



The February 2011 MTUN (**EARLY EDITION**)

~ tax education for the thinking tax professional

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A lot of noise about not much

Mr Shorten has been very noisy over the Christmas break. Analysis of his statements shows that the noise is about not much at all.

To whom does an agent owe a duty

Over a period of at least five years we have consistently drawn attention to tax agents who appear for clients at the Tribunal having acted for the client in the underlying transaction. This month taxpayers in two matters were represented by involved agents.

The involved agents lost both review application. In one of those matters the Tribunal said:

1. *I would add one further observation about the difficulties that may arise in proceedings conducted on behalf of a taxpayer by a tax agent or accountant where the outcome of the dispute may turn on the Tribunal's view of advice provided by that tax agent to its client. A tax agent has duties to its client, and there is a risk that those duties might conflict with*

the agent's own interests when the quality of the agent's advice is in issue before the Tribunal. It would usually be preferable for the taxpayer to obtain independent advice and representation at a hearing in those circumstances.

DON'T ACT FOR A CLIENT AT THE AAT IF YOU GAVE THE ADVICE TO THE CLIENT INITIALLY.

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1 INCOME TAX

1.1 Politicians, Boards & Statutory Authorities

(1) ** Regulating financial planners who provide Tax Agent Services [Shorten]

[Source: Month 12-2010-80 ~ 1-1 - Regulating Financial Planners Who Provide Tax Agent Services - Shorten, Media Release No. 018, 29 November 2010:](#)

The Government released an options paper in relation to how financial planners who offer tax agent services are regulated. Many of approximately 18,000 financial planners in Australia provide a tax agent service.

The paper, **Regulation of Tax Agent Services provided by Financial Planners**, puts forward options to ensure financial planners who offer tax agent services are regulated effectively.

The paper presents two options for consideration:

- ◆ Option 1 - bring tax agent services provided by financial planners permanently within the tax agent services regime and be regulated by the Tax Practitioners Board, but do so in a way that minimises any additional compliance burden.
- ◆ Option 2 - investigate and implement what changes, if any, might be made to the Australian Financial Services Licensing regime or its enforcement to ensure financial planners offering tax agent services are regulated to the same standards imposed on tax agents.

Copies of the options paper are available at www.treasury.gov.au and consultation closed on 25 December 2010

Editor

The three week consultation period was neatly timed! Too clever by half Mr Shorten!

(2) ** When spin is detected [Shorten]

[Source: Month 12-2010-82 ~ 1-1 - Improved Protections for Taxpayer Privacy - Shorten, Media Release No. 020, 30 November 2010:](#)

The confidentiality of taxpayers' personal information held by the Australian Taxation Office has been improved, following the passage of the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2010 through both houses of Parliament yesterday.

Existing tax secrecy and disclosure provisions found in 18 taxation Acts have been standardised and consolidated into a framework found, for the first time, in a single place in the taxation law.

Inconsistencies and complexities inherent in the existing laws have been removed to provide greater certainty for taxpayers, taxation officers and other users of taxpayer information.

The standardised confidentiality framework largely replicates existing disclosures, but also introduces a limited number of new disclosure provisions in the public interest, including for law enforcement agencies and courts.

Editor:

Far from having as their object the protection of taxpayer privacy the laws make it easier for government departments to share information.

(3) ** Release of Discussion Paper on Tax Relief for Consolidated Groups That Undertake Demergers [Shorten]

[Source: Month 12-2010-83 ~ 1-1 - Release of Discussion Paper on Tax Relief for Consolidated Groups That Undertake Demergers - Shorten, Media Release No. 021, 7 December 2010:](#)

Consolidated groups and Multiple Entry Consolidated groups (MEC groups) will find demerging and restructuring easier under proposed changes to the income tax laws.

The Government released a discussion paper on changes to the income tax law that will alleviate tax consequences that arise when a consolidated group or MEC group restructures by undertaking a demerger.

If a consolidated group or MEC group, of which there are about 9000 in Australia, restructures by undertaking a demerger and the demerged entities form a new group, then:

- ◆ any capital gain that would otherwise arise because a demerged entity has net liabilities at the time of a demerger will be disregarded
- ◆ the tax costs of assets held by subsidiary members of the new group will be retained.

