system created by Part IVC applies only if a provision in tax legislation provides that the person dissatisfied may object against it in the manner set out in Part IVC.
- [9] Accordingly, unless there is such a provision, the tribunal will lack the jurisdiction to review a decision of the commissioner. A taxpayer may object and appeal against an “assessment” decision under [s 175A](#) of the [Income Tax Assessment Act 1936](#) (Cth) (the 1936 Act), but the [taxpayer] does not claim to be appealing against an assessment, but rather against a decision not to transfer withholding payments to the [taxpayer]’s running balance account.
- [10] There is, however, no provision in the 1936 Act or the TAA allowing an objection to be made against a decision relating to the transfer or crediting of payments to a taxpayer’s running balance account. The provisions relating to such accounts are to be found in Part IIB of the TAA, and that part does not confer jurisdiction on the tribunal to review such a decision. Consequently, the commissioner’s decision is not an “objection decision” and thus [s 14ZZA\(a\)](#) does not apply to it, as the [taxpayer] does not have a “reviewable objection decision” in relation to which it is entitled to seek review in this tribunal.
- [11] That conclusion is supported by Taxation Ruling TR 96/12, which states in part that:
- ...
- Taxpayers dissatisfied with a taxation decision (ie, an assessment, determination, notice or decision) who wish to object against it are required to object in the manner set out in Division 3 of Part IVC of the TAA (see paragraph 7 below). Section 175A of the ITAA gives taxpayers the right to object against an income tax ‘assessment’. (There are other provisions in the ITAA and elsewhere that also give a right of objection against other taxation decisions; eg, section 160AL of the ITAA – foreign tax and other credits; subsection 221YHAAE(1) of the ITAA – provisional tax avoidance scheme notices; etc.)*
- ...
- [12] I therefore conclude that the tribunal has no jurisdiction to entertain the application.

(4) ** Original decision disappears from view and is replaced (Roche Products Pty Limited and C of T)

Source: Roche Products Pty Limited and Commissioner of Taxation [2008] AATA 639 (22 July 2008) ~ Downes J

This decision was originally reported as AATA 261 on 2 April 2008 [[Roche Products Pty Limited and Commissioner of Taxation \[2008\] AATA 261 \(2 April 2008\)](#)]-The Hon Justice Garry Downes, President at which time the AAT increased the assessment significantly (approximately \$58m) to reflect arm's length pricing.

Since then that original decision has been removed from the website and this new decision substituted. The decision effectively the same until paragraph 194 after which it explores new ground.

The explanation for what has transpired appears in paragraph 210.

What is the issue?

Did the prices the taxpayer made for non arm's length acquisitions exceed arm's length prices?

Should the taxpayer's assessment be increased to reflect arms length pricing?

Do double tax treaties, as incorporated into Australian law, confer on the Commissioner a power to assess?

Can the Tribunal to exercise the powers of the Commissioner conferred by s 136AD(4).

What was the outcome?

The Tribunal accepted Roche's calculations of acceptable pricing for two of the three divisions but uplifted the arm's length price for the prescription division purchases.

What were the facts?

Roche Products Pty Ltd:

- ◆ is the Australian subsidiary of a Swiss drug company which accepted that its acquisitions from its parent were not at arm's length;
- ◆ Operates three divisions:
 - ~ The prescription division;
 - ~ The consumer division whose principal function is the sale of over the counter preparations;
- ◆ The diagnostics division.

What are the contentions?***What was the relevant legislative provision?******What was the decision?***

THE OECD TRANSFER PRICING GUIDELINES

[34] The relevant tax treaty provisions relied upon before me are based on Article 9 of the OECD Model Tax Convention. Like the tax treaty provisions the Convention refers to "independent enterprises". The Guidelines describe this as "the arm's-length principle" (Art 1.6). They equate arm's-length dealings with the conduct of independent enterprises.

[35] The Guidelines begin by explaining the importance of comparison (Art 1.15) although material differences between what is compared should be taken into account (Art 1.17). They begin by identifying "traditional transaction methods" of which three types are identified (Art 2.1):

1. Comparable uncontrolled price method
 2. Resale price method
 3. Cost plus method.
- [36] The name of the first method describes its content: comparing the controlled price between related parties with an uncontrolled price between independent parties. Various matters are to be addressed to ensure that the prices are comparable. These are relatively obvious and may not add anything to the test itself. For example, no differences between the transactions or enterprises should materially affect price, unless accurate adjustments can be made.
- [37] The resale price method takes the resale price of the product acquired at a controlled price and applies an appropriate gross margin to arrive at an arm's length price for acquisition.
- [38] The cost plus method begins with the costs incurred by the supplier selling at a controlled price and applies an appropriate mark-up to arrive at an arm's length price for sale.
- [39] The Guidelines describe these methods as the most direct way of establishing an arm's length price. They state that they are preferable to other methods (Art 2.49). The evidence in this case leads me to suggest that, when it is available, the use of comparables might be said to be preferable to the other traditional transaction methods.
- [40] Other methods are covered by the Guidelines. They include profit based methods. One of these is the profit split method by which total profits are divided between holding company and subsidiary. An alternative is the transactional net margin method. It is described as follows (Art 3.26):

The transactional net margin method examines the net profit margin relative to an appropriate base (eg costs, sales, assets) that a taxpayer realizes from a controlled transaction (or transactions that are appropriate to aggregate...).

The margin is ideally "established by reference to the net margin that the same taxpayer earns in comparable uncontrolled transactions" (Art 3.26).

THE PRESCRIPTION PHARMACEUTICAL MARKET

- [41] The prescription pharmaceutical market is highly regulated.
- [42] Most sales of prescription pharmaceuticals in Australia are made through the Pharmaceutical Benefits Scheme.
- [45] Pharmaceutical companies selling under patent need to develop a demand for their product. In the case of a drug which has unique and positive therapeutic effects this will be easier than with a drug whose properties are similar to those of an existing drug. ...

THE PRESCRIPTION DIVISION

- [48] The most significant division in Roche Australia is the Prescription Division. It markets Roche's major prescription pharmaceutical products in Australia. Some of the products are protected by patents. Others no longer have patent protection.

THE CONSUMER DIVISION

- [53] The Consumer Division of Roche Australia sold medicines which did not require prescriptions. They are often known as "over the counter" products. Many of the products were imported although the local manufacture and packaging content was greater than in the Prescription Division.
- [54] Included in the Consumer Division were products named Rennies (indigestion), Interdens (oral hygiene), Aspro (headaches and pain), Aleve (pain relief) and Elevit (multivitamins for pregnancy). These products were imported. They were called in the proceedings "Category 1 products" and treated separately. The significance of this was controversial. It seems that the Category 1 products were identified for separate consideration during the audit period. Roche Australia says, however, that there never was any agreement or arrangement that their separate consideration was appropriate.

THE DIAGNOSTICS DIVISION

- [56] The Diagnostics Division sold diagnostic equipment and preparations, such as reagents, for use with the equipment. These were products used by hospitals and medical laboratories in providing pathology and other services.

- [57] Roche Australia followed the practice of selling or leasing its equipment at full value while permitting purchasers to source preparations such as reagents competitively. Other companies sold equipment at reduced prices upon condition that all preparations and reagents were purchased from them.
- [58] Most of the Roche products were old during the reassessment period although it also marketed Polymerase Chain Reaction technology which rapidly copied genetic material and which it had acquired in 1991. This technology showed potential. [189] Submissions were put to me on two particular matters I have not dealt with so far. The first was whether the double tax treaties as incorporated into Australian law conferred a power to assess. The second was whether it was open to the Tribunal to exercise the powers of the Commissioner conferred by s 136AD(4).

PRESCRIPTION DIVISION

- [165] When I take into account all these matters I conclude that an arm's length price for prescription pharmaceuticals would have yielded Roche Australia a gross profit margin of at least 40.0 percent throughout its range. I base this conclusion on a finding that 40.0 percent is the gross margin that arm's length parties would generally negotiate about. They might negotiate about a higher price. However, a margin of 40.0 percent would still be arm's length. This is what happened with the generics. The Inhibace sale which, on one view, might be the closest comparable was based on a gross profit margin of at least 60.0 percent. That might justify a finding that the proper gross profit margin is of the order of 50.0 percent or higher. However, I recognise that there must be a range. If all the evidence pointed to 40.0 percent it might be said that 38.0 percent was within the range. Adopting a very cautious approach to Inhibace I find that it has the effect at least of putting 40.0 percent at the bottom of any range. I also note that the arm's length price might not yield the anticipated margin. Again, the Inhibace agreement leads me to conclude that 40.0 percent remains the bottom of the appropriate range.
- [166] The 40.0 percent margin must be applied to each year. I calculate the resulting uplift of profits as follows:

...

Total Uplift 58,741

CONSUMER DIVISION

- [179] It follows that the decisions under review will be set aside insofar as the Consumer Division is concerned and assessments will be issued in accordance with the returns.

DIAGNOSTICS DIVISION

- [188] Roche Australia has satisfied me, based on the totality of the evidence before me, that the prices for which it acquired the products sold in its Diagnostic Division were arm's length prices. This is just like the Consumer Division. The bad results flowed from operating expenses not acquisition prices.

