



The April 2009 MTUN ~ tax education for the thinking tax professional

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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™ website](http://www.taxmatrix.com.au) and updated more regularly than monthly. The State Taxes section including State Taxes legislation is now published electronically on the [Taxmap™ State Taxes website](http://www.taxmatrix.com.au) and updated progressively during the month rather than monthly. Tax Matrix Pty Ltd has operated independently of Hall & Wilcox Lawyers since July 2002.

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~ TAX EDUCATION FOR THE THINKING TAX PROFESSIONAL

1 INCOME TAX**1.1 Politicians, Boards & Statutory Authorities****(1) *** Big Brother is watching ~ Consolidation of Secrecy and Disclosure Provisions [No. 15 – 13/03/2009 – Bowen]**

[Source: Government Moves to Consolidate the Taxation Secrecy and Disclosure Provisions \[No. 15 – 13/03/2009 – Bowen\]](#)

The Assistant Treasurer, Chris Bowen, released for public comment:

- ◆ an exposure draft Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009; and
- ◆ explanatory materials that propose to implement the single and consolidated framework outlined in the Treasury discussion paper released in 2006, to govern the protection and disclosure of taxpayer information received by the Australian Taxation Office (ATO) in the course of administering the taxation laws.

In addition to standardising existing taxation secrecy and disclosure provisions, the new framework also makes it clear that the future disclosure of taxpayer information should only be permitted where the public benefit from the disclosure outweighs taxpayer privacy.

Other key features of the new framework include that:

- ◆ it maintains current levels of disclosures that can be made by the ATO to other government agencies;
- ◆ it introduces some new disclosure provisions, where the public benefit outweighs taxpayer privacy;
- ◆ it includes clear rules to govern the on-disclosure of taxpayer information provided by the ATO to another agency or entity;
- ◆ it clarifies that there is no prohibition on the disclosure of taxpayer information that is lawfully available to the public; and
- ◆ it provides that a taxpayer's consent can not in and of itself authorise the disclosure of their information.

The Government now seeks submissions from interested parties on the exposure draft Bill and explanatory materials.

Copies of these materials are available from the Treasury website (www.treasury.gov.au) or may be obtained from the project team by telephoning 02 6263 4334

**** Capital Gains Tax Relief for Compulsory Acquisitions of Part of a Main Residence [Bowen]**

[Source: Capital Gains Tax Relief for Compulsory Acquisitions of Part of a Main Residence \[No. 19 – 19/03/2009 - Bowen\]](#)

The Assistant Treasurer, announced that the Government will extend the capital gains tax (CGT) main residence exemption for compulsory acquisitions (and certain other involuntary events) relating to part of a taxpayer's main residence.

This will ensure that taxpayers do not pay CGT on compulsory acquisitions of part of their main residence and that taxpayers are not worse off as a result of a compulsory acquisition, compared to if the compulsory event had not occurred.

Initial consultation will be undertaken on the design of these amendments - a consultation paper providing further information about this proposal is available on the [Treasury website](#).

Later, an exposure draft of the legislation will also be released for consultation on the [Treasury website](#).

The changes will apply to CGT events that happen after the date of Royal Assent.

Taxpayers will also have the option to apply the changes from the 2004-05 income year to the date of Royal Assent.

**** Taxation of Financial Arrangements - Synthetic and Complex Arrangements [Bowen]**

[Source: Taxation of Financial Arrangements - Synthetic and Complex Arrangements \[No. 22 – 26/03/2009 - Bowen\]](#)

The Assistant Treasurer, alerted taxpayers to the Government's commitment to ensuring the integrity of the income tax law relating to financial arrangements following the recent passage by the Parliament of the Taxation of Financial Arrangements (TOFA) Stages 3 and 4 measures.

TOFA Stages 3 and 4 provides a comprehensive framework for taxing financial arrangements. The measures cover tax timing treatments for financial arrangements, including elective hedging rules that are designed to minimise tax mismatches.

Eligible taxpayers can elect to have financial arrangements taxed on a fair value or retranslation basis, or to rely on their financial reports for taxation purposes. The elections create compliance cost savings by more closely aligning tax treatment with accounting standards.

Minister Bowen reiterated the Government's intention to monitor the implementation of this reform of Australia's financial taxation system and to consider the need for any refinements, particularly given the complex nature of many types of arrangements that the measures address.

Synthetic arrangements can be engineered to create a legal outcome which differs from their economic substance in a way that undermines the intent of the tax law.

Minister Bowen said that should specific integrity measures be required, the Government would consider the need for them to take effect from the commencement of the TOFA Stages 3 and 4 measures.

1.2 Courts & Tribunals

(a) Courts

(1) * Some business test - a relaxed view (Lilyvale Hotel v C of T)**

[Source: Lilyvale Hotel v C of T \(Edmonds, Graham and Perram JJ\)](#)

What is the issue?

Does the taxpayer satisfy the same business test?

What was the outcome?

The primary judge concluded that the business carried on by the taxpayer 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.

The Full Court found that:

- ◆ the taxpayer correctly described the business which it carried on as that of 'owning and operating ...[a] hotel to derive revenue from its guests and profits from its operation';
- ◆ it was possible to change the way a business is carried on without changing the business.

- ◆ the fact that at one stage the taxpayer conducted its hotel business without the intervention of a hotel management group and at another did so with the assistance of such a hotel management group is a distinction without a difference.

What were the facts?

The taxpayer owned the leasehold estate in the land known as No. 176 Cumberland Street, The Rocks, Sydney on which it constructed a building to be used as a hotel ('the hotel') originally named the ANA Hotel Sydney and later the ANA Harbour Grand Hotel but now known as the Shangri La.

On 18 December 1989:

- ◆ the taxpayer and ANA Enterprises Australia Pty Limited ('Enterprises Australia') entered into an agreement entitled 'Operating and Management Agreement' ('the Management Agreement') under which Enterprises Australia was to operate and manage the hotel for a term of 20 years;
- ◆ the taxpayer also entered into a Licence Agreement with ANA Enterprises Ltd ('ANA Enterprises'), under which the taxpayer paid ANA Enterprises a licence fee based on gross revenue and a 'System Service Charge' which entitled the taxpayer, in connection with the operations of the hotel to use:
 - ~ the name ANA Hotels;
 - ~ the triangular logo mark of the ANA Group; and
 - ~ the name 'Unkai' in relation to the Japanese restaurant operated within the hotel.

The shares in the taxpayer were held:

- ◆ before August 2002 by ANA Holding Pty Ltd, which, in turn, is wholly owned by All Nippon Airways Co Ltd ('ANA Co'), a Japanese resident company;
- ◆ after August 2002 by Reco Harbour Grand Pte Ltd ('Reco').

Shortly after Reco acquired the shares in the taxpayer the hotel was operated without the assistance of manager.

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

The Full Court interpretation of the same business test reflects an easier interpretation of the test that the Commissioner has found.

What were the contentions?

The Commissioner contended that the taxpayer did not carry on the same business before the share sale as it did afterwards.

What was the decision?

- [26] The primary judge did find at [38] that the limited role of the [taxpayer] in the day-to-day management of the hotel was reflected in the accounts and this was initially relied on by senior counsel for the [Commissioner] on the hearing of the appeal as being reflective of the proper characterisation of the [taxpayer]'s business. However, for the reasons detailed below, the argument and any consequence drawn there from is flawed.

Management of the Hotel after the Share Sale

- [27] The primary judge referred to and accepted the evidence of Mr Nigro that the services provided to the customers of the hotel were identical to the services provided before the sale and there was nothing in the presentation of the hotel, the services it provided or the price of its services which suggested any change of ownership; the staffing generally was unchanged and the hotel retained its focus on the Japanese market. This is what Mr Tang had referred to as a policy of 'seamless transition'.

THE PRIMARY JUDGE'S REASONING AND CONCLUSION

- [30] The critical parts of the primary judge's reasoning process are to be found at [70] – [72] of the reasons:

- [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* [1998] HCA 42; [(1998) 193 CLR 605] (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.*

- [31] The primary judge concluded that the business carried on by the [taxpayer] 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.
- [32] The primary judge's reasoning process manifest in the paragraphs extracted in [30] above, seems to us to involve a characterisation of the [taxpayer]'s business before and after the share sale by reference to the activities of Enterprises Australia before and after the share sale rather than by reference to the activities of the [taxpayer] itself. There could be a number of reasons for this to which reference will be made in the analysis below.

THE SUBMISSIONS ON APPEAL

- [33] At the forefront of the [taxpayer]'s submissions was that at all relevant times its business was to be properly characterised as being that of the owner and operator of the hotel – deriving revenue from its guests and profit from its operations; and that at all relevant times its business was 'the same' in the sense of requiring that it should be identical and not merely similar or of the same kind: *Avondale Motors* at 104, 105, per Gibbs J.

ANALYSIS

- [38] It lay at the heart of the [Commissioner]'s case, both before the primary judge (who accepted the argument) and on appeal, that because Enterprises Australia managed the hotel prior to the share sale but not after, the [taxpayer] did not carry on the same business before the share sale as it did afterwards. Inherent in this is the [Commissioner]'s contention, seemingly accepted by the primary judge, that prior to the share sale, the [taxpayer]'s business consisted of –
- ◆ 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;
 - a. *the procurement of [Enterprises Australia], pursuant to the Management Agreement, to operate and manage the hotel but with a veto on capital expenditure;*
 - b. *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.*

Hence the primary judge's comment at [71] that the [taxpayer]'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 ... could not be said to be the conduct of Lilyvale'.

- [39] There are a number of responses to this and we deal with each of these below.
- [40] First, the four activities listed in [38] above, which the Commissioner submitted, both before the primary judge and on the hearing of the appeal, were exhaustive of the business of the [taxpayer] before the share sale, were not revenue producing activities. The [Commissioner]'s senior counsel accepted as much. As the [taxpayer] derived revenue in excess of \$60 million from its ordinary activities in the year ended 31 December 2001 and in excess of \$72.7 million for the 15 month period ended 31 March 2003, it may be asked from what activities did these revenues arise. Senior counsel's (for the [Commissioner]) answer to this question, at least before the share sale, was to say from the activities of Enterprises Australia. At one level that is correct, but at the relevant level, that is, in characterising the business activities of the [taxpayer] at a particular point in time or over a relevant period, it is tantamount to saying that the millions of dollars of revenue reported each year by BHP Billiton Plc are sourced not in its business activities, but in the activities of its employees and others that it engages to manage those businesses.
- [41] Second, the primary judge's apparent acceptance of the [Commissioner]'s submission that the financial accounts of the [taxpayer] for the relevant periods reflect the [taxpayer]'s limited role in the day-to-day management of the hotel prior to the share sale (see [26] above), does not withstand scrutiny when one appreciates that the accounts to which reference was made were monthly management accounts. The full audited financial accounts for the year ended 31 December 2001 disclose revenue from ordinary activities of \$60,038,338 and describe the [taxpayer]'s principal activity in the following terms:
- The company's principal activity in the course of the financial year was the operation of the ANA Hotel Sydney. During the financial year there was no significant change in the nature of that activity.
- The full audited accounts for the 15 month period ended 31 March 2003 disclose revenue from ordinary activities of \$72,779,822 and describe the [taxpayer]'s principal activities in the following terms:
- The company's principal activity in the course of the financial period was the investment in and operation of the ANA Harbour Grand Hotel in Sydney. During the financial period there was no significant change in the nature of that activity.
- None of the financial statements indicate that the [taxpayer] derived revenue from any source other than the operation of the hotel.
- [42] Third, the primary judge's rejection of the invitation, under the banner of 'agency', to attribute the activities of Enterprises Australia to the [taxpayer] – to deem them to be the [taxpayer]'s activities, relies almost totally on an observation by the High Court in *International Harvester* at 652:
- Agency is a word used in the law to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties. But in the business world its significance is by no means thus restricted. (Emphasis added)
- In our opinion, in the absence of a contention of sham, of which there is none, there could be no suggestion that the agency created by the Management Agreement was not one which was to have full force and effect at law, rather than being, as was held in *International Harvester*, no more than business nomenclature to describe a distributor representative. ...
- [43] Fourth, it may be accepted, as a matter of general principle, that the fact that Enterprises Australia carried out its obligations under the Management Agreement on the [taxpayer]'s account does not necessarily mean that the 'agency' was such that its activities must be attributed to the [taxpayer] as the primary judge concluded at [68], but if the legal relationship thereby established was indeed one of agency, why not? That does not mean as the primary judge observed, that Enterprises Australia's business was the [taxpayer]'s business. Nor does it put in issue the proposition that what business the [taxpayer] carried on before the share sale is a question of fact, the answer to which depends on the characterisation of the activities in which the [taxpayer] was actually engaged – 'the real nature of the taxpayer's business': per Sheppard J in *J Hammond Investments Pty Ltd v Federal Commissioner of Taxation (1977) 31 FLR 349* at 357. But if the activities of Enterprises Australia in managing the hotel are carried out as agent for and on behalf of the [taxpayer], we are unable to comprehend why these activities should be excluded from consideration in the characterisation of the [taxpayer]'s business before the share sale. On the contrary, they must be taken into account.