These changes, announced in the Mid-Year Economic and Fiscal Outlook 2010-11, will apply to demergers that take place after 9 November 2010;

As a transitional rule, if a demerger took place on or before 9 November 2010 and a capital gain arose because the demerged entity had net liabilities when it left the consolidated group or MEC group, then any liabilities that were extinguished as a result of the demerger will be excluded from the consolidation tax cost setting calculations.

The discussion paper and further information about making a submission can be found on the Treasury website.

Submissions on the discussion paper are requested by Friday, 28 January 2011.

Editor:

With 900 consolidated and MEC groups in Australia there is an increasing likelihood that a client from a practitioner without any consolidation knowledge, will buy an entity or business from one of the 9000 entities triggering the need to deal with at least the threshold consolidation issues or risk losing the client in the longer term.

(4) * Montserrat and the Republic of Mauritius Help Australia Fight Tax Evasion [Shorten]

[Source: Month 12-2010-84 ~ 1-1 - Montserrat and the Republic of Mauritius Help Australia Fight Tax Evasion - Shorten, Media Release No. 022, 9 December 2010:](#)

Two more nations, the Caribbean island of Montserrat and the Republic of Mauritius, have signed bilateral Tax Information Exchange Agreements (TIEA),.

There are now 27 jurisdictions that have signed such Agreements with Australia.

This Agreement provides a legal basis for Australia to exchange taxpayer information with both nations.

Each of the agreements will enter into force when the countries' relevant domestic requirements have been completed.

Copies of the agreements can be found on the Treasury website www.treasury.gov.au.

(5) ** Is it a rewrite of or an update to the trust laws in division 6? [Shorten]

[Source: Month 12-2010-89 ~ 1-1 - Farmers Benefit with Changes to Trust Laws - Shorten, Media Release No. 025, 16 December 2010:](#)

The recent High Court decision in *Commissioner of Taxation v Bamford* highlighted the ongoing discrepancies between the treatment of trust income by trust laws, on the one hand, and by the tax system on the other.

There are also major uncertainties after *Bamford*, especially about the extent to which amounts derived by trustees retain their character (for example, as capital gains or franked dividends) when they flow through to beneficiaries.

The Government plans to introduce amendments before 30 June 2011 so that beneficiaries can continue to use the primary production averaging and farm management deposits provisions in a loss year.

To address these issues the Government announced a public consultation process as the first step towards updating the trust income tax provisions in Division 6 of Part III of the Income Tax Assessment Act 1936 (ITAA 1936) and rewriting them into the 1997 Act.

Any options will seek to ensure that net taxable income of a trust is assessed primarily to beneficiaries. Trustees will continue to be assessed only to the extent that amounts of net taxable income are not otherwise assessable to beneficiaries. The options will not include the taxation of trusts as companies, which would be a major departure from the current law.

The development of these options and the updating and rewriting of the trust income tax provisions responds to Recommendation 36 of Australia's Future Tax System review, which was conducted by an independent panel chaired by Treasury Secretary, Dr Ken Henry.

Editor:

While a decision to implement a further recommendation of the Henry Review is welcome taxpayers will rue the update. It has been the constant haranguing, by one and all, of the inadequacies of the current legislation that has forced the government's hand.

We respectfully submit that Treasury will take the opportunity to "update" the trust provisions to launch an attack on the tax efficacy of trusts. An update is not a rewrite.

Losses are but one aspect of trusts, even for farmers.

How can anyone serious commentator maintain that farmers will benefit when the changes haven't been decided. This government's spin doctors are taking us all for fools.

(6) ** Anstis – no retrospective changes but possible changes coming [Shorten]

Source: Month 12-2010-90 ~ 1-1 - ATO Decision Impact Statement on Anstis - Shorten, Media Release No. 026, 17 December 2010:

The Government will not amend the tax law retrospectively to deny deductions against Youth Allowance for prior years following the High Court decision in *Commissioner of Taxation v Anstis*.

The ATO's Decision Impact Statement indicates that it accepts educational expenses such as textbook costs and depreciating a computer used for study purposes as allowable deductions against Youth Allowance.

The Tax Office will allow an automatic deduction of \$550 from the 2006-07 to the 2009-10 income years for eligible taxpayers and potentially higher claims for those eligible taxpayers who can prove their expenses. The ATO estimates the average refund taxpayers will receive in their pocket will be \$90 for each year and more if receipts can be provided.