GENERAL CONSIDERATION

- [189] Submissions were put to me on two particular matters I have not dealt with so far. The first was whether the double tax treaties as incorporated into Australian law conferred a power to assess. The second was whether it was open to the Tribunal to exercise the powers of the Commissioner conferred by s 136AD(4).
- [190] So far as the first is concerned I note that the submissions were limited (particularly those of the Commissioner) and both parties accepted that the result in this case would not be affected if the treaties conferred no power to assess. This is because the issues in this case concerned pricing and, to the extent that the double tax treaties relate to profits, the only ultimate relevance of profit was that it reflected prices. Notwithstanding the different tests of independent pricing and arm's length dealing it was accepted that these are essentially the same tests, a proposition which is supported by the OECD Guidelines.
- [191] In the result I do not need to decide the issue although I note that there is a lot to be said for the proposition that the treaties, even as enacted as part of the law of Australia, do not go past authorising legislation and do not confer power on the Commissioner to assess. They allocate taxing power between the treaty parties rather than conferring any power to assess on the assessing body. On this basis Part 13 should be seen as the relevant legislative enactment pursuant to the power allocated.
- [192] It was suggested to me that by the time this matter came to the Tribunal the power in s 136AD(4) was effectively spent. I am not sure that this is the case. I do not read *W R Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* (2007) 161 FCR 1 as requiring a contrary conclusion. As I read s

136AD(4) it empowers the Commissioner to issue an assessment notwithstanding that there is not sufficient evidence which would ordinarily enable him to do so. I do not see why, on review, the Tribunal does not have the same power. The power is to use material which might otherwise be less than persuasive, or to reason from information in circumstances where reasoning might not otherwise be fully justified. Nevertheless, the process needs to be a rational one. The discretion needs to be exercised in accordance with reason. The present case comes close to such a case. Very little in the material is satisfying in terms of persuasiveness. Nevertheless, I have been able to come to the conclusion to which I have arrived without resorting to s 136AD(4).

CONCLUSION

[193] The result is that Roche is successful with respect to the Consumer Division and the Diagnostics Division. The taxable income for the Prescription Division will be higher than that contended for by Roche but, in most cases, will not be as high as the income on which the amended assessments are based. The amended assessments must now be addressed.

IMPACT ON ASSESSMENTS

[194] Before me are applications for review of objection decisions made by the Commissioner for each of the income years ending 30 June 1993 to 2003 (calendar years ending 31 December 1992 to 2002). The uplift I have arrived at should be applied to the income years ending 1993 to 1996 and 1998 to 2001. Amended assessments will be issued in the appropriate amounts. However, the position is not so simple for 1997, 2002 and 2003.

[195] In each of those years the amended assessments raised in accordance with the Commissioner's objection decisions are for less than the amount which would flow from these reasons. The question is whether the Tribunal can arrive at a decision which will have the effect of increasing the assessment for any year.

[196] ... The amendments following the Commissioner's objection decisions were made within that period for the years 2002 and 2003 but outside the period for the year 1997.

[197] Section 170(9B) refers to amendment "giving effect to a prescribed provision or a relevant provision". Section 136AD is a prescribed provision (s 170(14)). The subsection provides that "nothing in this section prevents the amendment, at any time, of an assessment for the purpose of giving effect to a prescribed provision...". However, s 170(9C) contains a limitation on the power. It provides that subs (9B) does not authorise the Commissioner to amend an assessment where "the prescribed provision has been previously applied, in relation to that supply or acquisition" (s 170(9C)(a)).

[198] Broadly speaking, the Commissioner is authorised by s 170(9B) to amend at any time to raise an assessment under s 136AD but not to vary an assessment previously made under that section.

[199] Since the assessments subject to the objection decisions under review for 1997, 2002 and 2003 were all amended assessments which raised income tax under s 136AD, Roche argues that there was no power to further amend to increase the amount of assessable income at the time the Commissioner considered the objections. Roche says that the power to amend given by s 170(9B) is the only power to amend an assessment raised under s 136AD. It submits that the general power under s 170(2) is not available. Accordingly, even though the objection decisions were made less than four years after the assessments for 2002 and 2003 were made, the Commissioner did not have power, when making the objection decisions, to amend under s 170(2).

[200] The power of the Commissioner at the time of the making of the objection decisions is important because that may determine what power this Tribunal has. Section 170(7) provides that nothing in the "section shall prevent the amendment of any assessment in order to give effect to the decision upon any appeal or review". The subsection facilitates the making of amendments to assessments where required by properly made decisions of this Tribunal. However, the subsection says nothing about the circumstances in which such decisions may be made. The Tribunal's authority comes from [s 43](#) of the [Administrative Appeals Tribunal Act 1975](#) (Cth) and the Act conferring the review power on it. The present review power, conferred by s 14ZZ of the Administration Act, authorises, relevantly, the review of objection decisions.

[200] Difficult questions can arise as to the point of time to which a Tribunal review is directed. ... However, these questions do not directly arise here.

[201] Section 43(1) gives to the Tribunal "all the powers and discretions that are conferred by any relevant enactment on the person who made the decision...". That power must confer upon the Tribunal all the powers and discretions which the Commissioner had when making the objection decisions. If the powers included the power to amend under s 170(2) then that power must be available to the Tribunal.

- [202] The initial question is whether, on consideration of an objection decision, the Commissioner, and on review, the Tribunal, has power to exercise powers and discretions not raised by the objection. If the Commissioner retains a power generally to amend, for example, under s 170(2), it would seem that he must have that power, at least incidentally, at the time the objection decision is made. In that event I see no reason why the Tribunal would not have the same power on review. This result seems to me to be required by the words of s 43 even though, at the time the Tribunal hears the matter, the time for amendment has expired.
- [204] The question remains, however, whether at the time he made his decision on the objections the Commissioner had power to amend the assessments to increase the taxable income pursuant to s 170(2).
- [205] It is clear that s 170(7) does not confer power on the Tribunal which was not otherwise conferred on the Commissioner. However, ss 170(2) and 170(9B) and (9C) are capable of standing together. The general power to amend will be available for four years. After that time has expired the Commissioner will be empowered to amend an assessment to include assessable income under s 136AD but not to increase the amount of any liability previously raised. Section 170(7) would appear to authorise a reduction because it extends past amendment consequent upon a decision “upon any appeal or review” to “amendment by way of reduction in any particular in pursuance of an objection...”.
- [206] Subsection 170(9B) is couched in negative terms. Effectively, it states a double negative. It provides that “nothing in this section prevents the amendment, at any time, of an assessment” under s 136AD. Double negatives are not equivalent to positives. The section focuses on what the section does not do, not on what it does do. The words of s 170(2) are clear and, relevantly, unqualified. I do not think the words of s 170(9B) and (9C) can be read as if they contained a provision that no amendment can be made, at any time, to an assessment under s 136AD. The better reading of the two sections is that s 170(9B) and (9C) extend the time for a first assessment without disturbing or extending the power to amend otherwise conferred. I note that this reading of the sections accords with the Explanatory Memorandum accompanying the Income Tax Assessment Amendment Bill 1982 (Cth) (at 79).
- [207] It follows that the Tribunal has the power, which the Commissioner had at the time he considered the objection decisions, to increase the amount of assessable income.
- [208] Questions may arise whether the Tribunal has a discretion and, if so, how it should be exercised, with respect to such an increase. However, I have decided that, even assuming the existence of a discretion, it should be exercised in favour of amendment to increase the taxable incomes.
- [209] I say this notwithstanding the fact that at the time of final addresses the Commissioner accepted that individual assessments could not be amended upwards. It was only after these reasons were published in an earlier form that the Commissioner sought to argue that the assessments could be increased.
- [210] I conclude that the assessments should be increased because these applications were at all times dealt with on an overall basis. During the hearing the parties hardly addressed individual tax years or the existing assessments. The possibility that results contended for by the Commissioner might require increases in individual assessments effectively went unnoticed. Although I had material before me from which I could have made the calculations, that material was not emphasised. Further, the evidence, as appears from the analysis in the body of these reasons, addressed tax years overall. However this matter was to be decided, whether on Roche’s expert evidence, the Commissioner’s expert evidence, or otherwise, it could not have been decided other than by reference to broad considerations and analysis of the kind discussed in these reasons. In this regard I note that while Roche’s evidence, if accepted in full, would have resulted in the objections being allowed in full, that evidence nevertheless approached the issues from a similar, although not identical, perspective to the Commissioner’s evidence. It proceeded on the same broad basis. The case having been conducted in this way, so that when the result was determined it might lead to increases in some assessments, it seems to me that, there being power to do so, the assessments should reflect that result when it did occur.
- [211] It follows that the assessments for 2002 and 2003 should be increased in accordance with the table above.
- [212] That leaves 1997. The problem is that when the Commissioner dealt with the objection the time for amendment under s 170(2) had passed. Were there nothing more than I have considered above, the Tribunal would have no power to increase the assessable income. However, the Commissioner has mounted an elaborate argument based on a submission that the Tribunal is not addressing the assessment as such and does not have the power to amend assessments (see, e.g. *Stevenson* at 294). The argument is that what s 136AD(3)(d) provides is that “the Commissioner determines that this subsection should apply in relation to the taxpayer in relation to the acquisition” with the consequence that “consideration equal to

the arm's length consideration... shall be deemed to be the consideration...". Assessment does not figure, so the argument goes. There is a search for the true consideration which continues until proceedings are concluded. When the amount is finally determined an appropriate assessment must issue.