SUMMARY AND CONCLUSION

- [44] Where the question is whether a particular inference should be drawn from proved facts, an appellate court has the right and duty to decide the question for itself (per Gibbs A-CJ, Jacobs and Murphy JJ in *Warren v Coombes* [1979] HCA 9; (1979) 142 CLR 531 at 541). As their Honours said at 551: ...
- [45] The critical issue for determination in this case was whether throughout the same business test period (i.e. 1 January 2002 to 31 March 2003) the [taxpayer] carried on the same business as it carried on immediately before the test time (on the [taxpayer]'s case, 8 August 2002 and on the [Commissioner]'s case, 30 August 2002).
- [46] In our opinion, the leaned primary judge fell into error in concluding that in answering the 'same business test' one had to have regard to the management of the business. In our opinion, the fact that at one stage the [taxpayer] conducted its hotel business without the intervention of a hotel management group and at another did so with the assistance of such a hotel management group is a distinction without a difference. In our opinion, the [taxpayer] correctly described the business which it carried on as that of 'owning and operating ...[a] hotel to derive revenue from its guests and profits from its operation'. The execution of the management of the hotel at different times in different ways had no bearing upon the identification of the business which the [taxpayer] carried on.
- [52] This was a case where changes in the way in which the business was carried on did not render it a different business.

(2) ** What amounts to dividend stripping? (Lawrence v C of T)

Source: Lawrence v C of T (Ryan, Stone and Edmonds JJ)

What is the issue?

Where the relevant transactions had substantially the effect of a scheme by way of or in the nature of dividend stripping within s 177E(1)(a)(ii) of the 1936 Act?

Were the transactions by which the relevant shareholding diminished in value represented distributions of the profits of the relevant entities within s 177E(1)(b) of the 1936 Act?

Was, as a matter of statutory interpretation, s 177E of the 1936 Act applies to the taxpayer in respect of the relevant transactions?

What was the outcome?

The Court rejected each of the taxpayer's arguments.

What was the decision?

THE FACTUAL CONTEXT

- [3] The facts as found by the primary judge were not put in issue by either party on the hearing of the appeal. They are set out at [3] – [46] of his Honour's reasons.
- [4] Relevantly, the primary judge found that there were '... two discrete, but substantially identical, series of transactions' ([7]), described by those advising the [taxpayer], in particular, Mr Ian Collie of the firm Cleary Hoare, as a 'distributable surplus arrangement'. The first involved a company called Plaster Plus (Vic) Pty Ltd ('Plaster Plus') of which the [taxpayer] had been the sole shareholder and the only director since 1998. As at 30 June 2002, Plaster Plus had taxed but undistributed profits of \$1,328,924. The second involved a company called Zinkris Pty Ltd ('Zinkris'), which was incorporated on 5 June 2003, and of which the [taxpayer] became the sole shareholder and the only director on that day. It had no undistributed profits at the time it entered into the relevant series of transactions, but it subsequently derived income in the form of a trust distribution in the sum of \$1,762,826 before the end of the year of income.
- [29] The primary judge concluded that the schemes were not by way of or in the nature of dividend stripping, as required by the first limb of s 177E(1)(a) (at [74]). ... that the first characteristic identified in *Consolidated Press (FC)* was present in the circumstances facing the [taxpayer]. However, at [74] his Honour concluded:

- [42] As the primary judge observed at [60] of his reasons, the term ‘dividend stripping’ is not defined in the 1936 Act. In *Consolidated Press (FC) the Full Court*, in reliance upon the judgment of Gibbs J in *Commissioner of Taxation (Cth) v Patcorp Investments Limited* (1976) 140 CLR 247, said (at [136]):

What is helpful for present purposes is that Gibbs J identified four cases as involving dividend stripping operations: Bell v Commissioner of Taxation (Cth) (1953) 87 CLR 548; Newton v Commissioner of Taxation (Cth) [1958] UKPCHCA 1; (1958) 98 CLR 1 (PC); Hancock v Commissioner of Taxation (Cth) [1961] HCA 90; (1961) 108 CLR 258; Commissioner of Taxation (Cth) v Ellers Motor Sales Pty Ltd [1972] HCA 17; (1972) 128 CLR 602. These four cases had the following characteristics in common:

a target company, which had substantial undistributed profits creating a potential tax liability either for the company or its shareholders;

the sale or allotment of shares in the target company to another party (a company in three cases and individuals resident in the then Territory of New Guinea in Bell);

the payment of a dividend to the purchaser or allottee of the shares out of the target company’s profits;

the purchaser escaping Australian income tax on the dividend so declared (whether by reason of a s 46 rebate, an offsetting loss on the sale of the shares, or the fact that the shareholders were resident outside Australia); and

the vendor shareholders receiving a capital sum for their shares in an amount the same as or very close to the dividends paid to the purchasers (there being no capital gains tax at the relevant times).

- [43] At [137], the Full Court identified a further common characteristic of each of the schemes in the cases considered by Gibbs J, namely:

[T]hat they were carefully planned, with all the parties acting in concert, for the predominant if not the sole purpose of the vendor shareholders, in particular, avoiding tax on a distribution of dividends by the target company.

- [50] Counsel for the [taxpayer], both before the primary judge and before this Court on appeal, pressed the argument, in reliance on those passages, that a scheme would not fall within the second limb of s 177E(1)(a) unless it would have fallen within the first limb of s 177E(1)(a) but for the fact that the profits of the target company were not distributed by way of dividend but by some other means. In other words, for a scheme to fall within the second limb of s 177E(1)(a) it had to have all the characteristics of ‘dividend stripping’ identified by the Full Court in the passage extracted in [42] above except that the distribution of profits was otherwise than by way of dividend. In short, the scheme must involve the sale or allotment of shares in the target company and the distribution of the target company’s profits to the purchaser or allottee otherwise than by way of dividend. The schemes in the present case did not involve all these characteristics and, therefore, so the argument went, the schemes did not fall within the second limb of s 177E(1)(a).

- [51] The primary judge responded to this argument at [80] – [82] of his reasons in the following terms:

[80] If read as though they purported to stand as exhaustive statements of the reach of s 177E(1)(a)(ii), the words of the High Court judgment, and of the Explanatory Memorandum, do provide support for the submission made on behalf of the applicant. However, I do not so read those words. In the case of the Explanatory Memorandum, the relevant paragraph is expressed as though providing examples or indications only, and not as though definitive. I do not read the paragraph as indicating a legislative intention that there always need be a separate person or entity, into whose hands the relevant shareholding has first passed. Indeed, the reference to the purchase of near-worthless assets, as an alternative to a formal dividend payment, amply accommodates a situation in which the target company itself purchases such assets from associates of its existing shareholders. In the present case, Plaster Plus ... purchased ‘B’ Class shares in Netscar ..., the consideration for which provided Netscar ... with capital of equivalent value. Plaster Plus ... then consented to changes in the constitution of Netscar ..., the manifest effect of which was to render their own shareholdings ‘near worthless’. Although I would not construe s 177E through the prism of the fact

situation in the present case, that situation does provide an example of a way in which profits of a company may be placed into the hands of an associate of the taxpayer in a tax-free form. That s 177E(1)(a)(ii) should be construed so as to cover examples of this kind is consistent with the operation of the section as explained in the paragraph of the Explanatory Memorandum set out in par 78 above. [81] In the case of the judgment in Consolidated Press (HC), their Honours' concern was to lay out their reasons for holding that the presence of a tax-avoidance purpose was a requirement of subpar (ii), no less than of subpar (i). That was why a scheme which produced a substantial consequence which was in any respect the same as a consequence of dividend stripping would not ipso facto fall within subpar (ii). When they pointed out that the subparagraph was 'aimed at' a scheme that would be within subpar (i) save for the fact that the distribution was not by way of dividend, their Honours were, in my respectful view, stressing that the difference between subpar (i) and subpar (ii) lay in the means adopted to distribute the profits of the target company. It followed that the requirement of a tax-avoidance purpose, being basic to the idea of dividend stripping in any form, existed equally under subpar (ii). [82] I do not think that the High Court's words – 'except for the fact that the distribution by the target company was not by way of a dividend or deemed dividend' – should be pressed into service to justify the conclusion that a scheme will never fall within subpar (ii) unless it involves the transfer of shares in the target company to a person or entity separate from the original shareholders. That would be to extend the meaning of those words beyond anything that their Honours had in contemplation. Structurally, the scheme in the present case is quite different from that which was before the High Court in Consolidated Press (HC). I think, with respect, that their Honours would be surprised to be told that they had, in that case, ruled that a scheme which involved the stripping of profits out of a target company and the placement of a corresponding capital sum into the assets of a trust for the original shareholder and his family could never be held to have the effect referred to in subpar (ii) for the sole reason that the shareholding in the target company had not changed hands.

[52] With respect, we agree with his Honour's response, but would add the following:

- (1) *What the Full Court and the High Court said in Consolidated Press in the passages relied upon by the [taxpayer] is clearly obiter. Consolidated Press was a first limb case – the distribution of profits was in the case of both CPIL(UK) and CPHIL(UK), by way of dividend. The only reason the second limb of s 177E(1)(a) was considered by the Full Court and the High Court was because of the primary judge's reasoning that the second limb did not require the presence of a tax avoidance purpose. As indicated in [46] above, even that aspect of the primary judge's reasoning was obiter because he had decided the case at first instance in relation to the shareholders of both companies on the basis that the formation of the Commissioner's opinion under s 177E(1)(b) had miscarried.*
- (2) *Having regard to the terms of the second limb of s 177E(1)(a) and the extrinsic material referred to in [27] above, the Plaster Plus transactions (and the Zinkris transactions) are paradigm examples of a scheme to which the second limb was intended to apply.*
- (3) *Finally, the [taxpayer]'s argument that acceptance of the construction and application of the second limb adopted by the primary judge and this Court would render the first limb otiose, does not withstand scrutiny. The first limb is concerned with schemes which are by way of or in the nature of dividend stripping; the second limb is concerned with other schemes, that is, schemes that are not by way of or in the nature of dividend stripping but which are schemes having substantially the same effect. A scheme falling within the second limb may not, as in this case, fall within the first limb. On the other hand, a scheme falling within the first limb will never fall within the second limb.*

[53] The first ground of appeal is, for these reasons, rejected.

The Second Issue

[54] The [taxpayer] contended that while there was a disposal of property of Plaster Plus (under s 177E(2)(d)) as a result of the scheme constituted by the Plaster Plus transactions (similarly of Zinkris as a result of the

scheme constituted by the Zinkris transactions), it was not open for the Commissioner to form the opinion required by s 177E(1)(b) that the disposal of that property represented in whole or in part, a distribution (whether to a shareholder or another person) of profits of Plaster Plus (or Zinkris, as the case may be).

[55] Reliance was placed upon what was said by Sweeney J in *Commissioner of Taxation v Black* [1990] FCA 267; (1990) 25 FCR 274 where his Honour observed that the word 'distribution' in par (a) of the inclusive definition of 'dividend' in s 6(1) of the 1936 Act 'involves, at least, a dealing out or bestowal' (at 281). In that case his Honour held that the forgiving of a debt owed by a shareholder to the company in question did not constitute a 'distribution' in that statutory context.