In terms of deductibility against youth allowance for the current and future income years, this will be considered by the Government in the New Year.

(7) ** Tax assistance for flood assistance – record reconstruction visits [Shorten]

Source: Month 01-2011-81 ~ 1-1 - Tax Assistance for Flood Assistance ~ Shorten, Media Release No. 002, 6 January 2011

Flood victims in Queensland can get their tax payments deferred and refunds fast-tracked after the Government announced a series of measures to make things a little easier for people dealing with the devastation of the worst floods in recent memory.

The ATO can provide the following services:

- ◆ Fast tracking refunds
- ◆ Providing people and businesses extra time to pay debts – without interest charges
- ◆ Giving extra time to meet activity statement, income tax and other lodgement obligations – without penalties
- ◆ Helping to reconstruct tax records where documents have been destroyed, and make reasonable estimates where necessary
- ◆ Assisting people if they are experiencing serious hardship.

To request a free 'record reconstruction visit' register online at www.ato.gov.au/assistancevisit. Tick only the box for record reconstruction.

The ATO has set up a dedicated emergency support info line – 1800 806 218 – or visit the website at www.ato.gov.au.

(8) ** Declaration of the 2011 Victorian & NSW Floods as Disasters for Tax Purposes [Swan]

[Source: Month 01-2011-85 ~ 1-1 - Declaration of the 2011 Victorian and New South Wales Floods as Disasters for Tax Purposes ~ Swan, Media Release No. 004, 19 January 2011](#)

The Treasurer:

- ◆ has declared the Victorian floods a disaster for the purposes of establishing Australian disaster relief funds, effective from 15 January 2011;
- ◆ has declared the New South Wales floods a disaster for the purposes of establishing Australian disaster relief funds, effective from 10 January 2011.

A similar declaration has been made by the Queensland Government in relation to floods in that state.

These declarations (and the declarations by the Queensland Government) ensure that qualifying existing funds established for the relief of people in communities affected by the floods, and new funds, can receive tax deductible donations.

Funds, which can provide money or direct assistance for relief, recovery and community reconstruction work to assist affected individuals and communities, still need to apply to the Tax Office for formal endorsement, and the Tax Office has established a fast track process for this purpose.

Donations to Australian disaster relief funds, established to provide relief in the aftermath of the floods, will be tax deductible for a period of two years from the date of the respective declarations.

The Australian Government will continue to assist flood affected communities as they undertake the long task of rebuilding and re-establishing.

(9) * Release of Exposure Draft Legislation for the Taxation of Alternative Fuels [Shorten][

[Source: Month 01-2011-91 ~ 1-1 - Release of Exposure Draft Legislation for the Taxation of Alternative Fuels ~ Shorten, Media Release No. 017, 24 January 2011](#)

The Assistant Treasurer released draft legislation for public consultation on the Government's reform of the taxation of alternative fuels.

The Government's long standing plan is to bring alternative fuels into the fuel taxation regime, with a 50% tax discount compared to regular petrol on an energy equivalent basis.

The draft legislation:

- ◆ removes the need for offsetting grants for the gaseous fuels and biodiesel producers;
- ◆ encourages innovation by ensuring eligible second generation production processes can be used to produce domestic ethanol and qualify for a grant.

The changes to fuel taxation are being phased in over the period beginning 1 December 2011 and ending 30 June 2015 which allow the alternative fuels industry time to adjust to these changes. Grants to eligible ethanol producers will be phased down until 1 July 2020.

The exposure draft legislation and draft explanatory material as well as a list of specific questions on which feedback is sought are available at www.treasury.gov.au.

The Government will also conduct targeted consultation meetings with key stakeholders on the exposure draft material. The due date for written submissions is the close of business on Friday 18 February 2011.

Details of the implementation of the taxation of alternative fuels policy were announced on 13 May 2010 in joint press release No. 99 released by the former Assistant Treasurer and the Minister for Resources and Energy.