- [213] Apart from being rather too clever it does not seem to me that the argument is right in principal. The fact that the Tribunal does not have power to amend an assessment should not be allowed to ignore reality. The assessment is a document produced within the Australian Taxation Office. For practical reasons, it is appropriate that it should have control over the process. If the Tribunal could amend an assessment, the Commissioner's records, particularly electronic records, would be capable of misleading. However, that does not mean that the Tribunal does not have power to make decisions which will compel the amendment of an assessment. It would be a triumph of form over substance if the wording of a section such as s 136AD were to have the effect contended for. I do not think it does. What spurred the objection decisions was assessments (deemed or actual). It is the assessments upon which the case is focussed. Unless they are to be varied, in the event of success by one or other party, the proceedings will have no utility.
- [214] Objections and applications for review can be taken from "an assessment, determination, notice or decision..." (s 14ZL(1) Administration Act), where authorised. The present objections were made under s 175A of the Assessment Act which authorises objections against assessments. The actual objection purports to be an objection against the assessment. The fate of the assessments was always at the heart of these proceedings.
- [215] I see nothing in s 136AD or Division 13 of Part III which would lead to any different result to the normal result that I have found follows from the provisions of s 170(2), namely that this Tribunal's powers of amendment expire when those of the Commissioner expire.
- [216] It follows that the assessment for 1997 will stand.
- [217] The parties agreed to forms of decision for each of the years other than 1997, 2002 and 2003. I have slightly varied those forms. The decisions for 2002 and 2003 will follow the same pattern. For 1997 the objection decision will be affirmed although on the basis appearing from these reasons rather than on the basis that it reflects the correct assessable income for Roche.

(5) ** Was the taxpayer a charitable institution?(Aid/Watch Incorporated v C of T)

Source: Aid/Watch Incorporated and Commissioner of Taxation [2008] AATA 652 (28 July 2008) ~ Downes J

What is the issue?

Was the taxpayer a charitable institution?

This decision was delivered a month after the decision of Justice French in [Victorian Women Lawyers' Association Inc v C of T \[2008\] FCA 983 \(27 June 2007\)](#) but makes no reference to that decision despite exploring the same issues.

What was the outcome?

The Tribunal found that:

- ◆ the circumstances in which institutions have been denied charitable status appears to extend to advocacy of change to government policy which means the principle embraces advocacy of change at the executive as well as the legislative level;
- ◆ because Aid/Watch does not have changes to the law as a main object it is not disqualified from charitable status by direct application of the principles enunciated in the Secular Society or National Anti-Vivisection Society cases.;
- ◆ Aid/Watch may be disqualified as a charitable institution if its objects and activities, although not overtly political, still place undue emphasis on attempts to influence government, particularly with respect to priorities and methods;

- ◆ the argument against charitable status may be enhanced because of its activist approaches and confrontational methods but Aid/Watch’s objectives and activities fall short of disqualifying it from being a charity.

What were the facts?

Aid/Watch researches, monitors and campaigns about the delivery of overseas aid with an objective of promoting aid programs that are environmentally sound and effectively delivered.

On 14 July 2000 the Commissioner endorsed the Taxpayer as exempt from income tax pursuant to s 50-5 of the Act.

From 1 July 2005, the Commissioner endorsed Aid/Watch as a charitable institution:

- ◆ under s 123E(1) of the Fringe Benefits Tax Assessment Act 1986 (Cth);
- ◆ under s 176-1(1) of A New Tax System (Goods and Services Tax) Act 1999 (Cth).

On 2 October 2006 the Commissioner revoked each of the endorsements on the basis that Aid/Watch did not qualify.

Aid/Watch unsuccessfully objected to the revocation and then sought review of the objection decision by the AAT.

What is the impact of the decision on your firm’s practices?

What were the contentions?

What were the relevant legislative provisions?

50-1 Entities whose ordinary income and statutory income is exempt

The total ordinary income and statutory income of the entities covered by the following tables is exempt from income tax. In some cases, the exemption is subject to special conditions.

50-5 Charity, education, science and religion

Charity, education, science and religion		
Item	Exempt entity	Special Conditions
1.1	charitable institution	see sections 50-50 and 50-52”

What was the decision?

[1] ... The question is whether Aid/Watch is a “charitable institution”..... I have decided that it is a charitable institution.

“CHARITABLE INSTITUTION”

[13] The question may be simple, but the course which must be followed in answering it, is not. Whether a body is in law a charitable institution is determined by whether the body has purposes which are charitable within “the indications contained in the preamble to the *Statute of Elizabeth 1601* [43 Eliz I c 4] and the classifications in Lord Macnaghten’s speech in *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531 at 583” (*Incorporated Council of Law Reporting (of Queensland) v Federal Commissioner of Taxation* (1971) [125 CLR 659](#) at 666 per Barwick CJ).

[18] Community expectations of government have changed in recent times. The role of elected governments is no longer simply to govern for their terms of office. Most government deliberations no longer take place

in secret. Openness and transparency are the watchwords. But this is not an end in itself. Community expectations extend to having the opportunity to influence government. Effective influence needs to be informed.

- [21] Rules established a century ago relating to what is charitable need to be revisited in this light. If seeking to influence government to deliver more effective aid may improve the quality of the aid, may that not be charitable? If it is government policy to furnish aid to less developed countries, why would seeking to increase or redirect the aid not be charitable because the purpose is political? Why would similar considerations not apply to protection of the environment? If there was a time when robust attempts to influence government policy could not themselves be charitable, is that still the position? The answer should not be that successful influence may not actually achieve public benefit. Otherwise, an educational trust might fail because it cannot be known if its education methods are beneficial.

AID/WATCH

- [22] Activities associated with the delivery of foreign aid are at the heart of the objectives in Aid/Watch's constitution. However, there is no provision for Aid/Watch to itself distribute aid. The objectives provide that it "monitors, researches, campaigns and undertakes activities" relating to aid and investment programs. Two threads run through the description of the detailed objects of those activities. The first is to ensure local community involvement in the planning and implementation of aid projects. The second is to ensure that aid is delivered in an environmentally effective manner.
- [31] Aid/Watch published a major report of more than 30 pages in May 2007. It was titled "Fighting Poverty or Fantasy Figures: The Reality of Australian Aid". The report addressed Australia's aid program generally but placed emphasis upon a conclusion that significant amounts of money, which were not directly related to aid, were reported as expended on the aid program. The report concluded with "a call to action" which was summarised as follows:

"This is a call to action to government to stop this insular approach to international aid, and get real with our aid program."

- [32] "Fighting Poverty" is only one of a number of publications of Aid/Watch which are before me. Each of them contain adverse comments relating to Australian government policy and AusAID activities, in particular. Nevertheless, the publications are not mere political pamphlets and contain much research and scholarship.
- [34] The activities of Aid/Watch seem to me to accord with its formal objectives. Both its objects and activities are well described as monitoring, researching and campaigning to improve the effectiveness of aid delivery both from a beneficial and environmental perspective.
- [35] Some of Aid/Watch's activities might be thought to be at the edges of appropriate conduct. For example, it sent derisory 60th birthday gifts to the World Bank suggesting it was time for the bank to retire. Some of its activities may be somewhat aggressive, for example, calls to action. However, charitableness will not depend upon the methods of the charity provided that the purpose remains charitable. Conduct may become so extreme that it loses its charitable quality, but I do not think that that is the case here, not in accordance with contemporary community values.
- [36] The question remains whether the objects and activities of Aid/Watch, as I have described them, are charitable.

REASONING

- [37] Aid itself is at the heart of charity. It satisfies both the legal and popular meaning of the word. Virtually every purpose or activity of Aid/Watch is directed towards promoting the relief of poverty. The relief of poverty is not promoted solely by the act of giving itself. Many conventional charities engage in activities parallel to those of Aid/Watch. Charities concerned with social security promote increases in pensions and other social security payments and campaign against what are seen to be unfair administrative practices. For many charities these activities will be incidental to actual distribution of aid, but as the overwhelming provider of social security in Australia is the government this may not wholly be true.
- [38] Lord Macnaghten's second and third divisions refer to "advancement" of the charitable objects of education and religion. They do not refer to teaching or proselytising or even to funding those activities. The cases are replete with references to the "promoting" of charitable objects (Inland Revenue Commissioner v Yorkshire Agricultural Society [1928] 1 KB 611 ("promotion of agriculture"), re Pleasants (1923) 39 TLR 675 ("promotion of horticulture"); Commissioner of Taxation v Triton Foundation (2005) 147 FCR 362 ("promotion of a culture of innovation and entrepreneurship in

Australia, particularly among the young, by visibly assisting innovators to commercialise their ideas’’)). I see no reason why an institution cannot be charitable under Lord Macnaghten’s first division although it does not itself distribute aid.