[56] In response to this submission, the primary judge at [96] said:

In my view, the judgment of Sweeney J in *Black* does not govern the present situation. First, his Honour was concerned with the question whether the forgiving of a debt was in fact a distribution. Here, the question is whether a disposal of property 'represents' a distribution. The language of s 177E(1)(b) is such as to comprehend a movement of property away from the company in question which is effectively the same as, or is tantamount to, a distribution of profits. Secondly, the operation of par (b) cannot, in my view, be divorced from the nature of the transactions which, according to subs (2), might constitute a 'disposal' by reference to which the paragraph operates. For example, it would be no answer for a taxpayer to say that a bailment of property, by reason only of it being a bailment rather than a 'dealing out or bestowal', did not constitute a distribution of the kind referred to in par (b). In the circumstances of the present case, s 177E, and therefore par (b) of subs (1), has the potential to extend to a transaction which has the effect, even the indirect effect, of diminishing the value of any property of the company. It could not be an answer to what would otherwise be the operation of s 177E to propose that a transaction of this kind cannot represent, in whole or in part, a distribution of the company's profits for the very reason that no observable movement of property has occurred. The section extends to transactions in which there is no 'dealing out or bestowal' and, in my view, par (b) of subs (1) must be construed accordingly.

[57] His Honour was of the view that it was open to the Commissioner to form the opinion that the transactions by which Plaster Plus' shareholding in Netscar was diminished in value represented distributions of the profits of Plaster Plus within the meaning of s 177E(1)(b).

[58] We agree with the view of the primary judge. The transactions into which Plaster Plus (and Zinkris) entered had, as their objective, a diminution in the value of the company's property. That was just as much a disposal of property of the company (under s 177E(2)(d)) as the payment of money to purchase assets at an overvalue or the sale of assets at an undervalue. Moreover, it as much represented a distribution of the company's profits as such a purchase or sale. ...

[59] The second ground of appeal is, for these reasons, rejected.

The Third Issue

[60] The argument on the third ground of appeal was that, as a matter of statutory construction or interpretation, s 177E did not apply. It is not dissimilar to the final contention made on behalf of the [taxpayer] below, which the primary judge rejected, that s 177E was a 'provision of last resort', in the sense that it had no operation at all in the context of the transactions by which a taxpayer was expressly entitled to reduce his or her assessable income under other provisions of the 1936 Act or associated legislation. The example was given of Div 7A of Pt III, under which non-arm's length loans by companies to shareholders were not treated as dividends so long as certain conditions were met (which they were in the case of Plaster Plus). It was submitted that it would be antagonistic to the achievement of the objects implicit in Div 7A if transactions designed to take advantage of, for example, s 109N, were then treated as dividend stripping under s 177E.

[61] The primary judge did not accept the submission for two reasons. First, and most obviously, the relationship between Pt IVA and other provisions of the 1936 Act is explicitly dealt with in s 177B. In particular, subs (1) thereof provides:

Subject to subsection (2), nothing in the provisions of this Act other than this Part or in **the International Tax Agreements Act 1953 or in the Petroleum (Timor Sea Treaty) Act 2003 shall be taken to limit the operation of this Part.**

- [62] His Honour viewed the submission as amounting to an invitation to the Court to hold, contrary to s 177B(1), that the **provisions of Pt IVA are** limited in their operation by other provisions of the 1936 Act and of the other legislation referred to.
- [63] Secondly, to propose that Div 7A of Pt III treats certain loans as not amounting to income, or dividends, under certain circumstances is to misunderstand the provisions of that division. Loans are not income or dividends as ordinarily understood. They are deemed to be so in the circumstances referred to in ss 109D and 109E. In the case of s 109D, exceptions arise under s 109N. Section 109E contains its own exceptions. The effect of these exceptions is to negative what would otherwise be the deeming provisions of ss 109D and 109E. In other words, the normal position, as though there were no legislative deeming, is thereby restored. That position is then subject to such other provisions of the 1936 Act as may, in particular circumstances, have something to say about it. Those other provisions are not rendered inoperative just because ss 109D and 109E have no role to play in relation to the loan in question.
- [64] On appeal, this argument was more broadly based. ...
- [66] Counsel for the [taxpayer] submitted that the test adopted by the primary judge would undermine the operation of some provisions, and introduce a significant element of uncertainty in the operation of many other provisions, of the income tax legislation. Parliament could not have intended s 177E to have such an uncontained and undefined operation. Section 177E, it was submitted, must not be permitted to deprive the other provisions of their intended and substantive operation.
- [67] The problem with this argument is threefold:
- (1) None of the provisions in the 1936 Act or the 1997 Act to which reference was made is in conflict with s 177E and so no reconciliation is necessary;
 - (2) no specific basis has been established for the assertion that the test adopted by the primary judge, and now by this Court, will undermine other provisions of the 1936 Act and the 1997 Act and will lead to the consequential uncertainty in their operation; and
 - (3) there is no reason why the terms of s 177B should not be given their full force and effect.
- [68] For the foregoing reasons, this ground of appeal must also be rejected.

(3) * Could the journalist examine the exhibits in Hartnell's case (Hartnell v C of T)

Source: Hartnell v C of T (Perram J)

What is the issue?

Could the Sydney Morning Herald journalist have access to exhibits tendered in a case?

What were the facts?

In a tax dispute various tax returns including TFN's were tendered as evidence.

A journalist applied to access the documents.

What was the outcome?

The Court found that:

- ◆ access to the exhibits so far tendered should be granted, save to the extent that the administration of justice requires otherwise;
- ◆ that if Ms Carson or her employer records, uses, divulges or communicates any of the tax file numbers in the exhibits she (or her employer) will commit an offence carrying the potential for two years imprisonment;
- ◆ it was not necessary to make a confidentiality order;
- ◆ there are no grounds for supposing that, under modern conditions, taxpayers would be discouraged from making full disclosure in their tax returns by the knowledge that the contents of their returns are subject

to inspection in legal proceedings, in sufficient numbers or on a sufficient scale to constitute a threat to the revenue of sufficient magnitude to justify withholding relevant information from courts.

(4) Does a partnership continue in existence? (Commonwealth Bank of Australia v D C of T)

Source: Commonwealth Bank of Australia v D C of T (Stone J)

What is the issue?

Was the taxpayer entitled to a step up in the cost of partnership assets transferred to the consolidated group?

Does s 22(3) of the Bank Integration Act have the effect that the relevant partnerships are (even if only for tax purposes) deemed to be continued in existence even though it wasn't in existence?

Do the consolidation provisions in Part 3-90 of the Income Tax Assessment Act 1997 apply to those deemed partnerships and to the assets of those deemed partnerships in the manner for which the Taxpayer contended?

What were the facts?

The Taxpayer was established in 1953 later in 1984, changing its name to the Commonwealth Bank of Australia.

The Commonwealth Savings Bank of Australia (Savings Bank) was established in 1927 and remained a subsidiary of the Commonwealth Bank until 1 January 1993 (the succession day).

On the succession day:

- ◆ by virtue of the Bank Integration Act 1991 (Cth), the Savings Bank was integrated with the Commonwealth Bank and the Commonwealth Bank became the successor in law of the Savings Bank, all assets of the Savings Bank were vested in it, all liabilities of the Savings Bank became its liabilities and the Savings Bank ceased to exist;
- ◆ the provisions of the Commonwealth Banks Act 1959 (Cth) that created and governed the Savings Bank were repealed by s 31 of the Bank Integration Act.

At the time of the integration four partnerships existed between the Commonwealth Bank and the Savings Bank, who were the only members of those partnerships.

It is a basic principle of partnership law that any change in membership destroys the existing partnership; *SJ Mackie Pty Ltd v Dalziell Medical Practice Pty Ltd* [1989] 2 Qd R 87. Accordingly, under the general law, those partnerships came to an end on integration as a consequence of the transfer of the Savings Bank's assets and liabilities and it ceasing to exist. The [Taxpayer] contends, however, that the effect of s 22(3) of the Bank Integration Act is that for taxation purposes the partnership has continued since the succession day. In 1993 s 22(3) provided:

Where a succession day is fixed for a receiving bank and the relevant transferring bank, then, for the purposes of the Income Tax Assessment Act 1936 nothing in this Act affects the continuity of any partnership in which a transferring bank was a partner immediately before the succession day.

Until 1 July 2002 the Commonwealth Bank:

acted on its understanding of s 22(3) in treating the relevant partnerships as having continued in existence since 1 January 1993;

- ◆ submitted income-tax returns for the partnerships in which deductions for asset depreciation were claimed as though the partnerships continued in existence and as though the assets continued to be held as partnership assets;
- ◆ in July 2002 when a consolidated group, of which the Commonwealth Bank is the head company, was formed pursuant to the provisions of Part 3-90 of the Income Tax Assessment Act 1997 (Cth).

Consistent with its approach to the partnerships since the succession day, the [Taxpayer] treated the partnerships as being still in existence for income tax purposes on 1 July 2002 and therefore reset the "tax cost" of the underlying assets of the partnerships to the market value of those assets as at 1 July 2002.

The Taxpayer claimed depreciation deductions for the 2003 income year by reference to the market value of the partnership assets upon consolidation.

The partnerships were entered into between the Taxpayer and the Savings Bank in the period from 1985 to 1990 and were known as:

Partnership	Closing written down value at 30 June 2002	Market value at 1 July 2002	CBA	Sale
Camooweal	\$4,142,828	\$89,594,356	99%	1%
Allco	\$0	\$17,109,347	99%	1%
ANL Charterparty	\$0	\$13,227,513	1%	99%
TAA (Comm) Leveraged Lease	\$0	\$19,929,453	1%	99%

The [Commissioner] disallowed the [Taxpayer]'s claim to the additional capital allowance deductions.

What was the decision?

- [21] Section 22(3) was intended to ensure that there were no adverse tax consequences as a result of the Commonwealth Bank replacing the Savings Bank in a partnership. The [Taxpayer] contends that the subsection addresses potential taxation problems by deeming a partnership to continue in existence while all partnership assets are held by a single entity. ... The proposition for which the [Taxpayer] contends would create an entity which is not only unknown at common law but which is fundamentally inconsistent with the legal concept of partnership. Moreover, as the [Commissioner] submitted:

The series of fictions upon which the [Taxpayer]'s case depends extends well beyond the apparently simple notion that the defunct partnership "continues". In order for that fictional state of affairs to persist, it is necessary also to suppose that each fictional partnership has continued to exist, that its partners (notional and real) were carrying on a business and that it has continued to strike accounts, submit tax returns, claim deductions and distribute profits and losses. It is also necessary to assume that partners continue to have enforceable rights against each other and that they continue to own assets in partnership.

- [22] This is not to say that such a state of affairs might not be effected by statute. ...

In my opinion deeming provisions are required by their nature to be construed strictly and only for the purpose for which they are resorted to: *Re Levy; Ex parte Walton* (1881) 17 ChD 746 per James LJ at 756.

- [24] The [Taxpayer] points to the statutory fiction involved in the above subsection and submits that the statutory fiction of continuing partnerships is consistent with the whole approach to taxation after integration adopted in [Part 4](#). Moreover, the [Taxpayer] points to the words of wide import used in providing that "nothing" in the Act affects the continuity of "any" partnership in which the Savings Bank is a member, and submits that such words must be given an unrestricted meaning unless the contrary is shown. ...

- [25] A distinction must be drawn between the "continuity" of a partnership and the continuing existence of a partnership with only one partner. Addressing the former, as s 22(3) plainly does, involves glossing over what might be seen as a quirk of partnership law. Addressing the latter would involve re-writing the fundamental principles of partnership law and the creation of a new category of legal relationship based on an unlikely fiction. Section 22(3) purports to do no such thing. It merely affects the "continuity" of partnerships. Notwithstanding the use of words with wide import, this is the critical phrase.

- [27] It should be clear from the above that the difficulty facing the [Taxpayer] in this proceeding is that although the partnerships referred to in [7] were dissolved when the assets and liabilities of the transferring bank were vested in the receiving bank, no new partnerships were created. There is nothing in the provisions of Part 3 of the Act or in the terms of s 22 to indicate that Parliament intended to create a new entity which is not only unknown at common law but which is fundamentally inconsistent with the legal concept of partnership. In my view the problem is not one of continuity which would be addressed

by s 22(3) but rather a much more basic problem: the non existence of a partnership for s 22(3) to operate upon.

- [32] I do not accept that Parliament's intention that integration be revenue neutral extends to such complex nebulous arrangements especially when there is an alternative construction of s 22(3) which is simple, coherent, focused on the effect of integration and, consistent with the policy of the Act. I accept the alternative construction: that s 22(3) applies only to partnerships between the transferring bank and third parties. It deems that, for taxation purposes, there is no break in continuity between the reconstituted partnership and the pre-integration partnership. For the reasons given above it does not apply to partnerships between the transferring and receiving banks.
- [33] As I have decided that after the succession day the four partnerships did not continue to exist and are not deemed to exist, even for tax purposes, the second issue identified in [11] above does not arise. The application must be dismissed with costs.