(10) * Consultation on Tax Breaks for Green Buildings scheme [Shorten & Dreyfus]

[Source: Month 01-2011-86 ~ 1-1 - Consultation on Tax Breaks for Green Buildings scheme ~ Shorten & Dreyfus, Media Release No. 011, 20 January 2011](#)

Tax breaks for redevelopments that will substantially improve the energy efficiency of existing buildings are the subject of a new public consultation paper.

From 1 July 2011, the Tax Breaks for Green Buildings scheme will offer businesses that invest in eligible assets or capital works to improve the energy efficiency of their existing buildings – from 2 stars or lower to 4 stars or higher – the ability to apply for a one-off bonus tax deduction of 50 percent of the cost of these improvements.

The consultation paper has been prepared to explain the key features of the proposed program design, in particular, the eligibility criteria and assessment and certification processes.

Organisations and individuals are welcome to submit their views on the proposed program design by 18 February 2011. Details on how to make a submission can be found in sections 1.4 and 1.5 of the consultation paper.

For more information on the consultation process, including the information sessions, please refer to the Tax Breaks for Green Buildings information page on the Department of Climate Change and Energy Efficiency website: <http://www.climatechange.gov.au>

(11) ** Consultation on the design of the tax system advisory board [Shorten]

[Source: Month 01-2011-88 ~ 1-1 - Consultation on the Design of the Tax System Advisory Board ~ Shorten, Media Release No. 014, 21 January 2011](#)

On 5 August 2010, the Government announced its intention to establish the Board to advise the Commissioner of Taxation and the ATO's Executive Committee on the general management and organisation of the ATO.

In late 2010 the Government formed a panel consisting of David Parker (Treasury's Revenue Group Executive Director), Jennie Granger (ATO Second Commissioner), Richard Warburton (company director and Chair of the Board of Taxation) and Jillian Segal (company director and Deputy Chancellor of the University of New South Wales) to facilitate this consultation.

This Consultation Panel will provide advice to the Government about the best way of proceeding with this commitment.

The next stage of this consultation process involves publicly releasing a discussion paper outlining different ways of establishing the Board and seeking submissions from the public. A critical issue will be maintaining the Commissioner's independence to administer the tax laws, whilst providing him with quality, relevant advice on organisational matters.

A copy of the discussion paper and information about how to make a submission is available on the Treasury website (www.treasury.gov.au). The closing date for submissions will be 11 March 2011.

The Consultation Panel will consider the submissions and provide its advice to the Government by 30 June 2011.

(12) ** Government Welcomes Policy Transition Group Reports [Swan]

[Source: Month 12-2010-87 ~ 1-1 - Government Welcomes Policy Transition Group Reports - Swan, Media Release No. 096, 21 December 2010:](#)

The Government received the Policy Transition Group's reports on the implementation of the new resource taxation reforms, and minerals and petroleum exploration.

The Group, jointly led by the Resources and Energy Minister Martin Ferguson and Don Argus, was established to advise on the implementation and technical design elements of the tax reforms, with the aim of minimising compliance costs and enabling a smooth transition to the new arrangements.

The Group undertook an extensive consultation process with over 80 formal submissions received in response to the consultation paper released on 1 October 2010, and a significant number of face-to-face discussions with industry and other stakeholders.

The Government:

- ◆ will now consider the recommendations of the report in detail and respond in early 2011 following Cabinet consideration and discussions with state and territory governments. The report will also inform the preparation of exposure draft legislation by mid-2011, which will be subject to further consultation.
- ◆ welcomes the proposal to establish an implementation group, comprising experts from industry and the tax profession, and officials from the Treasury, Australian Taxation Office and the Department of Resources, Energy and Tourism.

The Policy Transition Group reports are available at http://www.futuretax.gov.au/pages/resourcetax_PTG_reports.aspx

(13) * Tax exemption for business assistance payments paid to flood victims [Shorten]

[Source: Month 01-2011-90 ~ 1-1 - Tax exemption for business assistance payments paid to flood victims ~ Shorten, Media Release No. 016, 21 January 2011](#)

The Government has announced that clean-up and recovery grants of up to \$25,000, paid to primary producers and small businesses directly affected by the recent flooding that has occurred since 29 November 2010, will be exempt from tax.

Such grants would normally be treated as assessable income, with taxpayers able to claim deductions for the associated expenditure. However, in light of the extraordinary hardship suffered by those affected by the recent flooding, the Government has decided to make these payments non-assessable, non-exempt income. This ensures the grants are exempt from income tax, while also avoiding interactions with other areas of the income tax.