- [39] Many of the activities of Aid/Watch satisfy the test of advancement of education. Research and dissemination of the results of that research qualifies as advancement of education. Research alone may not be enough (re Shaw [1957] 1 WLR 729). However, a principal object of Aid/Watch is to publish the results of its research. Monitoring can be regarded as an aspect of research. The whole object of Aid/Watch is to influence public opinion by making the results of its research available, with the further goals of influencing public opinion and ultimately government agencies and government itself.
- [41] It follows that the objects and activities of Aid/Watch largely satisfy the first and second divisions of Lord Macnaghten. Being so closely associated to two longstanding and fundamental tests of charitableness, it will not be surprising if they also satisfy the fourth division.
- [42] Not all beneficial purposes will satisfy the fourth division. However, it seems to me that promoting the most advantageous delivery of aid comfortably falls within the fourth division to the extent that it is outside the first and second divisions. I note, in passing, that much overseas aid goes towards public infrastructure projects of the kind directly covered by the Statute of Elizabeth.
- [43] Aid/Watch will therefore be a charitable institution unless disqualified by being political.
- [46] The circumstances in which institutions have been denied charitable status because they have political purposes have not been confined to advocacy of changes to the law. The principle appears to extend to advocacy of change to government policy (eg McGovern at 340). This means the principle embraces advocacy of change at the executive as well as the legislative level.
- [49] Because Aid/Watch does not have changes to the law as a main object it is not disqualified from charitable status by direct application of the principles enunciated in the Secular Society or National Anti-Vivisection Society cases. It may be disqualified if its objects and activities, although not overtly political, still place undue emphasis on attempts to influence government, particularly with respect to priorities and methods. The argument against charitable status may be enhanced because of its activist approaches and confrontational methods. However, I consider that Aid/Watch’s objectives and activities, as I have found them to be, fall short of disqualifying it from being a charity.

CONCLUSION

- [50] I conclude that Aid/Watch is a charitable institution within the meaning of those words in s 50 of the Assessment Act. The decision on the objection will be set aside and a decision substituted for it upholding both the objection and Aid/Watch’s claim to be a charitable institution. The matter will be remitted to the Commissioner for reconsideration in accordance with a direction that he take all necessary steps to implement this decision and its consequences.

* Extension of time to lodge objection in Qld engineer’s psi matter (Jones & C of T)

[Source Month 07-2008-30 ~ Part 1-2\(b\) - Jones and C of T \[2008\] AATA 542 \(25 June 2008\) Mr A Sweidan, Senior Member](#)

What was the issue?

Was the taxpayer entitled to an extension of time to lodge objection?

What was the outcome?

The Tribunal granted the taxpayer the extension of time

What were the facts?

The taxpayer:

- ◆ was a professional engineer who practiced in Queensland under the provisions of the Professional Engineers Act;
- ◆ sought a review of the Commissioner’s decision that he was not carrying on a partnership business with his spouse during the 1996-98 income tax years.

What was the background to the application

In Queensland the Professional Engineers Act provided only for those individuals who were qualified as professional engineers to be registered.

Shortly prior to the original hearing of the matter on 4 July 2002 the Commissioner informed the taxpayer that one of the grounds that would be raised in opposing the application for review was that the relevant Queensland legislation prohibited engineers from entering into partnership agreements with persons who are not engineers.

On 2 July 2002 the matter proceeded on the basis that the income was the personal service income of the taxpayer and a decision was handed down on 31 January 2003 in which the AAT decided that the taxpayer was entitled to a deduction for a reasonable wage paid to his spouse.

The taxpayer and his spouse did not lodge amended income tax returns as might have been anticipated.

The taxpayer explained that this was because he and his accountant were waiting to hear from the Commissioner as to the basis on which those returns should be prepared.

On 23 October 2003 the Commissioner issued Amended assessments.

The taxpayer:

- ◆ made requests in correspondence to the ATO for deductions to be allowed for additional business expenses although the taxpayer did not request amendment of the taxpayer's income tax returns.:
- ◆ claimed expenses that were not raised in the taxpayer's original review application before the AAT, that application having been made on the basis that a partnership existed.

The Commissioner says these requests for deductions were inconsistent with and outside of those originally claimed.

On 2 December 2003 the taxpayer lodged objections to the amended assessments claiming that the Commissioner had failed to comply with the AAT's instructions and that the amendments were incorrect.

On 14 October 2004 the Commissioner allowed the objections.

On 10 February 2005 the Commissioner issued amended assessments for the 1996-98 income tax years.

On 5 April 2005 the taxpayer objected to those assessments.

On 26 July 2005 the Commissioner advised the taxpayer:

- ◆ the AAT did not have jurisdiction to deal with the objection request as the taxpayer was inter alia claiming a deduction in relation to a loan service fee to his spouse;
- ◆ that the proper procedure was to lodge applications for an extension of time to lodge objections against his original assessments.

On 2 February 2007 the AAT:

- ◆ dismissed the application on the grounds that it did not have jurisdiction to hear the matter.
- ◆ held that, as contended by the Commissioner, the proper course was for the taxpayer to seek from the Commissioner an extension of time to lodge objections to the original assessments.

On 30 June 2007 the taxpayer sought an extension of time to lodge an objection to the original assessments for the years ended 30 June 1996-98.

On 17 September 2007 the Commissioner advised the taxpayer that the request for an extension of time had been disallowed,

What was the decision?

- [30] The [taxpayer's] explanation for the 5 month delay in requesting an extension of time to lodge objections to the original assessments is that this was due to the lengthy and complex history of the matter coupled with the fact that the taxpayer was under extreme pressure of work at the time.
- [31] Other than as set out above, the Tribunal does not consider it necessary to detail the history of the matter here. It is sufficient to say that the Tribunal is of the view that the [taxpayer] has provided an acceptable explanation for the delay.

The taxpayer's wife filed a similar application and it was dealt with in a similar manner: see [Source Month 07-2008-35 ~ Part 1-2\(b\) Jones and C of T \[2008\] AATA 544 \(25 June 2008\) Mr A Sweidan, Senior Member](#)

(c) Decisions which are listed only – No extracts provided**(1) Was the Commissioner entitled to a winding up order?(D C of T v Eurama Vision Australia Pty Ltd)**

Source: [Deputy Commissioner of Taxation v Eurama Vision Australia Pty Ltd \[2008\] FCA 1003 \(27 June 2008\) ~ Emmett JJ](#)

What is the issue?

Was the Commissioner entitled to a winding up order?

What was the decision?

Justice Emmett:

- ◆ heard evidence suggesting the land owning taxpayer company might be solvent;
- ◆ noted that the directors had given undertakings that the Deputy Commissioner would be notified at the completion of any sale of any parcel of the land owned by the Company;
- ◆ stood the hearing of the winding up application over but reserved to the Deputy Commissioner leave to apply by whatever notice is practicable for the restoration of the application for immediate hearing.

His Honour noted that;

In a sense,[the undertaking] is a reasonably empty undertaking. However, [the undertaking]would at least give the Deputy Commissioner the opportunity of applying to the Court forthwith, if there was any threat that the proceeds of sale were going to be applied otherwise either in discharge of the Deputy Commissioner's debt.

(2) Taxpayer tries to limit the C of T's use of evidence (Bonnell v DC of T (No. 3))

Source [Month 07-2008-32 ~ Part 1-2\(a\) - Bonnell v DC of T \(No 3\) \[2008\] FCA 989 \(27 June 2008\) Graham J](#)

What was the issue?

Could the taxpayer have the Court make an order limiting the Commissioner's ability to use a bundle of documents which were tendered at the commencement of the hearing of the Commissioner's Notice of Motion and admitted into evidence without objection?

What was the decision?

- [25] ... I could not possibly conclude that it would be unfairly prejudicial to the [taxpayer] to allow unlimited use of the evidence to the extent to which it was admitted on the hearing of the present Notice of Motion,

nor could I possibly form the view that to allow the unlimited use of the evidence would be misleading or confusing. ...

Was the taxpayer entitled to amend the Statement of Claim? (Bonnell v DC of T (No. 4))

Source Month 07-2008-33 ~ Part 1-2(a) - Bonnell v DC of T (No 4) [2008] FCA 990 (27 June 2008) Graham J

What was the issue?

Was the taxpayer entitled to amend the Statement of Claim?

What was the outcome?

Justice Graham noted the concession by Counsel for the Tax Office and allowed the amendment.

(3) Could the Commissioner have the taxpayer's proceedings dismissed? (Bonnell v D C of T (No. 5))

Source Month 07-2008-34 ~ Part 1-2(c) - Bonnell v DC of T (No 5) [2008] FCA 991 (30 June 2008) Graham J

What was the issue?

Was the Commissioner entitled to have the taxpayer's proceedings dismissed?

Could an invalid exercise of the Commissioner's discretion to remit within the Hickman provisos invalidate a Notice of Amended Assessment of the amended taxable income of a taxpayer and of the tax payable thereon into which notice of assessment of additional tax has been incorporated under s 227(2) of the Act?

Does the Commissioner's discretion to remit additional tax under s 227(3) of the Act stand apart from the Commissioner's obligation to make an assessment of the additional tax payable under s 227(1) of the Act?

What was the outcome?

What was the decision?

[96] In the foregoing circumstances I am of the opinion that the [Commissioner] is entitled to summary dismissal of the whole of the matter in accordance with s 31A(2) of the Act.

[97] The orders which I would propose are:

- (1) There be judgment for the [Commissioner] against the applicant in relation to the whole of the proceeding.
- (2) The applicant pay the [Commissioner]'s costs of the motion.
- (3) The applicant pay the [Commissioner]'s costs of the proceedings, including reserved costs.

[98] Given the alternative bases on which orders may be made that are favourable to the [Commissioner], I will stand the matter over for the making of final orders to 2.15pm on Tuesday 1 July 2008 and direct the parties to bring in Short Minutes of Order.