(5) What does the word “each” mean in the trust loss provisions? (ConnectEast Management v C of T)

Source: [ConnectEast Management v C of T \(Sundberg, Jessup and Middleton JJ\)](#)

What is the issue?

Can the taxpayer trust carry forward losses?

How was the trust with two unit holders to be classified?

What was the outcome?

The Court preferred the primary judge's construction and found that the only requirement of s 272-[127](#)(1)(b) is that the "one or more trusts" be of a higher level than the status-seeking trust, and that this construction is confirmed by the later use of the superlative "highest" in the concluding words of the sub-section: "the trust is instead a trust of the same kind ... as the trust of the highest level".

What were the facts?

The taxpayer is the trustee of three related trusts which together with other trusts and companies, form the ConnectEast Group which is responsible for the construction and operation of the Eastlink tollway in Melbourne.

- ◆ the ConnectEast Holding Trust (the Holding Trust);
- ◆ the ConnectEast Investment Trust (the Investment Trust).
- ◆ the ConnectEast Investment Trust (No 2) (the Subsidiary Trust).

The units in the Subsidiary Trust are held as follows:

- ◆ as to one unit – by the Holding Trust;
- ◆ as to 477,963,546 units – by the Investment Trust;

For the purposes of Schedule 2F of the Income Tax Assessment Act 1936 (Cth) the Subsidiary Trust is an "unlisted widely held trust": s 272-110.

The taxpayer was unsuccessful at first instance and appealed to the Full Court.

What was legislative background?

A trust cannot carry forward losses incurred in an earlier year unless it can show a specific degree of continuity of beneficial ownership.

The trust loss provisions provide for four "levels" of widely held trust with trusts at each level being subject to different tax treatments in relation to carry forward losses: See ss 272-110, 272-[120](#), 272-125 and 272-115 respectively.

In order of increasing levels of favourable tax treatment they are:

- ◆ unlisted widely held trust
- ◆ unlisted very widely held trust
- ◆ wholesale widely held trust, and
- ◆ listed widely held trust.

Under s 272-127 a trust which is owned by another trust of a higher level is treated as having the status of its owner.

Section 127 provides:

- (1) *If:*
- (a) *apart from this Subdivision, a trust is an unlisted widely held trust, an unlisted very widely held trust or a wholesale widely held trust; and*
 - (b) *each of one or more trusts of a higher level (see subsection (3)) has, directly or indirectly, fixed entitlements to all of the income and capital of the trust;*
- the trust is instead a trust of the same kind (see subsection (2)) as the trust of the highest level.*
- (2) *For the purposes of this Subdivision, trusts are of the following kinds:*
- (a) *unlisted widely held trust;*
 - (b) *unlisted very widely held trust;*
 - (c) *wholesale widely held trust;*
 - (d) *listed widely held trust.*
- (3) *The kinds of trust are allocated levels in the following order (from lowest to highest): unlisted widely held trust, unlisted very widely held trust, wholesale widely held trust and listed widely held trust.*

What were the contentions?

The taxpayer contended that where a trust (the status seeking trust) is owned in whole by more than one trust, the words "each of one or more trusts of a higher level" in subs (1)(b) should be read as referring to:

- ◆ trusts of a particular (ie the same) higher level;
- ◆ which collectively own fixed entitlements to all of the income and capital of the status-seeking trust.

The taxpayer's argument was that the Holding Trust and the Investment Trust are trusts of a particular (ie the same) higher level, namely listed widely held trusts, and they collectively own fixed entitlements to all of the income and capital of the Subsidiary Trust so that the Subsidiary Trust to be treated as a listed widely held trust.

The Commissioner:

- ◆ relied on other parts of Schedule 2F which depart from the "each of" structure of s 272-127 and contemplate collective entitlement;
- ◆ relied on these examples from other "entitlement" contexts to show that where it is intended to include groups or combinations of entities, this is made express.

The taxpayer contended that on the primary judge's construction, s 272-127 can never apply to a wholesale widely held trust because such a trust must have more than one unit holder.

What was the decision?

Before the primary judge

- [10] The primary judge saw the word "each" in the phrase "each of one or more trusts of a higher level" as an impediment to adopting the [taxpayer]'s construction. His Honour said at [7]:

The applicant's construction immediately confronts the problem that the section does not mention collectivity or groups. On the contrary the word "each", a quasi-pronoun (Oxford English Dictionary), usually denotes individuality. The Macquarie Dictionary gives the primary meaning "every, of two or more considered individually or one by one".

The appeal

- [19] The [taxpayer] attacked the primary judge's reliance on the word "each" in the phrase "each of one or more trusts of a higher level". ... The [taxpayer] argued that the use of *particular* is justified by the words "of a higher level", the natural meaning of which is "one of the (particular) higher levels in subs (3)" as opposed to "any one or other of the higher levels".

- [22] After describing the four types of widely held unit trust, the Memorandum at [13.91] outlines the effect of s 272-127:

The characterisation of a trust may be affected by whether it is wholly owned, directly or indirectly, by another trust. An unlisted widely held trust, unlisted very widely held trust or wholesale widely held trust whose fixed entitlements to income and capital are all held, directly or indirectly, by another trust of a higher level will instead be a trust of the same kind as that higher level trust. The parent trust must be of a higher level so that the subsidiary trust will not be worse off.

- [24] At a linguistic level the [taxpayer]'s construction encounters a difficulty in the requirement in s 272-127(1)(b) that "each of one or more trusts of a higher level ... has ... fixed entitlements to all of the income and capital of the trust". The ordinary meaning of "each" is "every, of two or more considered individually or one by one": *Macquarie Dictionary*. The word "each" links up with the singular "has", and shows that the test is to be undertaken by reference to each one of the trusts, and not to a group of trusts collectively or as a whole. The words "each of" are an obstacle to reading the provision as allowing collective ownership by a group of trusts where no individual trust, directly or indirectly, owns the status-seeking trust.

- [34] We accept the Commissioner's contention. Section 272-125(1)(c) contemplates that one qualifying holder may hold all the units. The [taxpayer] relied on par (f) of the definition of wholesale widely held trust, which requires that "the amount subscribed for units in the trust by *each person* to whom units have been issued was at least \$500,000". It was said that "each person" contemplates direct ownership by more than one entity. Having regard to what we see as the clear indication in par (c) that one qualifying holder may hold all the units, we are of the view that "each" in par (f) is intended to cover two situations: where there is but one unit holder, it must have subscribed at least \$500,000; and where there are two or more unit holders, each of them must have so subscribed. That is the sensible way of reading par (f) so as to accommodate par (c).

- [37] The result of the foregoing survey of the parties' submissions is that the primary judge's construction is supported by:

- (a) *a dictionary/linguistic analysis of s 272-127;*
- (b) *[13.91] and the final sentence of [13.92] of the Explanatory Memorandum; and*
- (c) *the comparison between s 272-127 and the provisions noted at [29] above.*

- [38] On the other hand the primary judge's construction means that it is highly unlikely that an unlisted very widely held trust will be elevated to the status of a wholesale widely held trust or a listed widely held trust.

- [39] In our view the primary judge's construction is to be preferred because of the considerations noted at [37]. As we have said at [36], the fact that on that construction an unlisted very widely held trust is unlikely ever to be elevated to the status of a wholesale widely held trust does not support the [taxpayer]'s own construction of 272-127(1).

- [40] The [taxpayer] submitted that the primary judge's construction was not supported by any discernible purpose or policy and leads to anomalous outcomes. The anomalous outcome in the present case was said to be that the Subsidiary Trust would have satisfied s 272-127 but for the fact that one unit out of 477,963,547 is held by the Holding Trust. We were urged not to endorse what was said to be the odd

result that a trust that is wholly owned by a single listed widely held trust is treated differently from one that is owned by two or more listed widely held trusts.

- [41] Resort to the odd or anomalous consequences of a particular construction of legislation is to be **approached with caution. In Esso Australian Resources Ltd v Federal Commissioner of Taxation [1998] FCA 1655; (1998) 83 FCR 511 at 518-519, speaking of ss 118 and 119 of the Evidence Act 1995 (Cth), Black CJ and Sundberg J said:**

In our opinion the plain language of the sections is confirmed by the only directly relevant extrinsic material, which shows that Parliament intended the consequence that is said by the [taxpayer] to be anomalous. Especially when different views can be held about whether the consequence is anomalous on the one hand or acceptable or understandable on the other, the Court should be particularly careful that arguments based on anomaly or incongruity are not allowed to obscure the real intention, and choice, of the Parliament.

- [42] We have recorded at [11] and [13] the primary judge's rejection of the [taxpayer]'s "same level" contention. We agree with his Honour's view that the only requirement of s 272-[127\(1\)\(b\)](#) is that the "one or more trusts" be of a higher level than the status-seeking trust, and that this construction is confirmed by the later use of the superlative "highest" in the concluding words of the sub-section: "the trust is instead a trust of the same kind ... as the trust of the highest level".

(6) Failure to set aside statutory demand (D C of T v Neo Rock Pty Ltd)

[Source: D C of T v Neo Rock Pty Ltd \(Logan J\)](#)

What is the issue?

Was the company entitled to have a winding up application adjourned?

What was the outcome?

The court found that:

- ◆ the evidence led by the company was noteworthy for its absence of reference to the overall financial position of the company;
- ◆ it is not a satisfactory state of affairs for a company to seek an indefinite adjournment of a winding up application on the strength of assertions unfocused on the subject of proof of the solvency of the company;
- ◆ there was no endeavour to engender a satisfaction that there exists a certain stands whereby leave ought to be granted under section 459(S).

(b) Tribunals

(1) ** Signing a fairy story tax return – What penalty applies? (Necovski and C of T)

[Source: Necovski and C of T 23 February 2009 Mr S E Frost Member](#)

What is the issue?

What penalty should tax office party after signing a tax return that had been prepared by a tax agent on an incorrect basis?

What was the outcome?

The tribunal found that the 25% level of penalty imposed by the tax office was correct.

What were the facts?

The taxpayer lodged incorrect tax returns for the 2005 and 2006 income years.

The returns were prepared by the taxpayer's tax agent incorrect in that they claimed significant deductions in respect of gifts and rental property expenses. The taxpayer also claimed smaller amounts of tax offsets.

The taxpayer said:

- ◆ they had not asked the agent to include the claimed expenses in the returns but acknowledged that they had signed the returns before the returns were lodged with the Commissioner;
- ◆ they trusted their tax agent and assumed that the information included in the returns was correct.

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

This is the second decision in 2009 examining appropriate penalties after a taxpayer has signed an incorrect tax return.

On each occasion the taxpayer trusted the tax agent.

Many clients are fundamentally incapable of reading a tax return or of understanding what has been included on a tax return. We take the view, that merely having a signed consent may not be sufficient. We recommend that practitioners ensure that the client's written consent is an informed consent.

The majority of agents are sticklers for ensuring that the tax return from taxpayer is not lodged until they have received the taxpayers signed copy of the return. We suggest that a tax return is never lodged on behalf of a client unless the person lodging the return has the clients signed and informed consent to the return being lodged/

Two areas of primary concern are:

- ◆ deductions for work-related expenses, in respect of which a number of agents still view the \$300 limit as an automatic deduction without substantiation;
- ◆ deductions for bucket collections from charities, a particularly difficult area in recent times given the plethora of charities that have conducted such collections following natural disasters: e.g. the tsunami, hurricane Katrina, and the black Saturday fires to name a few in recent years.

It will not be long before a taxpayer, who has incurred a penalty, brings a civil action against a tax agent who has gratuitously inflated a taxpayer's claim for deductions.

What was the decision?

THE ADMINISTRATIVE PENALTY PROVISIONS

- [4] The Parliament has established a "self assessment" income tax system under which an assessment may issue based solely on information contained in the income tax return of the taxpayer.
- [6] A taxpayer is liable to an administrative penalty if the taxpayer or the taxpayer's agent makes a statement to the Commissioner which is false or misleading in a material particular and the taxpayer has a "shortfall amount" as a result of the statement: s 284-75(1) in Schedule 1 to the *Taxation Administration Act 1953* ("TAA").
- [8] If *either* the taxpayer *or* the agent fails to take reasonable care, then the 25% penalty is automatic. That position is not altered if, for example, the agent took reasonable care while the taxpayer did not. ...
- [11] This is a case where the registered tax agent included in the client's returns amounts by way of deduction or tax offset which had no reasonable basis to support them.
- [12] The major part of the deductions claimed related to mortgage interest paid on Mr Necovski's principal place of residence ... was treated as if it were interest paid on the Necovskis' investment property, although they gave evidence that the loan on that property had been paid off in around 1990. No prudent tax agent could reasonably include such a claim in a client's return.
- [13] ... By treating the signing of his returns as a mechanical exercise, [Mr Necovski] denied himself the opportunity to query the claims and to satisfy himself that the claims were in order, or to have them removed from the return.