The Government has also confirmed that the Disaster Income Recovery Subsidy, which was announced by the Prime Minister on 10 January 2011, to assist employees, small business persons and farmers who have lost their income as a direct consequence of the flooding, will also be tax exempt.

Editor

This announcement begs a question or two – is a business in receipt of non assessable non exempt flood relief payment entitled to deduct expenditure on making good flood damage that exceeds the relief payment?

e.g. If the taxpayer received a flood relief payment of \$25,000 but incurred clean-up expenses totaling \$40,000 what deduction would be allowable to the taxpayer?

1.2 Courts & Tribunals

(a) Courts

(b) Tribunals

(1) *** Was the accountant engaging in legal practice?[Sinclair and C of T]

Source: Month 11-2010-43 ~ 1-2(b) – Sinclair and C of T [2010] AATA 902 (16 November 2010) Deputy President SA Forgie

What is the issue?

Was the \$99,000 deductible as interest expense or was it capital expenditure?

What was the outcome?

The Tribunal found that the \$99,000 was not interest expense and so was not deductible.

What were the facts?

Mr Sinclair had noticed on a house, not in good condition, on a site near his home and noticed that various developments had been proposed for the site.

In May 2005, he noticed boardings going up on the property and made enquiries which led him to understand that the owner of the property, Towerlake Pty Ltd (Towerlake), had been frustrated in obtaining planning approval for its proposal that it build two units on the site.

Three or four years and a court case later, Towerlake's focus and finances had changed and its mortgagee, Statewide Secured Investments Ltd (Statewide), was threatening foreclosure.

Mr Sinclair telephoned Towerlake and from the ensuing conversation understood that:

- ◆ Towerlake was looking for cash flow before the end of June 2005;
- ◆ that the managing director could get all the shareholders to "sign off" on a transfer of the property before 30 June

2005.

Mr Sinclair:

- ◆ was very interested in purchasing the property but could “*not see how the legals would work*” and contacted his lawyer and his accountant.
- ◆ asked his lawyer how he could buy the property quickly and solve the problem of Towerlake’s cash flow. If he were to pay the interest himself, the finance would remain in place;
- ◆ had a discussion with his lawyer to have the amount recognised as a pre-paid interest on the loan.

On 30 June 2005, Mr Sinclair entered a contract to purchase the property on certain terms and conditions including that:

- ◆ that he would pay \$99,000 to the vendor’s mortgagee to cover the interest due and payable by the vendor under the mortgage for the period from 30 June 2005 to 15 December 2005;
- ◆ if the amount of the interest due under the mortgage in respect of that period proved to be less than \$99,000, Mr Sinclair agreed to pay the difference to the vendor.

The property was tenanted at the date of sale.

In his income tax return for the year of income ending 30 June 2005, Mr Sinclair claimed a deduction in the amount of \$99,000 on the basis that it was “*interest on loans*”.

The Commissioner refused to allow the deduction.

After advising Mr Sinclair that he had been selected for audit in respect of the deduction claimed for the interest, the Commissioner issued a Notice of Assessment dated 27 March 2006 and a Notice of Assessment and Liability to Pay Penalty dated 28 March 2006.

The total of the tax assessed and the penalty was \$12,003.75.

Mr Sinclair unsuccessfully objected and now seeks review of the decision.

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

The decision itself is unremarkable, it is the Deputy President’s comments that pose the greatest concern. In considering whether the taxpayer could establish that he had taken reasonable care by relying on the advice of his accountant the Deputy President said:

“[Name of Tax practitioner] is a Fellow of the Tax Institute of Australia but he could not give legal advice regarding the taxation implications of the arrangements.¹”

The conclusion that flows from that comment and the context in which it was made was that the only advice that the taxpayer could seek that would have resulted in the taxpayer being able to avoid a penalty would have been from a person qualified as a legal practitioner. It wasn’t necessary to make that observation in order to impose the penalty and it would have been better if the comment hadn’t been made. The penalty could as easily have been set by finding that the tax agent had not taken reasonable care.

That that conclusion is the correct conclusion to draw is established by reference to the member’s later comments:

“I am satisfied that a reasonable person would have sought legal advice from a tax lawyer before claiming the deduction.”