1.3 Featured ATO interpretations

[Click here for Listed ATO Publications for the MONTH](#)

(a) TR Series - including TR series in draft form

(1) ** TR 2008/4 ~ Clarification of the replacement basis write off

Source *Month 06-2008-64a ~ Part 1-3(a)* - [TR 2008-4](#)

What is the issue?

The Ruling discusses the methodology used by the Tax Office in making determinations of the effective life of depreciating assets under section 40-100 of the ITAA 1997.

What was the background to the ruling?

The Tax Office determination of the effective life of depreciating assets has been amended with effect from 1 July 2008.

A consolidated version of the amended ruling is set out in the Schedule to the Ruling.

However, although there is a consolidated version of the ruling there are some traps for practitioners:

The effective life for an asset acquired prior to the commencement date of this determination (1 July 2008) must be determined by reference to the ruling that applies for the particular asset.

What is the Tax Office ruling?

The Tax Office view is that the effective life of assets is determined by reference to rulings as follows:

	before 11.45 am, by legal time in the Australian Capital Territory, on 21 September 1999	Acquisitions of plant/depreciating assets post 21 September 1999
For plant: <ul style="list-style-type: none"> ◆ you entered into a contract to acquire; ◆ you otherwise acquired; or ◆ you started to construct 	IT 2685	N/a
If you start to use other plant or a depreciating asset or have it installed ready for use within five years of the time (the relevant time): <ul style="list-style-type: none"> ◆ you entered into the contract to acquire it; ◆ you started to construct it; or ◆ you otherwise 	N/a	The determination of effective life that will apply is the one that was in force at the relevant time

acquired it,		
If you do not start to use the plant or depreciating asset or have it installed ready for use within the required five year period		The determination that will apply is the one that is in force at the date you first use it or have it installed ready for use for any purpose (see section 40-95 of the ITAA 1997).

- ◆ In relation to rental properties meanings are attributed as follows:
 - ~ Freestanding - items designed to be portable or movable and where attachment to the premises is only for the item's temporary stability.
 - ~ Fixed - annexed or attached by any means, for example screws, nails, bolts, glue, adhesive, grout or cement, but not merely for temporary stability.
- ◆ in relation to 'environmental control structure' and 'Protective structure' are used to describe certain agricultural assets listed in Table A of the attached schedule and meanings will be attributed as follows:
 - ~ Environmental control structure - is designed to provide a protective environment within which the operator is able to monitor and manipulate factors influencing the growing environment such as temperature, humidity, air movement, light, water and pests to enable the greatest efficiency in producing the desired product.
 - ~ Protective structure - is a structure used primarily and principally for protecting a growing product from one or more natural elements such as sun, hail, birds and wind.
- ◆ in relation to replacements it had been a longstanding Tax Office practice to permit taxpayers to treat the initial purchase of certain assets as not depreciable but to claim an immediate deduction for the cost of their replacement including low cost items that had very long or indeterminate lives, were difficult to keep track of, and were subject to frequent replacement through loss or breakage (for example, crockery).
- ◆ since 1 July 2000 the \$300 immediate write-off provision:
 - ~ for business assets was replaced with pooling provisions for taxpayers with assets costing less than \$1,000 that enabled the assets to be written off:
 - for larger taxpayers under the diminishing value method using an effective life of four years (see Subdivision 40-E of the ITAA 1997);
 - immediately by small business taxpayers;
 - ~ has been retained for assets used by taxpayers predominantly in deriving non-business income;
- ◆ the replacement basis for deductions is not available for assets first used (or had installed ready for use) for relevant purposes after 30 June 2000;
- ◆ the entries for the effective life of assets listed under a particular industry in Table A must only be used by members of that industry;
- ◆ if an asset used by an industry member is not listed under its industry heading in Table A, either specifically or under the general functional group/class, then the member should use the effective life of the asset listed in Table B;
- ◆ if an asset is not listed in either Table A or B then the Commissioner has not made a determination of its effective life the taxpayer will be required to work out the effective life itself.

The following table summarises the rulings that apply for acquisitions of plant/depreciating assets post 21 September 1999.

For plant or articles acquired after 26 February 1992 and prior to 21 September 1999.	Applies from	Withdrawal date
IT 2685	Commencing with the beginning of	With effect from 1 January 2001

	the 1991/92 income year	
Acquisitions of plant/depreciating assets post 21 September 1999		
TR 2000/18		With effect from 1 July 200
TR 2006/5	With effect from 1 July 2006	On and from 1 January 2007
TR 2006/15	On and from 1 January 2007	On and from 1 July 2007
TR 2007/3	From 1 July 2007	On and from 1 July 2008
TR 2008/4	On and from 1 July 2008	

(b) TD Series - including TD Series in draft form**(1) ** Car limit ~ TD 2008/17**

[Source TD 2008/17](#)

What is the issue?

What is the car limit for the 2008-2009 financial year

What is the Tax Office determination?

The Tax Office has determined that the car limit for the 2008-2009 financial year is **\$57,180**.

(2) ** TD 2008/18 ~ Reasonable travel allowance amounts

[Source Month 07-2008-50 ~ Part 1-3\(b\) - TD 2008-18](#)

What issue does the determination consider?

The Determination sets out the amounts that the Commissioner considers are reasonable for the substantiation exception for the 2008-09 income year in relation to claims made for:

overtime meal allowance expenses - for food and drink in connection with overtime worked and where a meal allowance has been paid under an industrial instrument;
domestic travel allowance expenses - accommodation, food and drink, and incidentals that are covered by the allowance;
travel allowance expenses for employee truck drivers - food, drink and incidentals that are covered by the allowance; and
overseas travel allowance expenses - food, drink and incidentals that are covered by the allowance.

See www.taxmatrix.com.au/taxmap for access to all reasonable travel allowance rulings for recent years.

(3) ** TD 2008/19 ~ Decision 7A benchmark interest rate

[Source Month 07-2008-51 ~ Part 1-3\(b\) - TD 2008-19](#)

What issue does the determination consider?

What is the Division 7A benchmark interest and how is it used?

What is the determination?

For the income year that commenced on 1 July 2008, the benchmark interest rate for the purposes of sections 109N and 109E of the Income Tax Assessment Act 1936 is 9.45 % per annum.

(4) ** TD 2008/20 ~ Related party funding from offshore – debt or equity? ~

Source [TD 2008/20](#) previously released in draft form as [TD 2008/D3](#)

What is the issue?

If a taxpayer has supplied or acquired property under an international agreement and that gives rise to a debt interest or an equity interest, does Division 974 of the ITAA 1997 bear upon the characterisation to be adopted for the purposes of the application of Division 13 of Part III ITAA 1936 to the transaction?

What was the background to the determination?

Division 13 of the ITAA 1936 permits the Commissioner to apply an arm's length consideration in assessing the correct amount of income or deductions in connection with the supply or acquisition of property by the taxpayer under an international agreement if it is considered the parties are not dealing with each other at arm's length.

Under an international agreement if the taxpayer has received or made a contribution of funds, the question that can arise under Division 13 is whether a certain return would be expected on the funds, and if so, of what amount.

The answer is determined by application of the arm's length principle, that is, by what might reasonably be expected under an agreement between independent parties dealing at arm's length.

In the application of the test it may, according to the particular circumstances, be important to establish whether the contribution of funds under the agreement was equivalent to equity rather than as a loan.

The factors that are taken into account include the legal effect of the transaction and other relevant matters.

What is the Tax Office determination?

The Tax Office had determined that:

- ◆ if it is relevant to distinguish between debt and equity in the application of Division 13 of Part III to a supply or acquisition of property, the characterisation is not affected by Division 974, should Division 974 have application to the scheme under consideration;
- ◆ Division 974 of the ITAA 1997 provides a test for determining whether an interest is to be treated as a debt interest or an equity interest for particular tax purposes that do not include the application of Division 13 of the ITAA 1936.

(5) * TD 2008/21 ~ What is a deferred Purchase Agreement warrant?

Source [TD 2008/21](#)

What is the issue?

Is a Deferred Purchase Agreement warrant, an investment product offered by financial institutions, a traditional security for the purposes of sections 26BB and 70B?

What is the Tax Office determination?

The Tax Office has determined that:

- ◆ a Deferred Purchase Agreement warrant (DPA warrant) is not a traditional security;

- ◆ for the purposes of the determination:
 - ~ a DPA warrant is a listed or unlisted retail investment product offered by financial institutions with the following features:
 - an investor enters into an agreement to purchase a number of assets (Delivery Assets) from the issuer;
 - the value and number of Delivery Assets is determined at a specified future date (Maturity Date), typically 3 to 5 years after the date of contract;
 - Delivery Assets comprise a number of a nominated security, which is typically a share or unit listed on the Australian Securities Exchange (ASX);
 - the number and value of securities that is delivered to the investor is dependant on the performance of an nominated share market index or basket of indices (Reference Indices) from the date of contract until the Maturity Date;
 - soon after the Maturity Date, the issuer satisfies its obligations under a DPA warrant by effecting a transfer of the Delivery Assets to the Investor;
 - the value of the Delivery Assets is based on the DPA warrant's 'Maturity Value';
 - Maturity Value is worked out by increasing or decreasing the investor's initial investment by the percentage change in the performance of the Reference Indices from the date of contract until Maturity Date; and
 - the number of the securities comprising the Delivery Assets is equal to the Maturity Value divided by the market price per security at the Maturity Date or such later date stipulated in the DPA warrant;
 - ~ A DPA Warrant may have the following features:
 - a capital guarantee ensuring that at Maturity Date, the Maturity Value will be at least the initial amount invested;
 - the investor may receive a right under the DPA warrant to receive coupon payments during the investment period (coupon payments are assessable under section 6-5 of the Income Tax Assessment Act 1997 (ITAA 1997));
 - a facility under which, after taking delivery of the Delivery Assets, the investor can appoint the issuer to sell those assets on the investor's behalf.