[15] ... Although perhaps in differing degrees, both the taxpayer and the agent failed to take reasonable care. In those circumstances the imposition of the penalty could not be regarded as harsh or unintended.

(2) ** When you miss the Tribunal's deadlines ~ Reinstatement application (Burnett and C of T)

Source: Burnett and C of T (Mr A Sweidan, Senior Member)

What is the issue?

Was the taxpayer entitled to have their application to the AAT reinstated after the Tribunal dismissed the application in error?

What was the outcome?

The Tribunal concluded that the circumstances that led to the Tribunal, resulted in a denial of procedural fairness to the taxpayer and the application should be reinstated.

What were the facts?

On 21 February 2007 the Tribunal dismissed two of the taxpayer's applications under [s42\(5\)](#) of the [Administrative Appeals Tribunal Act 1975](#) ("the [AAT Act](#)") for failure to comply with directions made by the Tribunal on 11 October 2006.

The Tribunal previously dismissed the applications on 21 August 2006 under [s42A\(2\)](#) of the [AAT Act](#) for the taxpayer's failure to appear at a directions hearing.

On 11 October 2006 the application was reinstated.

On 18 January 2007 the [Taxpayer] appeared by telephone at a conference with a Conference Registrar.

On 20 February 2007 the [Taxpayer] failed to appear at a dismissal hearing which had been listed before the Senior Member.

The Tribunal dismissed the application:

- ◆ under paragraph 42A(5)(a) in respect to a "failure to proceed with the application"; and
- ◆ under paragraph 42A(5)(b) in respect to a failure to comply with the Direction "to file and serve a statement of facts, issues and contentions by 25 October 2006".

Under [s.42A\(10\)](#) the Tribunal may reinstate an application that the Tribunal has "dismissed in error" under [s.42A\(5\)](#):

The taxpayer resided in Sydney but was regularly away from Sydney in the course of his employment. All hearings in the proceedings were conducted by telephone.

The Taxpayer's telephone contact notified to the Tribunal was a mobile telephone phone via which he was contactable in Australia and overseas.

Usually the Tribunal calls taxpayers for hearings rather than vice versa.

The Taxpayer:

- ◆ does not believe he received written notice of the 20 February 2007 hearing;
- ◆ did not receive a telephone call from the Tribunal on that date.

There is no onus on the Taxpayer "to show that an opportunity to be heard would in fact have proved fruitful." *Guse*.

The power to reinstate is discretionary and may be exercised if the Tribunal is satisfied reinstatement is appropriate in the circumstances of the particular.

The Taxpayer:

- ◆ considered that those items he believed to be the facts and contentions were contained in documents already filed, essentially the Notice of Objection;
- ◆ had not understood that the Tribunal's requirement to lodge a Statement of Facts and Contentions required of him a re-statement, in a separate and new document even though the new document would substantially set out the facts and contentions already set out in the Objection and other documents.

What was the decision?

- [30] The Tribunal's discretion is conditional upon the application having been dismissed in error.
- [33] It does not appear from the Order that the Tribunal considered the provisions of [s42A\(7\)](#) in deciding to dismiss the application. While the dismissal order was not made under [s s42A\(2\)](#) it is not clear whether the [Taxpayer]'s failure to appear was a factor in the Tribunal's decision to dismiss the applications, although the terms of the Order indicate that his non-appearance may have been a factor.
- [35] It is not clear whether at the dismissal hearing on 20 February 2007 the Senior Member was fully apprised of what had occurred at the conference on 18 January 2007.
- [36] Having regard to the matters set out above it appears that the [Taxpayer] was not given an opportunity to explain his non-compliance with the Tribunal's previous directions, or to seek a further extension of time, albeit that such extension may well not have been granted.
- [37] In the Tribunal's view it is likely that some or all of the above circumstances led to error by the Tribunal, resulting in a denial of procedural fairness in accordance with the principles set out by the Federal Court in *Guse supra*.

(3) ** Home office deductions and car log book (Ovens and C of T)

[Source: Ovens and C of T \(Mr S E Frost, Member\)](#)

What is the issue?

Could the taxpayer, Mr Ovens:

- ◆ claim deductions in relation to the use of a home office?
- ◆ claim deductions in relation to his use of a car in accordance with the log book?

What was the outcome?

Mr Ovens:

- ◆ used a home office almost exclusively for work-related (and therefore income-producing) purposes during the relevant year:
- ◆ allowed some incidental use by Mr Ovens (or by other members of his family) for purposes not related to Mr Ovens' work activities.

What were the facts?

During the relevant year, Mr Ovens:

- ◆ was engaged in two income-producing activities wine importing and wholesaling which he undertook in partnership with his wife under the name "KiWiNZ";
- ◆ was an employee of a company known as Interim Pty Ltd ("Interim").

Interim provided a city office but the taxpayer did much of his work in his home office including making phone calls, sending emails to and receiving emails from prospective or established clients, and the writing of proposals.

The taxpayer's evidence was that:

- ◆ that a typical working day would start sometime between 7:00 and 7:30 in the morning and last until 6:00 or 6:30 in the evening but sometimes he would work later into the night, have dinner and then do some more work in the home office;
- ◆ he worked in his home office with the knowledge and somewhat grudging concurrence of, rather than at the request of, his employer.
- ◆ the home office area consisted of:
 - ~ a separate room included within the structure of the family home;
 - ~ an adjacent bathroom, including a bath, shower, toilet and basin used by anybody coming to see Mr Ovens for work-related purposes;
 - ~ another room, described in the plan of the house at T5-41 as the “library”, part of which was used on occasion as a waiting area for people who had come to see Mr Ovens for work-related purposes.

The rest of the family home contains:

- ◆ three bedrooms; a lounge room; a dining room; a central hallway; a bathroom apart from the one in the home office area; a laundry; a kitchen; an area adjacent to the kitchen described as a “dining nook”;
- ◆ the remainder of the “library”;
- ◆ an external patio at the rear.

Mr Ovens claimed a deduction of \$24,556, based on entries in a “log book” that he had kept for a three-month period during the relevant year.

The Commissioner was not satisfied that the log book accurately reflected the use that Mr Ovens had made of his car for income-producing activities.

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

The decision highlights the need for practitioners to carefully analyse the type of home office expense for which a deduction is claimed. Home office expenses remain an item drawing audit attention.

The [ATO website](#) provides the following in respect of home office expenses:

You can claim the additional running expenses of a home office – for example, the decline in value of and repairs to your home office furniture and fittings, heating, cooling, lighting and cleaning. You can keep a diary to work out how much of your running expenses relate to doing work in your home office. Alternatively, you can use a fixed rate of 26 cents per hour for home office expenses for heating, cooling, lighting and the decline in value of furniture instead of keeping details of actual costs.

When you use your home office for work as an employee, note that time in your diary. Diary records are acceptable evidence of a connection between the use of a home office and your work. Keep diary records for a representative four-week period.

Further information about the Tax Office view in relation to claiming a deduction in relation to home office expenses is available in:

- ◆ PS LA 2001/6 – Home office expenses: diaries of use and calculation of home office expenses;
- ◆ TR 93/30 – Income tax: deductions for home office expenses.

What were the contentions?

The two broad categories of expenditure Mr Ovens claimed in relation to the home office were what the Commissioner described as “occupancy costs” and “running costs”:

- ◆ within the first category were a portion of the interest charged on Mr and Mrs Ovens’ home mortgage; a portion of the home building insurance premiums; a portion of the amount of local council rates and water rates paid; and costs relating to repairs and maintenance of the home (including painting);

- ◆ within the second category were items of expenditure such as a portion of the household gas and electricity bills; a portion of the household contents insurance premiums; a portion of the telephone bills; and depreciation on furniture, equipment, carpets etc.

What was the decision?

The Tribunal found that:

- ◆ any use of the office area for other than work purposes in the relevant year was very minor indeed;
- ◆ occupancy costs were not deductible;
- ◆ running costs, to the extent that they were incurred in gaining or producing assessable income would be deductible.

MR OVENS' ENTITLEMENT TO DEDUCTIONS FOR THE HOME OFFICE

- [25] For a period of at least 12 weeks during the relevant year, in accordance with Subdivision 28-G of the 1997 Act, Mr Ovens kept a log book in relation to the BMW
- [45] To return now to Mr Ovens' circumstances, I need to ask: "is the occasion of the outgoings found in whatever is productive of actual or expected income?" I should emphasise that the question is not whether he used his home office for income-producing purposes. I have already found that he did, but this is not enough. Unless I also find that the occasion of the outgoings – in his case there are various different items of expenditure that need to be considered – is found in his income-producing activities, he will not be entitled to the deduction.
- [47] The occasion of the outgoings that the Commissioner described as "occupancy costs" is not to be found in the work that Mr Ovens undertook in his home office. ... When the Court said that the taxpayer's incurring of legal expenses "followed upon" the charges brought against him as an officer, it was not talking of timing, but rather of causation. So much is clear from the next sentence, emphasised in [43] above. It was *by reason of his office* that the taxpayer was exposed to those charges, and to the consequential legal expenses. ...
- [48] In relation to Mr Ovens' "occupancy costs", that type of nexus is missing. It was not by reason of his working in the home office so as to earn income that Mr Ovens incurred the various items of expenditure described as "occupancy costs". Those items of expenditure – in their entirety – were incurred by reason of his and his wife's ownership of the home. They were incidents of home ownership, and of the desire (or need) to insure their family home. Mr Ovens is not entitled to a deduction for "occupancy costs".
- [49] That means that the following items shown at Appendix "A" of Exhibit A5 are disallowed:
- ◆ Council rates – Documents 2-6;
 - ◆ Building insurance – Document 15;
 - ◆ House repairs – Document 34;
 - ◆ Bathroom repairs – Document 35;
 - ◆ Painting – Document 36;
 - ◆ Water rates – Documents 79-81;
 - ◆ Home loan interest – Document 100.
- [50] It might be argued that "house repairs", "bathroom repairs" and "painting" should not be dealt with as "occupancy costs" but as "running costs". ... No matter where these three items belong, they were not incurred by reason of Mr Ovens' income-producing activities and are not deductible.
- [51] That brings me to the "running costs". These are items of expenditure, the occasion of which is indeed the work that Mr Ovens undertook in his home office. It is by reason of his working in the home office that he would switch on the gas heater in that area. It is by reason of his working in the home office that he would turn on the lights, and consume electricity through the use of the various items of electronic equipment that he had deployed in that room. It is by reason of his working in the home office that he incurred that part of his home contents insurance expenditure that related to the equipment in his office.

- [52] Nevertheless, in some cases the proportion of an item of expenditure that he claimed was excessive. I could find no justification, for example, for his claim for 40 per cent of the entire household electricity bill for the income year (even though he was only employed by Interim for a little over eight months of the year). Similarly, a claim for 70 per cent of the household contents insurance could not be sustained.