¹ Section 2.2.2(1) of the *Legal Profession Act 2004* (Vic) provides that “A person must not engage in legal practice in this jurisdiction unless the person is an Australian legal practitioner.” Section 2.2.2(2) provides for a number of qualifications to the prohibition and notes another provided for in the *Estate Agents Act 1980* (Vic) but none applies to an accountant.

Tax practitioners who are not able to engage in legal practice have much to fear from this approach. Not all legal practitioners have the capacity to give tax advice.

What was the decision?

2. I have decided to affirm the objection decision.

Entering a contract to purchase the property

6. That amount of \$99,000 was in addition to the purchase price and was dealt with separately in the contract. That amount of \$99,000 was in addition to the purchase price and was dealt with separately in the contract.
8. The contract of sale for the property shows the price to be \$1,950,000. Mr Sinclair was required to pay a deposit of \$1,000 on the day of the sale, i.e. 30 June 2005. The balance was to be paid on 15 December 2005 in accordance with Special Condition 19.² In the main, Special Condition 19 is concerned with the mortgage held by Statewide over the property and the interest payable by Towerlake on that mortgage up until settlement of the sale. The interest was defined to mean the interest due and payable by the vendor under the mortgage from 30 June 2005 to settlement up to an agreed amount capped at \$99,000. With regard to that interest, Special Condition 19 provides:

“19.2.1 On the Day of Sale the Vendor will assign to the Purchaser in consideration of this Contract all of its rights and obligations to pay the Interest.

19.2.2 On the Day of Sale the Purchaser shall make payment of the Interest directly to the Mortgagee, in full and final satisfaction of the Vendor’s obligations under the Mortgage to pay the Mortgagee the Interest. The Mortgagee shall acknowledge receipt of payment of the Interest but the Vendor remains liable to pay interest on the Mortgage in excess of the Interest.

19.2.3 The Purchaser shall, making payment of the Interest shall have no further responsibility to the Vendor or the Mortgagee for the payment of the Interest.

19.3 ...

19.4 ...

19.4.1-19.4.3 ...

19.4.4 the Vendor must procure the Mortgagee’s consent to the Contract of Sale and also the Mortgagee’s consent to accept prepayment of Interest from the Day of Sale, until the Settlement Date which shall be applied solely towards payment of Interest for that period.

19.5 In consideration of Tower Lake P/L entering into a contract of today’s date of the land comprised in Certificate of Title ... I Richard Peter Sinclair agree that in the event that the interest due to the mortgage referred to in the contract is less than \$99,000 then I agree to pay Tower Lake P/L the difference.”³

9. Special Condition 19.3 provided that “As from the Day of Sale the Purchaser shall be entitled to the receipt of the rent and income from the Property.”⁴ The provisions of Special Condition 19.4 that I have omitted in the preceding paragraph provide that “the Purchaser shall accept the risk in the Property”, would be responsible for all statutory rates and outgoings from the Day of Sale until the Settlement Day and for effecting insurance of all improvements on the property.

Mr Sinclair’s plans for the property

14. Mr Sinclair focused on developing the property. It would have been problematic to put tenants into it and then have to remove them. In any event, the builder and the architect needed access to the building. ...

² T documents, T4-49 and Supplementary T documents (ST documents), ST5-109

³ ST documents, ST5-113

⁴ ST documents, ST5-113

15. It was not until September or October 2005 that Mr Sinclair decided that he was not going ahead with the building. He and his wife lived ..nearby ... [and] decided to sell the house in which they were living and move into the property Mr Sinclair had just purchased. In order to do that, they moved to an apartment while they did some renovations on the house. ... The family moved into the property at Easter 2006.

Advice sought by Mr Sinclair regarding the purchase of the property

16. I accept that Mr Sinclair sought advice before he entered the contract with Towerlake. A more recent advice dated 19 May 2010 from his solicitors sets out their understanding of the transaction. That understanding accords with my summary of the contract. Their letter states:

“I also confirm from my file that we were not asked to nor did we provide any formal taxation advice to you as to whether or not the prepayment which you had negotiated would in fact be tax deductible.”