(6) ** TD 2008/22 ~ When does CGT event C2 occur under a DPA Warrant?

[Source TD 2008/22 previously released in draft form as TD 2008/D5](#)

What issue does the determination consider?

Does CGT event C2 happen as a result of the satisfaction of an investor's rights under a Deferred Purchase Agreement warrant (DPA warrant), by the delivery of the Delivery Assets?

What was the background?

A deferred purchase agreement is an investment product offered by financial institutions

What was the determination?

The Tax Office has determined that:

- ◆ Upon the delivery to the investor of the Delivery Assets, the investor's ownership of the contractual rights under the DPA warrant comes to an end by reason of those rights being discharged or satisfied (subsection 104-25(1) (ITAA 1997);
- ◆ for the purposes of this Determination, a DPA warrant:
 - ~ is a listed or unlisted retail investment product offered by financial institutions with the following features:
 - an investor enters into an agreement to purchase a number of assets (Delivery Assets) from the issuer;

- the value and number of Delivery Assets is determined at a specified future date (Maturity Date), typically 3 to 5 years after the date of contract;
 - Delivery Assets comprise a number of a nominated security, which is typically a share or unit listed on the ASX;
 - the number and value of securities that is delivered to the investor is dependant on the performance of an nominated share market index or basket of indices (Reference Indices) from the date of contract until the Maturity Date;
 - soon after the Maturity Date, the issuer satisfies its obligations under a DPA warrant by effecting a transfer of the Delivery Assets to the Investor;
 - the value of the Delivery Assets is based on the DPA warrant's 'Maturity Value';
 - Maturity Value is worked out by increasing or decreasing the investor's initial investment by the percentage change in the performance of the Reference Indices from the date of contract until Maturity Date; and
 - the number of the securities comprising the Delivery Assets is equal to the Maturity Value divided by the market price per security at the Maturity Date or such later date stipulated in the DPA warrant;
- ~ A DPA Warrant may have the following features:
- a capital guarantee ensuring that at Maturity Date, the Maturity Value will be at least the initial amount invested;
 - the investor may receive a right under the DPA warrant to receive coupon payments during the investment period (coupon payments are assessable under section 6-5 (ITAA 1997));
 - a facility under which, after taking delivery of the Delivery Assets, the investor can appoint the issuer to sell those assets on the investor's behalf.

(c) Decision Impact Statements

(1) Main residence & moving in as soon as practicable (Summers v C of T [2008] AATA 152)

Source: 2008 ATC 10-007

The Issue

The decision considered the application of the CGT main residence exemption in Subdivision 118-B and whether certain expenses formed part of the cost base of a CGT asset.

On the main question, the Commissioner took the view, based on the indicia in http://law.ato.gov.au/atolaw/view.htm?locid='CGD/TD51/NAT/ATO'&PiT=99991231235958TD_51, that there was insufficient evidence to support the view that the shed was the applicant's main residence for 4 months from January 2003 (she did not cook meals at the shed; she showered at work; no electricity or gas was connected to the shed, though mains water and sewerage was; and her parents' house was her mailing address).

On the subsidiary question, the Commissioner submitted that, even if the shed was found to be the taxpayer's main residence, she was not entitled to the four year extension of the exemption under s118-150 as she had not moved into the shed "as soon as practicable" after its completion.

The decision per Mr Pascoe

[3] ... Ms Summers purchased a vacant block of land in Kallista, Victoria on 31 July 1996 for \$166,000 with settlement occurring on 1 November 1996. In June 2002 she entered into a contract with a builder to erect a dwelling on the land. In September 2002 the building contract was terminated. In the meantime, the builder had erected a two room shed on the property. On 24 June 2004, Ms Summers sold the property for \$380,000. Prior to this, on 30

January 2004, Ms Summers had purchased a residential unit in which to reside. In response to a request for particulars of the sale, Ms Summers claimed that she had occupied the two room shed for approximately four months from January 2003 and that the main residence Capital Gains Tax (CGT) exemption applied.

[9] ... In this case it is clear that the building which became Ms Summers' principal residence was erected by the builder for his use prior to the cancellation of the contract in September 2002. At the time it was completed she had no intention of living in it. It was only in January 2003, after a disagreement with her then tenancy sharer that she decided to moved to the Kallista shed. While the time gap may have been four months only, it cannot be said that she resided there "as soon as practicable" after completion of the building. Given the state of the building and the acceptance by Ms Summers of the level of accommodation in which she was prepared to live with her minimal possessions, as soon as practicable, in this case, would mean as soon as the building was available at the termination of the contract. The result of this is that the preceding four year period is not available pursuant to s 118-150.

Tax Office view of Decision

The ATO considered:

- ◆ the case depended on its own particular facts and did not appeal the decision.
- ◆ the decision reinforces the statement in <http://law.ato.gov.au/atolaw/view.htm?locid='CGD/TD51/NAT/ATO'&PiT=99991231235958> TD 51 that the relevance and weight to be given to any factor in determining whether a dwelling is a taxpayer's main residence will depend upon the circumstances of each particular case.

(2) Penalty tax if taxpayer's purpose was not to obtain tax benefit [O'Brien v C of T]

Source: DIS OT2005/364-368

The decision concerned whether scheme penalty tax otherwise payable should be remitted in full on the basis that the taxpayer's subjective purpose in entering into a Part IVA scheme was not to obtain a tax benefit.

The AAT:

- ◆ found that Part IVA applied to cancel the tax benefits obtained by the applicant in connection with his participation in the Projects and that the penalty tax imposed by section 226 should be remitted in full;
- ◆ found that 'the evidence in this case does not indicate that the applicant participated in the scheme with the avowed purpose of tax avoidance. Subjectively, the applicant did wish to participate in an agricultural scheme that would harvest real products, albeit in a tax effective way.' (paragraph 160).

Tax Office view of Decision

The Tax Office:

- ◆ did not appeal to the Federal Court from the penalty remission decision;
- ◆ accepts that the decision was based on the evidence before the AAT and considers that it is confined to the particular facts of the case;
- ◆ recognises that the decision is consistent with paragraph 2 of TR 94/7 that states that 'Each case should be decided on the basis of its own facts and circumstances.'

2 GST

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

2.2 Courts & Tribunals **[NIL]**

(a) Courts **[NIL]**

(b) Tribunals **[NIL]**

(c) Decisions which are listed only **[NIL]**

2.3 Featured ATO interpretations

[Click here for Listed ATO Publications for the MONTH](#)

(a) GSTR Series – including GSTR series in draft form **[NIL]**

(b) GSTD Series – including GSTD series in draft form **[NIL]**

(c) Decision Impact Statements **[NIL]**

~ TAX EDUCATION FOR THE THINKING TAX PROFESSIONAL

3 FBT ~ UPDATE MATERIAL IS ACCESSED ON LINE THROUGH TAXMAP™

Due to the sporadic nature of FBT developments and practitioner desire that all FBT material for an FBT year be available in one place we now publish FBT material on-line in printable form at [Taxmap™](#).

Publishing on line will also allow us to minimise paper and toner wastage.

3.1 ** Consultation on FBT - Jointly Held Assets (Bowen)

[Source: Press Release No 58 - Consultation on Fringe Benefits Tax \(FBT\) - Jointly Held Assets \[29/07/2008\] \(Bowen\)](#)

As part of the 2008-09 Budget, the Treasurer announced a number of changes to improve the integrity of the Fringe Benefits Tax (FBT) law (Media Release No. 048 of 13 May 2008).

One of these changes was an amendment to the FBT law to ensure that FBT applies appropriately to employee arrangements involving jointly held investment assets.

The changes will generally apply:

for new arrangements from 7.30 pm (AEST) on 13 May 2008;

for existing salary sacrifice arrangements ~ employers and employees will have until 31 March 2009 (the end of the FBT year) to unwind existing arrangements.

The relevant media release also advised that transitional arrangements for employees who have entered into a loan arrangement (such as the arrangement that was the subject of the National Australia Bank Ltd v Federal Commissioner of Taxation 93 ATC 4919) will be put in place. These arrangements will be the subject of consultation.

Submissions are invited on transitional arrangements that may be required in respect of employees with existing loans, in particular, whether the transitional period that is available for salary sacrifice arrangements until 31 March 2009 will provide sufficient time for employees with existing loans to alter their arrangements.

Submissions should be provided to:

*Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600*

The submissions should be provided by Monday 18 August 2008 and can be emailed to FBTjointlyheldassets@treasury.gov.au.

4 STATE TAXES ~ UPDATE MATERIAL IS ACCESSED ON LINE THROUGH TAXMAP™

Generally practitioners are interested in developments in one state only. Accordingly the State Taxes are now published on line. Publishing on line will also allow us to minimise paper and toner wastage.