CAR EXPENSES - THE "LOG BOOK" METHOD

- [57] The first instruction in Subdivision 28-F, contained in s 28-90(1), is deceptively simple:
- [58] To use the "log book" method, you multiply the amount of each *car expense by the *business use percentage.
- [59] Critical to that calculation is the "business use percentage", a term defined in s 28-90(3) as, in summary, business kilometres divided by total kilometres. The expression "business kilometres" means, relevantly, the number of kilometres the car travelled in the course of producing assessable income: s 28-90(4)(a). As far as this "business kilometres" component is concerned, s 28-90(5) explains:

You calculate the number of business kilometres by making a reasonable estimate. The estimate must take into account all relevant matters, including:

- (a) *any log books, odometer records or other records you have; and*
 - (b) *any variations in the pattern of use of the *car; and*
 - (c) *any changes in the number of cars you used in the course of producing your assessable income.*
- [60] There are several things you must do if you wish to use the "log book" method. You must, for example, substantiate the car expenses under Subdivision 900-C: s 28-100(1). You must also keep a log book (s 28-100(2)) and odometer records (s 28-100(3)). In this context the word "keep" means "maintain" (in the sense of recording regularly), rather than "retain"; the rules relating to retention of the log book are in Subdivision 28-I.
- [61] Subdivision 28-G tells you how to keep a log book. One of the things you must do is "record journeys made in the car during the log book period in the course of producing your assessable income": s 28-110. The expectation is that a taxpayer will record in the log book all journeys which, in the opinion of the taxpayer, are made in the course of producing assessable income. It might be that not all of those journeys are in fact made "in the course of producing assessable income" because there will sometimes be some uncertainty as to the precise location of the borderline between those journeys that qualify and those that do not. Sometimes – perhaps most of the time – the taxpayer will be right; sometimes the taxpayer might be wrong. But a wrong judgment by a taxpayer as to whether a journey (or perhaps a number of journeys with similar characteristics) satisfied the description "made in the course of producing assessable income" does not render the entire log book unreliable. It will simply be one of the "relevant matters" to be taken into account under s 28-90(5) in making the estimate of "business kilometres" travelled.
- [62] Nowhere is there a requirement to record in the log book those journeys that may be described as "private" journeys (that is, those that are not made "in the course of producing assessable income"). Of course, there is no logical reason why such journeys should need to be recorded. These are the journeys that are represented by the difference between business kilometres and total kilometres, and their extent can be deduced arithmetically once "business kilometres" and "total kilometres" are known.

MR OVENS' LOG BOOK

- [64] Mr Ovens relies on a log book that he says records his use of the BMW for the period 1 February 2005 to 7 May 2005. The log book indicates a total distance of 6647 km travelled in that period. Mr Ovens identified 287 km as private kilometres travelled. The remaining 6360 km he identified as "business kilometres" travelled during the period. From these figures he calculated a "business use percentage" of 95.6%.
- [65] The log book also notes the odometer readings of the car at the beginning and at the end of the financial year. From these readings Mr Ovens calculated the total distance travelled in the car during the financial year as 25,518 km.
- [66] There are about 60 journeys entered in the log book. A typical entry will show a "start date", an "end date" and, in the column headed "Purpose of journey", a description such as "Client mtg" followed by a suburb name and a company name. Often there will be more than one place visited. The "odometer start"

and “odometer end” will be recorded, and there is a space for “kilometres travelled”, either “business” or “private”. Most of the “kilometres travelled” are recorded in the “business” column – of all the entries recorded, only 12 of them note any “private” kilometres.

- [67] Mr Ovens freely admitted that he chose to use the BMW on his travel for Interim “to get the best tax deduction” (Transcript, page 46), and there is nothing wrong with that. He continued: “That’s the reason I drove it and kept very precise logs on it ... I very carefully kept records on that.”
- [92] Keeping a log book is a mechanical exercise. Under s 28-125(2) of the 1997 Act you need to record the start and finish date of the journey, the start and finish odometer readings, the distance travelled and a brief description of the journey. You must record those details “at the end of the journey or as soon as possible afterwards”. Those requirements are not onerous. Nevertheless, they must be complied with – if not with absolute perfection, then at least substantially – by anyone wishing to use the log book method.
- [93] I am not satisfied that Mr Ovens’ log book complies substantially with the requirements of s 28-125(2). In particular, I find that, if he ever undertook the journeys that are described in the log book:
- ~ the log book does not sufficiently reliably indicate the day the journey began and the day it ended, and as a result, I am not satisfied that all the journeys recorded took place in the log book period, or even in the relevant year;
 - ~ the log book does not sufficiently reliably indicate the car’s odometer readings at the start and end of the journey, and as a result, I am not satisfied as to the distance travelled as “business kilometres” during the log book period; and
 - ~ a significant number of the records were not made at the end of the journey or as soon as possible afterwards.
- [94] Mr Ovens cannot, therefore, use the log book method to claim his car expenses for the relevant year.
- [95] The Commissioner has indicated a preparedness to accept a claim based on whichever of the other methods set out in Division 28 is of greatest advantage to Mr Ovens. I will remit the matter to the Commissioner to allow that to be done.

ADMINISTRATIVE PENALTY

- [99] In Mr Ovens’ case there are several statements that have led to several shortfall amounts. In relation to each statement there are two questions to be addressed: first, what is the proper base penalty amount; and second, is any remission warranted?
- [100] The “statements” are:
- (i) the claim for deductions in relation to “occupancy costs” of the home office;
 - (ii) the claim for deductions in relation to “running costs” of the home office;
 - (iii) the claim for depreciation in respect of equipment in the home office;
 - (iv) the claim for car expenses based on the log book method.
- [101] In respect of matters (ii) to (iv), the base penalty amount of 25% is appropriate. To the extent that his statements led to a shortfall amount, it was because of a failure to take reasonable care to comply with a taxation law. Although the discretion to remit the penalty in whole or in part is very wide, I have not identified any reason why the penalty should be remitted.
- [102] Matter (i), however, is a little different. He and his agent, to some extent, took reasonable care in making the statement that he was entitled to a deduction for “occupancy costs”, and to that extent there is no “shortfall amount”: s 284-215(2) in Schedule 1 to the Administration Act. However, it is also true that to some extent he and his agent did not take reasonable care.
- [103] More particularly, Mr Ovens and his agent took reasonable care in making the statements (even though I have found the statements to have been wrong) that he was entitled to a deduction for those items of expenditure set out at [49] of these reasons, provided that the amount claimed in relation to his employment at Interim was no more than 11% of the total expenditure for the particular item. If more than 11% was claimed in his return, then it is not the case that Mr Ovens and his agent took reasonable care in making the statement.
- [104] Therefore, in respect of “occupancy costs”, I remit the administrative penalty issue to the Commissioner for recalculation in accordance with the following directions:

- (a) As to any item in respect of which the claim for deduction in Mr Ovens' tax return did not exceed 11% of the total expenditure for that item – no penalty imposed because of the exception in s 284-215(2) in Schedule 1 to the Administration Act; and
- (b) As to any item in respect of which the claim for deduction in Mr Ovens' tax return exceeded 11% of the total expenditure for that item – administrative penalty at 25% of the shortfall amount arising from the percentage claimed in excess of 11%, with no remission.

CONCLUSION

[105] The objection decisions are affirmed, except to the following extent:

- (a) Certain home office expenses allowed, as set out in [53] – to be recalculated by the Commissioner;
- (b) Depreciation claims as set out in [55] and [56] – for reconsideration by the Commissioner; taxpayer allowed 21 days to provide further information;
- (c) Car expenses – for reconsideration by the Commissioner, with a direction that Mr Ovens cannot rely on the log book method;
- (d) Administrative penalty – for recalculation by the Commissioner, in relation to “occupancy costs”, in accordance with [104].

(4) **** Were the regular payments by the company to the employee loans or wages? (Martinazzo and C of T)**

Source: [Martinazzo and C of T \(Mr A Sweidan, Senior Member\)](#)

What is the issue?

Were payments of fixed and regular weekly amounts payments of wages or payments in the nature of a loan?

What was the outcome?

The tribunal found that the payments by the company to the taxpayer constituted payment of wages.

What were the facts?

Prior to the years in dispute the taxpayer:

- ◆ worked in the family crane and plant hire business conducted by MMH and CRT;
- ◆ was paid salary and wages by MMH on a weekly basis in the amount of \$895 net of tax;

In the income year ended 30 June 2002 the MMH wages book records that the taxpayer "received a wage of about \$895 per week net of taxes" during the period 19 March to May 2002.

In the 2000 and three income year MMH paid the taxpayer a total of \$46,540 by a fixed and regular weekly payment of \$895 during the 2003 and 2004 income years.

In the 2004 income year:

- ◆ MMH paid the taxpayer a total amount of \$20,585 period ending December 2003;
- ◆ CRT paid the taxpayer a total of \$25,955 and the period commencing December 2003.

MMH described the weekly payments to the taxpayer in its accounts as wages but debited the payments to an account called "loan-T. G. & A Martinazzo" which had a credit balance of 345,000 at 1 July 2002.

CRT described the weekly payments it made to the taxpayer in its accounts as "wages" and debited the payments to an account called "loan - Martinazzo Family" which had an operating balance of Neil at the time of the first payment and a debit balance of \$73,700.26 at 30 June 2004.

After conducting an audit the Tax Office increased:

- ◆ the taxpayers assessable income by \$46,540 in each of the years ended 30 June 2003 and 30 June 2004;

- ◆ imposed tax shortfall penalties calculated at the rate of 25% on the basis that the taxpayer and exercise a lack of reasonable care.

The taxpayer objected to each of the assessments and was partially successful in relation to 2000 and full year of income in relation to a capital gain.

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

The case highlights the need for practitioners:

- ◆ to ensure that client records accurately reflect the underlying transactions;
- ◆ to ensure that what is recorded as a loan is intended to be repaid.

What were the contentions?

The taxpayer contended that:

- ◆ he continued to receive a fixed and regular amount of \$895 during the 2003 and 2004 income years and that those payments were in the nature of the loan;
- ◆ his parents had agreed that the amounts paid to him by MMH would be reduced or offset against their loan accounts.

What was the decision?

- [14] At paragraphs 6 and 9 [of his affidavit] the [taxpayer] refers to large amounts loaned to the business by his parents 'or entities related to them' and says his parents agreed to allow him to withdraw some of these contributed amounts to 'substitute for wages'. At paragraph 9 he says it was agreed we (family members) would 'take advances in the nature of loans to us in lieu of wages', and 'that with Tom & Anna's permission (which they gave) that these advances would be reduced against their loan accounts', and that 'these advances could also be offset against possible distribution of profit from family trusts'.
- [26] Thomas Martinazzo's Witness Statement (Exhibit A3) at paragraphs 24-29 addresses the relevant payments made to the [taxpayer] in the following way:
- [26.1] In July 2002 it was agreed between family members and the accountant Bernard Hoey that family members would be given loans/advances to cover living expenses and personal commitments. For Giovanni they 'would be an amount roughly equal to wages ... [he was] receiving during 2002', while for his daughter Laura and wife Anna they 'were more in the nature of advance of profit from the business' (paragraph 24). At paragraph 27 he states that 'it was agreed that Giovanni would receive sufficient loans/advances so that he was no better or worse off than in a personal cash flow sense than if had been an employee'.
- [26.2] At paragraph 25 he refers to substantial amounts loaned to the business by him and Anna and says that 'it seemed reasonable that some of this debt owed to us could be transferred to the benefit of [the [taxpayer]] and other family members'. He also says it was done to reduce State payroll tax and income tax.
- [27] In cross-examination Thomas Martinazzo agreed that the words used in his witness statement were in fact Mr Hoey's words (Transcript p106 and 112) and that he had a basic understanding (Transcript p107) or no understanding (Transcript p112) of the relevant parts of the statement.
- [28] He testified that Mr Hoey had suggested the arrangement and he didn't query it or have any objection to it (Transcript p111). He considered that the [taxpayer] was not being paid enough for the work he was doing (Transcript p112-113) and agreed that the [taxpayer] would not have to repay any of the money either to him (Transcript p109) or to anyone (Transcript p112).

WHETHER THE PAYMENTS WERE LOANS TO THE [TAXPAYER]

- [46] It is clear from the evidence that the amounts paid to the [taxpayer] by MMH were not loans made to him by MMH.
- [49] There is no evidence that the parties intended that MMH would loan money to the [taxpayer]. Conversely the apparent intention was that MMH would repay amounts owing to the parents who agreed that these amounts would be paid directly to the [taxpayer] by MMH.