17. Mr Sinclair’s accountant, Mr Terrence Jasper, wrote in his letter to the Tribunal and dated 4 June 2010:

“13. I confirm that Mr Sinclair did obtain advice from us in relation to whether the prepayment was deductible. We advised Mr Sinclair that interest paid on a loan obtained to acquire an investment property was indeed deductible. We also advised Mr Sinclair that any prepayment of this interest would be deductible in respect of the year during which the interest was paid.

14. Since Mr Sinclair entered into the loan agreement to acquire an investment property during the year ended 30 June 2005, and interest of \$99,000 was paid on this loan during the year ended 30 June 2005. We believe that this interest payment is deductible to Mr Sinclair in the year ended 30 June 2005.”

18. In a letter to the Australian Taxation Office dated 30 July 2010, Mr Jasper observed that “... *there is so much compelling evidence that this interest payment of \$99,000 in relation to a Vendor loan relating to the purchase of an investment property is a deductible expense to the subject taxpayer.*”⁵

CLAIM FOR A DEDUCTION OF \$99,000 FOR INTEREST ON LOAN

Expenditure for which deduction claimed must be referable to assessable income gained or produced

29. The expenditure for which a deduction is claimed must be referable to assessable income gained or produced. That does not mean that it must be referable to the whole of the assessable income gained or produced by the taxpayer but it must be referable to some part of it.

32. ... That part which is referable is deductible but not otherwise. ...

How to determine whether an outgoing is “incurred in gaining or producing” assessable income?

37. Determining whether particular expenditure has been incurred in gaining or producing assessable income is a question of fact⁶ ...

...

38. It is necessary to examine the circumstances and transactions in order to determine the character of the advantage sought by the taxpayer in making the outgoings. ...

The submissions

53. On behalf of Mr Sinclair, Mr Jasper submitted that his client had taken constructive ownership of the property on 30 June 2005. He settled by way of a vendor loan of \$1,949,000 payable on 15 December 2005.⁷ The December date was chosen to enable Towerlake to have sufficient time to facilitate the transfer of the title to Mr Sinclair. The contract would have been completed on the day of the contract had Towerlake been able to secure a clear title on that day to enable it to complete the settlement. During the year of income ending 30 June 2006, Mr

⁵ ST documents, ST7-117

⁶ *Ronpibon Tin NL and Tongkah Compound NL v Federal Commissioner of Taxation* [1949] HCA 15; (1949) 78 CLR 47; 8 ATD 431 at [18]; 59; 437

⁷ See Mr Jasper’s letter dated 4 June 2010 at [4] and [8]

Sinclair was entitled to receive rent earned from the property and was responsible for all costs and outgoings in respect of the property.

54. The amount of \$99,000, Mr Jasper submitted, was a separate matter. It was prepayment of the interest due under the loan of \$1,949,000. The amount of the prepaid interest, which was prepaid on 30 June 2005, was deductible as it is interest due on a loan relating to the purchase of an investment property. During the year ending 30 June 2006, Mr Sinclair received rent from the property and incurred all outgoings on the property.
55. In his oral submissions, Mr Jasper also submitted that Mr Sinclair had purchased the property with a view to developing it. Had he gone ahead with building the units on the land, for which approval had already been given, the proceeds of their sale would have given rise to income and not to a capital gain.
56. On behalf of the Commissioner, Ms Lecordier submitted that Mr Sinclair had acquired the property not to derive income but to develop it with an eye to its returning a capital gain. Towerlake remained the legal owner of the property and was the entity entitled to the rental between 30 June 2005 and the settlement date. Mr Sinclair was not the legal owner of the property held for the purpose of gaining or producing rental income and did not have an exclusive right to use the property during that period. The expense was not incurred in gaining or producing Mr Sinclair's assessable income but, rather, was incurred to generate Towerlake's assessable income.

What is the proper characterisation of the payment of \$99,000?