~ TAX EDUCATION FOR THE THINKING TAX PROFESSIONAL

5 SUPERANNUATION, ETP'S & PENSIONS**5.2 Courts & Tribunals****(c) Decisions which are listed only****(1) Were the amounts paid to superannuation "contributed" amounts?(Clarke v C of T)**

Source: Clarke v Commissioner of Taxation [2008] FCAFC 126 (10 July 2008) ~ Branson, Sundberg & Dowsett JJ

What is the issue?

Two questions of law were referred to the Court.

What were the questions and decisions?**Question 1**

On the true construction of the Superannuation (Benefits Scheme) Act 1992 (SA) and the Southern State Superannuation Act 1994 (SA), were the amounts paid for or by the applicant to, or otherwise credited or attributed to an account for the applicant, "contributed amounts" within the meaning of s 9(2) and s 38 of the Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997 (Cth) ("the Assessment Act") with respect to surchargeable contributions reported for the financial years ending 30 June 1997 through to 30 June 2001?

Answer: Yes

Question 2

Were the amounts paid for or by the applicant to, or otherwise credited or attributed to an account for the applicant by, a superannuation provider (if any) in connection with the Superannuation (Benefits Scheme) Act 1992 (SA) and the Southern State superannuation Act 1994 (SA) in the relevant financial years, "surchargeable contributions" of the applicant for those financial years within the meaning of s 9(2) of the Assessment Act?

Answer: Yes

6 OTHER IMPOSTS, OFFSETS & REBATES

6.2 Courts & Tribunals

(b) Tribunals

(1) ** Can the fully employed ex student defer student assistance repayments? (Bak and C of T)

Source: Bak and Commissioner of Taxation [2008] AATA 630 (18 July 2008) ~ Senior Member Bernard J McCabe

What is the issue?

Can the fully employed ex student defer student assistance repayments?

What were the facts?

Mr Andrea Bak:

- ◆ received assistance under the Student Financial Supplement scheme;
- ◆ now has a full-time position with the public service in Darwin;
- ◆ receives income above the level where he would ordinarily be expected to make repayments of the assistance received;
- ◆ has asked that the financial supplement payment be deferred.

The Commissioner declined to agree to the deferment.

Mr Bak sought review of the Commissioner's decision.

What were the relevant legislative provisions?

[Section 1061ZZFJ\(2\)](#) of the Social Security Act 1991 provides that the Commissioner of Taxation may delay making an assessment pursuant to [s 1061ZZFH](#):

... if the Commissioner considers:

- (a) *were the assessment to be made, payment of the assessed amount would cause serious hardship to the person; or*
- (b) *there are other special reasons that make it fair and reasonable to delay the assessment.*

What was the decision?

- [2] This case requires me to consider Mr Bak's circumstances, especially his financial circumstances, to determine if he meets the criteria for deferring the compulsory financial supplement repayment. Those criteria are set out in [s 1061ZZFJ](#) of the [Social Security Act 1991](#).
- [3] [Section 1061ZZFJ\(3\)](#) says the Commissioner may defer making the assessment, and consequently defer collecting the money, for such period as he believes is appropriate in the circumstances. If the Commissioner is not persuaded to defer making the assessment, the assessment is made and a notice of assessment is issued pursuant to [s 1061ZZFH](#).
- [4] The Commissioner also has the power to amend an assessment so that no amount is payable under the assessment: s 1061FFZK. The criteria are essentially the same as those referred to in [s 1061ZZFJ\(2\)](#).

- [5] I am not persuaded that the assessment for the year ended 30 June 2007 (the financial year in question) should be deferred or amended so that is reduced to zero. I set out my reasons below.

WOULD PAYMENT OF THE ASSESSED AMOUNT CAUSE “SERIOUS HARDSHIP”?

- [8] The expression “serious hardship” is not defined, but the meaning of the legislation is clear enough. A person suffers serious hardship as a result of making a payment if he or she is left destitute in the sense that he or she cannot thereafter afford to acquire necessities: see *Re The Taxpayer and Commissioner of Taxation* [2004] AATA 1073; 2004 ATC 234 at [12]-[14]
- [11] Mr Bak’s finances are a mess. He owes \$14,659.75 on his credit cards and he has taken out personal loans on which he still owes \$12,570. It is not clear where all of the money has gone. Although some of the debts were incurred paying for a computer he used in connection with his studies, Mr Bak does not appear to own any other assets. He produced letters of demand from various credit providers as evidence that he was experiencing hardship. He also has another tax debt in the amount of \$3959.85. He added that he is experiencing dental problems that he cannot afford to fix.
- [16] I am satisfied there is a reasonable prospect that Mr Bak could make savings, consolidate his debt and adjust his lifestyle in ways that permitted him to meet all of his obligations without incurring serious hardship – although I doubt he will achieve that goal unless he accepts responsibility for obtaining appropriate advice and assistance. ...

ARE THERE OTHER “SPECIAL REASONS” THAT MAKE IT FAIR AND REASONABLE TO DELAY THE ASSESSMENT?

- [17] The expression “special reasons” is undefined. It should be taken to include reasons that are unusual or which otherwise suggest the case is worthy of being treated differently to the ordinary run of cases.
- [18] Mr Bak has at various times referred to:
- ◆ his need for a car in light of his transport needs;
 - ◆ the extraordinary cost incurred in relocating to Darwin;
 - ◆ his desire to visit his family in Sudan given his lengthy separation; and
 - ◆ his desire to marry.
- [19] I do not think any of these matters is unusual. I am not satisfied there are any circumstances that suggest the applicant ought to be treated any differently to other taxpayers who have incurred a liability and who face straitened financial circumstances.

(c) Decisions which are listed only

6.3 Featured ATO interpretations

[Click here for Listed ATO Publications for the MONTH](#)

- (a) TR Series - including TR series in draft form **[NIL]**
- (b) TD Series - including TD Series in draft form
- (1) ** LCTD 2008/1 ~ What is the luxury car tax threshold for the 2008-2009 financial year?

[Source LCTD 2008/1](#)

What is the Tax Office determination?

The Tax Office has determined that the luxury car tax threshold for the 2008-2009 financial year is **\$57,180** which is equal to the car limit and is used to determine if luxury car tax is payable.

Check www.taxmatrix.com.au/taxmap to display at one click this determination and all other determinations you need on a daily basis to complete tax returns.

~ TAX EDUCATION FOR THE THINKING TAX PROFESSIONAL

7 LISTED ATO PUBLICATIONS FOR THE MONTH

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

7.1 ATO Publications that you can rely upon TR Series - including TR series in draft form [NIL]**(b) TD Series - including TD Series in draft form [NIL]****(c) Class Rulings**

CR 2008/46	Income tax: early retirement scheme - Central Northern Adelaide Health Service Incorporated
CR 2008/47	Income tax: early retirement scheme - Charles Sturt University
CR 2008/48	Income tax: Scrip for scrip roll-over: merger of Centro Shopping America Trust with Centro Retail Trust
CR 2008/49	Income tax: Demerger of Impedance Cardiology Systems Inc. by ImpediMed Limited
CR 2008/50	Income tax: Distribution of VISA proceeds by Cuscal Limited via the issuance of a special class of share
CR 2008/51	Income tax: Off Market Share Buy-Back: Portman Limited

(d) Product Rulings

PR 2008/59	Income tax: tax consequences of investing in equities using the Macquarie Geared Equities Investment plus
PR 2008/60	Income tax: 2009 Willmott Forests Premium Forestry Blend Project

(e) Decision Impact Statements

DIS 2007/0345	Summers v Commissioner of Taxation
DIS 2007/0772	Alexander Drysdale v Commissioner of Taxation
DIS 2007/4517-4521	Frisch v Commissioner of Taxation
DIS NSD 1959 of 2007	Murdoch v Commissioner of Taxation
DIS QT2005/364-368	O'Brien v Commissioner of Taxation

(f) Addenda, Errata and Withdrawals affecting publications that are intended to be relied upon**ATO Publications that you are not entitled to rely upon**

The ATO publishes documents other than public rulings in which it sets out its view of the law.

The ATO has stated unequivocally that these documents are not intended to be relied upon.

The documents listed in this section of the MTUN are documents recently published by the ATO which are not intended to be relied upon in forming a Reasonably Arguable Position.