- [50] Mr Armstrong was given instructions to that effect and the accounts of MMH are consistent with the intention of the parties, ie they do not show loans to the [taxpayer] but rather the repayments of amounts (referred to as 'wages') to the partnership.
- [51] The [taxpayer]'s submissions contend that the payments from MMH were payments from Thomas and Martinazzo that were in the nature of a loan (a 'family payment' from parents to son which could be repayable at the request of the parents) that would not in the normal course be repaid (unless it was necessary in the context of the business and family financial arrangements). Money that is given with no intention for it to be re-paid is in these circumstances either income or a gift.
- [52] The evidence clearly does not support the characterisation of the payments as loans and simply calling such payments a loan does not give them any particular status.
- [54] The amounts paid to the [taxpayer] by CRT were clearly also not loans. Given the regularity of the payments combined with the making of superannuation payments and the work being performed, they were equally clearly not gifts.
- [56] The Tribunal is of the opinion that all the amounts paid to the [taxpayer] by MMH and CRT have all the indicia of ordinary income.
- [59] ... It can be inferred from the [taxpayer]'s evidence that there was a clear expectation on his part that he would continue to receive these payments if he continued to perform similar work for the relevant operating entity.
- [61] The payments were so closely associated with the services which the [taxpayer] performed for MMH and CRT that the Tribunal concludes, as a matter of fact, that that they were a product of his services (Hill J in *Reuter*):
- [62] The [taxpayer] contends that the payments from MMH were a gift from his parents, of an entirely 'personal nature' and provided for his services to the 'family cause'. ... In the Tribunal's view the cases where a voluntary payment has been held to be a mere gift are clearly distinguishable from the facts in this case. This is clearly not a case of a single payment made for some personal quality of the recipient who has already been rewarded for his services. On the contrary:
- [62.1] They were regular weekly payments that would continue only while the [taxpayer] worked for the relevant operating entity (MMH or CRT), and therefore made in relation to services rendered rather than some personal quality.
- [62.2] The [taxpayer] was not otherwise rewarded for his services.
- [62.3] There was an expectation that he would be paid.
- [62.4] The payments were clearly a substitute for wages. Moreover, superannuation continued to be paid at the same rate.
- [69] In this case both the [taxpayer] and his agent, Mr Hoey, were involved in the discussions that took place in July 2002 and where it was agreed that the [taxpayer] would be paid amounts equal to, and in substitution for, the amounts that he previously received as wages. The amounts were not to be loaned to him but rather offset against his parents loan accounts or possible future trust distributions. In these circumstances, the failure of the [taxpayer] to include those amounts in assessable income was clearly a failure to give appropriately serious attention to complying with his obligations under the tax law, even taking into consideration the fact that he had no specialist tax knowledge. The position of the [taxpayer]'s tax agent, Mr Hoey, is even more clear: his specialised tax knowledge required a higher standard of care and recognition that the amounts were likely to be assessable as ordinary income.
- [79] The Tribunal is of the view there is no basis for the full or partial remission of the penalties. On the contrary, the following factors point to remission being inappropriate:
- [79.1] The amounts here were large in comparison with the other assessable income in the relevant year of income.
- [79.2] The [taxpayer] has a poor compliance record. The income tax returns for both the 2003 and 2004 year were lodged late following final notices issued by the [Commissioner] (GMSD2 pp.237-238 and 240-241). A final notice also had to be issued for the return for the year ended 30 June 2006 (GMSD2 pp.243-244).

(c) Decisions which are listed only – No extracts provided**1.3 Featured ATO interpretations**

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(b) TD Series - including TD Series in draft form**(1) ** TD 2009/3 ~ When does the taxpayer hold a beneficial interest in employee shares?**

[Source TD 2009/3 previously released as TD 2008/D18](#)

What is the issue?

For the purpose of subsection 139CD(6), does a taxpayer become the holder of a beneficial interest in shares merely by acquiring a contractual right to obtain shares in a company (the particular, individual shares not being ascertained at the time)?

What was the background to the determination?

Employee share schemes commonly allow for the grant of share options to employees.

A call option over a share gives the holder the right, but not the obligation, to obtain a share in a specified company at a predetermined date or during a predetermined period (the maturity date or exercise period) and at a predetermined amount (the exercise price).

The concept of an option is not legally precise, the being more than one legal means to achieve what may loosely be described as the grant of an option to obtain a share in a company.

Normally, under employee share schemes the terms of the option are governed by a contract between the parties conferring the relevant right on the employee, and there is no express trust or other more elaborate arrangement.

The draft Determination is concerned only with call options of this nature; that is, where the employee's express rights in relation to any relevant share are purely contractual.

What is the relevant legislative provision?

The tax consequences of acquiring a right to obtain a share in a company 'under an employee share scheme are governed by Division 13A of Part III (Division 13A).

If the right is a 'qualifying right', the employee taxpayer may choose one of two alternative concessions under Division 13A.

For a right to be a qualifying right, the conditions in section 139CD must be satisfied.

One of those conditions is that immediately after acquiring the right, the taxpayer must not hold a legal or beneficial interest in more than 5% of the shares in the company to which the right relates: subsection 139CD(6).

What is the Tax Office determination?

The Tax Office view is that:

- ◆ a taxpayer does not become the holder of a legal or beneficial interest in a share for the purposes of subsection 139CD(6), on acquiring a merely contractual right to obtain a share in a company under an employee share scheme, if the particular share is not yet ascertained;
- ◆ the expression 'hold a legal or beneficial interest' in a share:
 - c. *is not defined for the purposes of subsection 139CD(6);*

d. covers any kind of proprietary right over a share, whether recognised by law or equity;

- ◆ some grants of options:
- ◆ are to be regarded as arising under a contract for the sale of the underlying property that is conditional on the grantee later exercising the option;
- ◆ are to be regarded as the grantor making a contractually binding promise to keep open an offer to sell the underlying property should the grantee later elect to accept that offer, thus creating at that time a contract for the sale of the property;
- ◆ for the purposes of applying subsection 139CD(6) to a simple arrangement of the kind covered by this draft Determination it does not matter which of these situations exists;
- ◆ even if the grant of a particular option to acquire a share is correctly regarded as immediately creating a conditional contract for the sale of a share, merely entering into a contract for the sale of unascertained personal property does not create in the grantee any proprietary right, whether legal or equitable, in that property;
- ◆ there is no principle of equity that recognises the grantee as holding any proprietary interest over any particular share immediately after the option is granted;
- ◆ there is no authority to suggest that a constructive trust arises in this case.

(2) ** TD 2009/4 ~ Tainting share capital account

[*Source TD 2009/4 previously released in draft form as TD 2008/D17*](#)

What is the issue?

Can a company taint its share capital account for the purposes of Division 197 of the ITAA 1997 in accounting for a Dividend Re-investment Plan?

What are the relevant legislative provisions?

The share capital tainting rules are integrity rules designed to prevent a company from making tax-preferred capital distributions from a share capital account to which the company has transferred profits.

The share capital tainting rules operate by treating a company's share capital account as having been tainted if the company has transferred an amount from another account to the share capital account, other than where the amount transferred is an excluded amount (for example an amount of share capital or an amount transferred under a debt for equity swap).

If a company taints its share capital account:

- ◆ a franking debit arises in the company's franking account. Distributions from a tainted share capital account are treated as unfrankable dividends rather than returns of capital.
- ◆ it can elect to untaint its share capital account.

What is the Tax Office determination?

The Tax Office view is that if the issuing company's:

- ◆ Dividend Re-investment Plan (DRP) has certain features and is accounted for in an acceptable manner (each specified in the determination) the company will not taint the issuing company's share capital account for the purposes of Division 197;
- ◆ the draft Determination does not deal with Bonus Share Plans and 'scrip dividends'.
- ◆ the required features for the DRP are as follows:

e. optional for the shareholder and the shareholder:

- i. can participate with respect to the whole or part of their shareholding;
- ii. has the ability to vary participation or withdraw at any time;
- f. *shares issued under the plan rank equally with existing fully paid shares; and*
- g. *from the perspective of the issuing company, the share issue is by internal account transfers rather than cash payment of the dividend.*

(3) ** TD 2009/5 ~ The Commissioner's discretion on value of company assets

[Source TD 2009/5 previously released as TD 2008/D19](#)

What is the issue?

Can the Commissioner take into account the value, of the company's assets, not shown in the company's accounting records in exercising the discretion (in relation to determining the distributable surplus of the company) under subsection 109Y(2) to substitute an appropriate value for a private company's assets?

[The determination is particularly pertinent for a company with a large goodwill whose value is not shown in the accounting records of the company because accounting standards will not permit it.]

What is the effect of the determination on your practices?

Where shareholders/directors show that they regard the value of goodwill as sufficient to treat the earnings as an available surplus which may be safely appropriated by the owners of the company the Tax Office will substitute the real value of assets for the book value of assets.

What is the Tax Office determination?

The Tax Office view is that:

- ◆ for the purpose of working out a private company's distributable surplus under subsection 109Y(2) of the Commissioner's power to adjust the value of the company's assets is not limited if the company omits to assign a value to a particular asset in its accounting records;
- ◆ in exercising the discretion to substitute an appropriate value for a company's assets. The Commissioner must compare the value assigned in the company's accounting records to the totality of the company's assets and determine whether that value is substantially correct;
- ◆ where the company's accounting records understate the value of the company's assets because they are required to do so (for example where accounting standards require the value of internally generated goodwill to be omitted), the understatement is not itself an attempt to circumvent the operation of Division 7A;
- ◆ the Commissioner will not exercise his power under subsection 109Y(2) whenever accounting standards require the total value of assets to be understated;
- ◆ where it is plain that the company, its shareholders and directors have acted, in making loans or other payments, in a way that treats the real and higher value of assets as their true value, that is, regardless of their value shown in the accounting records, and that the mischief against which Division 7A is directed is present, the Commissioner may, and generally will, substitute the true value of the assets.

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2 GST

(a) Courts

(b) Tribunals

(c) Decisions which are listed only

23 Featured ATO interpretations

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

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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.

(1) ** TD 2009/6 ~ Reasonable food allowances

[Source TD 2009/6](#)

What is the issue?

What represents a reasonable food component of LAFHA allowance?

What is the Tax Office determination?

The Tax Office view is that the amounts listed below are acceptable as a food component for the fringe benefits tax (FBT) year commencing 1 April 2009. The amounts result from the indexation of the previous year's food component:

	per week
One adult	\$221
Two adults	\$354
Three adults	\$397
One adult and one child	\$286
Two adults and one or two children	\$397
Two adults and three children	\$463
Three adults and one child	\$463
Three adults and two children	\$529
Four adults	\$529

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

(2) ** TD 2009/7 ~ Cents per kilometre basis

[Source TD 2009/7](#)

What is the issue?

What are the rates to be applied on a cents per kilometre basis for calculating the taxable value of a fringe benefit arising from the private use of a motor vehicle other than a car for the fringe benefits tax year commencing on 1 April 2009?

What is the Tax Office determination?

The Tax Office view is that the rates to be applied where the cents per kilometer basis is used for the FBT year commencing 1 April 2009 are:

Engine capacity	Rate per kilometre
0 - 2500cc	44 cents
Over 2500cc	53 cents
Motorcycles	13 cents

(3) ** TD 2009/8 ~ Non remote housing benefits

[Source TD 2009/8](#)

What is the issue?

What are the indexation factors for valuing non-remote housing for the fringe benefits tax year commencing on 1 April 2009?

What is the Tax Office determination?

The Tax Office view is that The indexation factors for the purpose of valuing non-remote housing for the fringe benefits tax (FBT) year commencing 1 April 2009 are:

New South Wales	1.072
Victoria	1.062
Queensland	1.096
South Australia	1.053
Western Australia	1.127
Tasmania	1.046
Australian Capital Territory	1.078
Northern Territory	1.100

(4) ** TD 2009/9 ~ Exemption threshold

[Source TD 2009/9](#)

What is the issue?

For the purposes of section 135C of the FBT Act, what is the exemption threshold for the fringe benefits tax year commencing on 1 April 2009?

What is the Tax Office determination?

The Tax Office view is that the exemption threshold for the FBT year commencing 1 April 2009 is \$7,063.

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.

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5 SUPERANNUATION, ETP'S & PENSIONS**5.1 Politicians, Boards & Statutory Authorities****(1) ** Amendments to Improve Superannuation Guarantee Late Payment Offset [Sherry]**

Source: Amendments to Improve Superannuation Guarantee Late Payment Offset [No. 21- 13/3/2009 - Sherry]

Tax Laws Amendment (2008 Measures No. 6) Bill includes amendments to improve the operation of the Superannuation Guarantee late payment offset.

The existing late payment offset allows an employer who makes a late SG contribution into a superannuation fund to reduce their SG charge liability for a quarter.

The amendments:

- ◆ ensure that an employer will only be able to use the offset if they make SG contributions before they are assessed with the superannuation guarantee charge liability;
- ◆ provide an incentive for employers to make their super contributions in a more timely manner, while still providing employers with the option of using the offset to reduce their superannuation guarantee charge liability;
- ◆ improve the operation of the GIC applying to SG payments so that it will accrue on the remaining amount of any unpaid SG liability after the offset has been applied with the result that the GIC calculation takes into account the fact that the employer has made a contribution to the fund for the employee;
- ◆ will commence from the date the Bill receives Royal Assent.