(g) MT Series - including MT series in draft form [NIL]**(h) ATO ID's**

ID 2008/100	Crystallised segment of a superannuation interest
ID 2008/101	GST and reverse charge on cross border leases
ID 2008/102	GST and reverse charge on cross border operating lease
ID 2008/103	Capital gains tax: marriage breakdown roll-over - transfer to legal personal representative
ID 2008/104	Excise: whether the <i>Duboisia hopwoodii</i> plant, is a tobacco plant
ID 2008/105	Excise: meaning of tobacco
ID 2008/106	Hire purchase agreement: notional sale - 'start of the arrangement'
ID 2008/107	Capital allowances: business related costs - business proposed to be carried on
ID 2008/108	Capital allowances: business related costs - business not proposed to be carried on
ID 2008/109	Controlled foreign companies: financial intermediary business
ID 2008/96	Consolidation: capital gains tax - tax cost setting amount - cost base and reduced cost base - incidental costs - business capital expenditure- paragraph 40-880(5)(f)
ID 2008/97	Excess concessional contributions tax: notional taxed contributions - exercise of a discretion under Part 4 of Schedule 1A to the ITAR 1997
ID 2008/98	Excess contributions tax: notional taxed contributions - superannuation salary increases
ID 2008/99	Foreign Investment Fund exemption and foreign hybrid

(i) Practice Statements [NIL]**(j) Speeches & Press Releases ~ Commissioner & Assistant Commissioners [NIL]****(k) Other ATO publications****(1) TPAL**

TPAL 2008/1	Income Tax returns
TPAL 2008/2	Income Tax returns for parents with a child support assessment
TPAL 2008/3	Superannuation providers
TPAL 2008/4	Trust beneficiary statements

(2) RCTI

RCTI 2008/1	Agricultural Producers
-----------------------------	------------------------

(3) SGR

SGR 94/1W	Superannuation guarantee: Earnings bases
---------------------------	--

(4) LCTD

LCTD 2008/1	Luxury car tax: what is the luxury car tax threshold for the 2008-2009 financial year?
-----------------------------	--

(5) SMSFR

SMSFR 2008/1	Self Managed Superannuation Funds: giving financial assistance using the resources of a self managed superannuation fund to a member or relative of a member that is prohibited for the purposes of paragraph 65(1)(b) of the Superannuation Industry (Supervision) Act 1993
SMSFR 2008/2	Self Managed Superannuation Funds: the application of the sole purpose test in section 62 of the Superannuation Industry (Supervision) Act 1993 to the provision of benefits other than retirement, employment termination or death benefits

Addenda & Errata & Withdrawals to documents not intended to be relied upon**(6) ATO IDs Withdrawn – Income Tax**

ID 2001/317 (Withdrawn)	Costs incurred for the payment of rates on a vacant block of land
ID 2001/340 (Withdrawn)	Dependent Spouse Tax Offset - prospective spouse residing overseas
ID 2001/43 (Withdrawn)	Deductions and expenses: Self Education Expenses (Postgraduate Study Overseas)
ID 2001/84 (Withdrawn)	Travel expenses: Combined Purposes
ID 2002/1030 (Withdrawn)	Tax-related expenses - penalty not deductible
ID 2002/1097 (Withdrawn)	Cost of obtaining an estimate of the cost of depreciating assets
ID 2002/249 (Withdrawn)	Assessability of bonuses received upon termination of a life insurance policy
ID 2002/466 (Withdrawn)	Deductibility of meal expenses incurred as part of a course of education
ID 2002/471 (Withdrawn)	Deductibility of prior year loss when taxpayer was a non resident in the loss year
ID 2002/483 (Withdrawn)	Loss from isolated sale of property
ID 2002/485 (Withdrawn)	Subscription to Pay TV Channel
ID 2002/506 (Withdrawn)	Self-education expenses - Receives tax-free scholarship and employed part-time in field of study
ID 2002/512 (Withdrawn)	Deductibility of prior year loss when taxpayer was a non resident in the loss year
ID 2002/54 (Withdrawn)	Repairs - Replacement of petrol storage (bowser) tank
ID 2002/547 (Withdrawn)	Deductibility of cost of meals and incidentals while overseas - substantiation requirements
ID 2002/560 (Withdrawn)	Alienation of Personal Services Income -payments to an associate
ID 2002/571 (Withdrawn)	Deductibility of overtime meal expenses - meal allowance folded-in as part of ordinary wages
ID 2002/572 (Withdrawn)	Alienation of Personal Services Income - Losses from rental property
ID 2002/579 (Withdrawn)	Assessability of maintenance payments

ID 2002/60 (Withdrawn)	Deductibility of expenses incurred by administrator of a deceased estate prior to appointment
ID 2002/700 (Withdrawn)	Realisation of farm asset - Subdivision of land
ID 2002/722 (Withdrawn)	Undeducted purchase price: Commissioner's discretion
ID 2002/777 (Withdrawn)	Deductions and expenses: Investment expenses (Non-profit organisation)
ID 2002/817 (Withdrawn)	Deductibility of interest under a line of credit facility - mixed purpose loans
ID 2002/821 (Withdrawn)	Assessability of allowance for expenses paid to participants in market research sessions
ID 2002/830 (Withdrawn)	Deductibility of Interest on a Loan Used to Finance a Share Trading Operation
ID 2002/901 (Withdrawn)	Self education expenses: deductibility of meals and accommodation
ID 2002/950 (Withdrawn)	Deductibility of storage expenses - personal items removed from a rental property
ID 2002/954 (Withdrawn)	Racing Steward - deductibility of expenses incurred in maintaining a horse
ID 2003/1125 (Withdrawn)	Determination of the net income or loss of a partnership and partnership 'salaries'
ID 2003/1126 (Withdrawn)	Assessable income : drawings of partnership 'salary' to a partner
ID 2003/33 (Withdrawn)	BOTPLS - deductibility of loan repayments
ID 2003/34 (Withdrawn)	BOTPLS - deductibility of course fees
ID 2003/79 (Withdrawn)	Deductibility of child support payments
ID 2004/241 (Withdrawn)	Interest deduction: purchase of a motor vehicle costing more than the cost limit for depreciation purposes - 'one third of actual expenses' method
ID 2004/242 (Withdrawn)	Interest deduction: purchase of a motor vehicle costing more than the cost limit for depreciation purposes - log book method
ID 2004/896 (Withdrawn)	Exempt income: scholarship paid to a student enrolled part-time due to personal circumstances

(7) ATO's Withdrawn - Rental Property

ID 2001/410 (Withdrawn)	Rental Property Expenses - GST component
ID 2001/49 (Withdrawn)	Nominal Repairs
ID 2001/671 (Withdrawn)	Non-income producing property - rates and fencing expenses
ID 2001/796 (Withdrawn)	Deductibility of Rental Property Advertising Expenses
ID 2002/1029 (Withdrawn)	Body corporate fees - taxpayer still living in a property that they intend to use as a rental property
ID 2002/183 (Withdrawn)	Deductibility of consulting fee expenses - rental property

ID 2002/652 (Withdrawn)	Rental Property Expenses - mortgage discharge expenses
ID 2004/933 (Withdrawn)	Rental property: body corporate levies - special contribution levied for capital expenditure
ID 2004/934 (Withdrawn)	Rental property: body corporate levies - administration fund or general purpose sinking fund

(8) ATO IDs Withdrawn – GST

ID 2001/574 (Withdrawn)	GST and the acquisition of an IT industry domain name from a non-resident overseas supplier by a resident GST registered Australian entity
ID 2003/51 (Withdrawn)	GST and provision of a loan by a pawnbroker

(9) ATO IDs Withdrawn – Superannuation

ID 2001/2 (Withdrawn)	Superannuation: Undeducted Purchase Price (Italy)
ID 2001/235 (Withdrawn)	Superannuation: Undeducted Purchase Price (UPP) - Pension purchased by a roll-over of an ETP that is a commutation of an earlier pension which commenced to be payable prior to 1 July 1994
ID 2001/311 (Withdrawn)	Superannuation: Undeducted Purchase Price (Netherlands)
ID 2002/144 (Withdrawn)	Superannuation, retirement & employment termination: Eligible termination payments and Bona fide redundancy
ID 2002/147 (Withdrawn)	Superannuation, retirement & employment termination: Eligible termination payments and bona fide redundancy payments
ID 2002/419 (Withdrawn)	Superannuation, retirement and termination of employment: Unused Undeducted Purchase Price (UUPP) at time pension commuted to a lump sum
ID 2002/452 (Withdrawn)	Superannuation retirement and employment termination: Undeducted Purchase Price, Deductible amount, Invalidity component
ID 2002/702 (Withdrawn)	Retirement income entities: Leasing property to members on non-arms length basis.
ID 2004/248 (Withdrawn)	Investment in art by a Self Managed Superannuation Fund (SMSF)
ID 2004/249 (Withdrawn)	Investment in art by a Self Managed Superannuation Fund (SMSF) and its display
ID 2004/250 (Withdrawn)	Investment in art by a Self Managed Superannuation Fund (SMSF) - in-house asset.

(10) ATO IDs Withdrawn – Other imposts, offsets and rebates

ID 2005/55 (Withdrawn)	Energy Grants (Credits) Scheme: mining - extraction of shale
ID 2002/469 (Withdrawn)	Low income tax offset - whether refundable
ID 2002/936 (Withdrawn)	Pensioner tax offset - taxpayer in receipt of foreign pension
ID 2002/949 (Withdrawn)	Baby bonus - using a notional taxable income amount for the base year

LEGISLATION - UPDATE MATERIAL IS ACCESSED ON LINE THROUGH TAXMAP™

We now publish legislation updates on-line at [taxmap™](#) in a comprehensive tabular format showing summary & commencement dates. This development allows us to track developments on “as occurs basis” rather than monthly in arrears basis.

APPEALS TO THE FULL COURT OF THE FEDERAL COURT - UPDATE MATERIAL IS ACCESSED ON LINE THROUGH TAXMAP™

We now publish the Full Court Appeals Update on-line at [taxmap™](#). This development allows us to track developments on “as occurs basis” rather than monthly in arrears basis

~ TAX EDUCATION FOR THE THINKING TAX PROFESSIONAL

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.

© 2008 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
PO Box 228 South Yarra VIC 3141
taxmatrix@taxmatrix.com.au

Manager Research: Rachel Ritchie

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