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6 OTHER IMPOSTS, OFFSETS & REBATES**6.2 Courts & Tribunals****(a) Courts****(1) ** Diesel fuel purchases – off road credits (Asciano Services v C of T)**

Source: Asciano Services v C of T (Ryan, Stone & Edmonds JJ)

What is the issue?

Was the taxpayer entitled to off road credits for diesel fuel purchased for use in equipment deployed in connection with its rail transport enterprise?

What was the outcome?

The Full Court found that the diesel fuel must be used in the rail vehicle or in equipment in or on the rail vehicle.

What were the facts?

Some of the equipment was used to load and unload bulk freight containers onto the rolling stock used to transport the containers between the various terminals which the taxpayer operated throughout Australia.

Other equipment was used for safety testing including testing the brakes of the rolling stock using compressors.

None of the equipment was "in or on a rail vehicle".

All of the equipment was operated adjacent to the rail tracks.

The Commissioner disallowed the taxpayer's application for fuel credits and also disallowed the applicant's objection.

The trial judge held that the use of diesel fuel in equipment used for a purpose incidental to rail transport (as well as its use for air-conditioning, heating and lighting) must be "in or on a rail vehicle" if it is to be "use in rail transport".

What was the decision?

- [2] ... On appeal to this Court the primary judge accepted the Commission's contention that the use of diesel fuel in equipment used for a purpose incidental to the use of a rail vehicle is a qualifying use that gives rise to a credit entitlement **only** if the incidental use takes place "in or on a rail vehicle". ...
- [3] As the primary judge recognised, the question is one of statutory construction. ...
- [4] The meaning of the expression, "use in rail transport" is critical to the [taxpayer]'s claim. It is defined in s 38 of the Act ...
- [5] It is the interpretation of s 38(5) that is in issue in this appeal. The question is whether the requirement in the opening words of the subsection that equipment using diesel fuel in respect of which energy credits are claimed, must in all cases be "in or on a rail vehicle" or whether that requirement applies only to equipment used for air-conditioning, heating or lighting. In other words, for equipment to be used "in rail transport" is it sufficient for it to be used for "any purpose incidental to using the rail vehicle in rail transport" or is it also necessary for the equipment to be "in or on a rail vehicle"? If the latter interpretation is correct, it would not be sufficient for such equipment to be placed adjacent to the rail vehicle.
- [34] In our view the more natural construction of s 38(5) is that preferred by her Honour. It is also consistent with the very specific focus on on-rail activities that is evident in the other subsections of s 38. In particular ss 38(3)(a) and (b) specifically deal with loading and unloading as well as enabling persons to

board or alight from a rail vehicle. The subsections are clearly limited to circumstances in which the fuel is used in the rail vehicle or in equipment in or on the rail vehicle. In view of these quite specific provisions, it would be very strange if other forms of loading or unloading were intended to be caught up in the reference to incidental purposes in subsection (5).

(2) Leave to amend grounds (Esso Australia Resources v C of T)

[*Source: Esso Australia Resources v C of T \(Sundberg J\)*](#)

What is the issue?

Could the taxpayer have leave to rely on the additional grounds relating to two issues which the parties called the “taxing point amendment” and the “take or pay amendment”.

The take or pay amendment would only arise if the taxpayer is unsuccessful on the taxing point amendment.

The taxing point amendment related to some years of income and the take or pay amendment related to other years of income following a change in the relevant underlying laws.

What was the outcome?

The Court granted leave to the taxpayer to make the amendments sought notwithstanding the delay in the taxpayer bringing the application.

(b) Tribunals

(c) Decisions which are listed only

6.3 Featured ATO interpretations

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

(b) TD Series - including TD Series in draft form

(1) ** FTD 2009/1 ~ Fuel Tax Act

[Source FTD 2009/1](#)

What is the issue?

What is the meaning of ‘use’ for the purpose of section 41-5 of the Fuel Tax Act 2006?

What is the relevant legislative provision?

Section 41-5 of the *Fuel Tax Act 2006* applies to fuel you acquire, manufacture in, or import into, Australia with the intention of using it in carrying on your enterprise.

What is the Tax Office determination?

The Tax Office view is that the term ‘use’ means ‘expend or consume in use’, which in turn requires that the fuel, by putting it into service in carrying on your enterprise.

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

TR 2009/D1	Income tax: entitlement to foreign income tax offsets under section 770-10 of the Income Tax Assessment Act 1997 where income is derived from investing in fiscally transparent foreign entities
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(b) TD Series - including TD Series in draft form

TD 2009/3	Income tax: employee share schemes: for the purpose of subsection 139CD(6) of the Income Tax Assessment Act 1936, does a taxpayer become the holder of a beneficial interest in shares merely by acquiring a contractual right to obtain shares in a company (the particular, individual shares not being ascertained at the time)?
TD 2009/4	Income tax: in accounting for a Dividend Re-investment Plan, can a company taint its share capital account for the purposes of Division 197 of the Income Tax Assessment Act 1997?
TD 2009/5	Income tax: Division 7A: in exercising the discretion under subsection 109Y(2) of Division 7A of Part III of the Income Tax Assessment Act 1936 to substitute an appropriate value for a private company's assets, can the Commissioner take into account the value of the company's assets not shown in the company's accounting records?"
TD 2009/6	Fringe benefits tax: for the purposes of Division 7 of Part III of the Fringe Benefits Tax Assessment Act 1986, what amount represents a reasonable food component of a living-away-from-home allowance for expatriate employees for the fringe benefits tax year commencing 1 April 2009?
TD 2009/7	Fringe benefits tax: what are the rates to be applied on a cents per kilometre basis for calculating the taxable value of a fringe benefit arising from the private use of a motor vehicle other than a car for the fringe benefits tax year commencing on 1 April 2009?
TD 2009/8	Fringe benefits tax: for the purposes of section 28 of the Fringe Benefits Tax Assessment Act 1986 what are the indexation factors for valuing non-remote housing for the fringe benefits tax year commencing on 1 April 2009?
TD 2009/9	Fringe benefits tax: for the purposes of section 135C of the Fringe Benefits Tax Assessment Act 1986, what is the exemption threshold for the fringe benefits tax year commencing on 1 April 2009?

See section 1-3(b) & 3-3(b) for more information for above Taxation Determinations

(c) Class Rulings

CR 2009/8	Income tax: assessable income: Football Umpires: Combined Southern
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	Leagues Football Umpires Panel Incorporated
CR 2009/9	Income tax: distributions from the sale of land held by the Underbank Country Club Incorporated (in liquidation)
CR 2009/10	Income tax: scrip for scrip roll-over: exchange of shares in Select Design Technologies Limited for shares in International Innovations Limited
CR 2009/11	Fringe benefits tax: RewardsCorp Holiday Options Vouchers provided by RewardsCorp Trading Pty Limited clients to their own employees or to the employees of third party employers
CR 2009/12	Fringe benefits tax: RewardsCorp Resort Rewards Certificates provided by RewardsCorp Trading Pty Limited clients to their own employees or to the employees of third party employers
CR 2009/13	Income tax: Victorian Public Health Training Scheme Scholarships
CR 2009/14	Income tax: Goldman Sachs JBWere Capital Markets Limited; Goldman Sachs JBWere Group Holdings Pty Limited - Goldman Sachs JBWere Redeemable Capital Securities
CR 2009/15	Income tax: return of capital: DSF International Holdings Limited (previously Deep Sea Fisheries Limited)

(d) Product Rulings

PR 2009/5	Income tax: TFS Sandalwood Project 2009
PR 2009/6	Income tax: Goulburn Valley Orchards 2000 Project (8 March 2000 - 5 December 2000)
PR 2009/7	Income tax: Goulburn Valley Orchards 2000 Project (6 December 2000 - 5 June 2001)
PR 2009/8	Income tax: Goulburn Valley Orchards Project
PR 2009/9	Income tax: Macquarie Almond Investment 2009 - Early Growers (to 15 June 2009)
PR 2009/10	Income tax: ITC Diversified Forestry Project 2009
PR 2009/11	Income tax: 2007 Macgrove Project (2009 Growers)
PR 2009/12	Income tax: ITC Pulpwood Project 2009
PR 2009/13	Income tax: Tasmanian Premium Cherries Project (May 2009 Growers)
PR 2009/14	Income tax: Macquarie Eucalypt Project 2009 (pre 1 July 2009 Growers)
PR 2009/16	Income tax: payments assigned to representative public dentists under the Medicare Teen Dental Plan
PR 2009/17	Income tax: Department of Ageing, Disability and Home Care (NSW) Attendant Care Program Direct Funding Model

(e) Decision Impact Statements

DIS NSD 730 of 2008	Metlife Insurance Limited v Commissioner of Taxation
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7.3 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.

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

MT 2049W	Petroleum resource rent tax: calculation of PRRT instalments
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(b) ATO ID's

ID 2009/12	Energy Grants (Credits) Scheme: off-road credit - diesel fuel used in construction of premises
ID 2009/16	Foreign exchange (forex) gains and losses: bond maturity
ID 2009/17	A compulsory subscription payable from foreign earnings in a foreign country under a legislative decree is not income tax

(c) Practice Statements

PS LA 2009/1	The Commissioner's discretion to issue a written notice specifying the amount of a tax offset for research and development allowable to an eligible company
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(e) Other ATO publications**(1) Excise**

EXC 2009/1	Excise (Alcoholic strength of excisable goods) Determination 2009 (No. 1)
EXC 2009/2	Excise (Volume - Alcoholic excisable goods) Determination 2009 (No. 1)

(2) Fuel Tax Determination

FTD 2009/1	Fuel tax: what is the meaning of 'use' for the purposes of section 41-5 of the Fuel Tax Act 2006?
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(3) Income Tax

IT 2592W - Notice of Withdrawal	Income tax: cost of mains electricity connections
SPR 2009/1	Employment Termination Payments Redundancy Trusts (12 month rule)

(4) Operations

OPS 2009/2	Occasional payroll donations to deductible gift recipients
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7.4 Addenda & Errata & Withdrawals to documents not intended to be relied upon**(a) Addenda****(1) Class Rulings - Addenda**

CR 2008/24A - Addendum	Fringe benefits tax: employer clients of Australia and New Zealand Banking Group Limited who are subject to the provisions of section 57A of the Fringe Benefits Tax Assessment Act 1986 whose employees make use of the ANZ Business One - Salary Packaging Card facility
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(2) Product Rulings - Addenda

PR 2008/73A1 - Addendum	Income tax: Rewards Group Premium Timber Project 2009
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(c) Withdrawals**(1) Class Rulings - Withdrawn**

CR 2006/83W - Withdrawal	Income tax: Department of Ageing, Disability and Home Care (NSW) Attendant Care Program Direct Payment Pilot project
CR 2006/27W	Income tax: La Trobe University - Victorian Public Health Training Scheme Scholarships

(2) Interpretive Decisions - Withdrawn

ID 2005/219 (Withdrawn)	Loan Fringe Benefits: otherwise deductible rule - joint loans and the National Australia Bank decision
ID 2006/280 (Withdrawn)	Energy Grants (Credits) Scheme: Off-road credit - diesel fuel used in the construction of a premises

(3) Taxation Determination - Withdrawn

TD 20W	Capital gains: is there a disposal where assets are transferred on the merger or de-merger of superannuation funds?
TD 26W	Capital gains: where a pre-CGT lease is renewed post-CGT, what is the time of acquisition of the new lease?

8 LEGISLATION - UPDATE MATERIAL IS ACCESSED ON LINE THROUGH TAXMAP™

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9 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

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Interpretation

In these Tax Update Notes a reference to the:

- 10** AAT is a reference to the Administrative Appeals Tribunal
- 11** Administration Act is a reference to the Taxation Administration Act 1953
- 12** ADJR is a reference to the Administrative Decisions Judicial Review Act
- 13** ITAA 1936 or the 1936 Act is a reference to the Income Tax Assessment Act 1936
- 14** ITAA 1997 or the 1997 Act is a reference to the Income Tax Assessment Act 1997
- 15** ITR is a reference to the Income Tax Regulations
- 16** FBTA is a reference to the Fringe Benefits Tax Assessment Act (1986)
- 17** GST Act means is a reference to the A New Tax System (Goods and Services Tax) Act 1999
- 18** GST Regulations is a reference to the A New Tax System (Goods and Services Tax) Regulations 1999
- 19** SGAA means Superannuation Guarantee (Administration) Act 1992
- 20** The SIS Act is a reference to the Superannuation Industry (Supervision) Act
- 21** Tribunal is a reference to the Administrative Appeals Tribunal
- 22** 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.

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

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