57. I will begin with Mr Jasper's submission that there exists a "vendor loan" of \$1,949,000 on which Mr Sinclair owed, and made a prepayment of on 30 June 2005, the sum of \$99,000 to Towerlake. The contract does not support that submission. It is clear from Special Condition 19.1 of the contract between Mr Sinclair and Towerlake that the term "Interest", which is an amount capped at \$99,000, is the interest due and payable by Towerlake to Statewide. It is not interest payable on any loan from Towerlake to Mr Sinclair. That finding is further supported by Special Condition 19.2.2 which refers to Mr Sinclair's paying the amount to Statewide in full and final satisfaction of Towerlake's obligations under the mortgage to pay the interest. There is no reference to Mr Sinclair's paying interest in full and final satisfaction of his obligations according to any loan agreement between him and Towerlake. Furthermore, Special Condition 19.2.2 refers to Towerlake's remaining liable to pay Statewide any interest in excess of the sum of \$99,000.⁸ The loan in respect of which the sum of \$99,000 represented interest was the loan from Statewide to Towerlake. There was no loan from Towerlake to Mr Sinclair. The balance of the purchase price was due on the settlement date i.e. 15 December 2005.
58. The characterisation of the sum of \$99,000 is also important. Mr Sinclair paid it to Statewide. Statewide acknowledged its receipt of the money on behalf of the Towerlake account. It made no reference to its being interest on the loan but it clearly accepted the money as payable in respect of the account. There is no evidence that it actually consented to accept prepayment of the interest as required by Special Condition 19.4.4. There is no evidence that it accepted it as payment of interest rather than a payment of capital. Assuming that Statewide accepted it as a payment of interest and Towerlake regarded the payment as satisfying its obligation in that regard to Statewide, it does not automatically follow that the payment was a payment of interest from Mr Sinclair's point of view. Certainly, Special Condition 19.1 characterised the amount as a payment of interest and, ignoring Special Condition 19.5 for the moment, the Additional Special Conditions described it as such. Special Condition 19.5 puts the sum in a different light. It becomes clear from that clause that the entire sum of \$99,000 is payable by Mr Sinclair even if it exceeds the amount of interest due by Towerlake to Statewide. In the absence of any evidence as to the amount of the interest payable to Statewide, that clause leads me to conclude that the relationship between the sum of \$99,000 and a payment of interest is one of timing and convenience but not one of substance. It is one of timing and convenience in that Towerlake required that sum to be paid to Statewide to extricate from its immediate financial embarrassment. It is not one of substance. Special Condition 19.5 cast aside any link of substance when it provided that Mr Sinclair must pay to Towerlake any difference between the sum and the amount of the interest owed by Towerlake to Statewide. That sum is clearly part of the purchase price payable by Mr Sinclair. It is not payable on Settlement Day but the manner of payment of the purchase price is a matter for the contracting parties.
59. As part of the purchase of the property, it is a capital expenditure and so excluded from the deductibility provision in s 8-1(1) by s 8-1(2)(a) of ITAA97. Mr Sinclair understood that any interest paid on a loan was deductible but what he has misunderstood is that s 8-1(1) only permits the deduction of a loss or outgoing to the extent that *he* has incurred it in gaining or producing assessable income. If anybody has incurred a loss or

⁸ See [8] above

outgoing in gaining or producing assessable income, it was Towerlake for it incurred the interest payable on the loan it obtained from Statewide. Mr Sinclair did not obtain that loan.

60. The attempt in Special Condition 19.2.1 to assign Towerlake's obligation to pay interest to Mr Sinclair does not achieve that result. I know of no way in which an obligation to pay interest can be transferred from a debtor to another person without the consent of the person lending the money and, effectively, negotiating and entering a new contract to which the lender and the other person are the parties.
61. The obligation to pay interest cannot be a chose in action for that is a right of property and not an obligation:
...
63. My conclusion that the payment of \$99,000 was capital expenditure leads to the conclusion that it is not deductible and my deciding to affirm the Commissioner's objection decision in so far as it relates to the assessment.
64. Should I be incorrect in my conclusion regarding the proper characterisation of the payment of \$99,000, I have also looked at whether any loss or expenditure was incurred in gaining or producing assessable income. I have decided that it was not.

Was Mr Sinclair's interest payment incurred in gaining or producing assessable income?

65. The contract of sale provided for Mr Sinclair to be entitled to the receipt of income and rent from the property from 30 June 2005. The contract also provided that he accepted the risk and would be responsible for effecting insurance in respect of all improvements. As matters turned out, Mr Sinclair received no rent from the property at all. The final payment of rent was made on 19 August 2005. As it was made in respect of the period ending 23 June 2005, it was not an amount of rent to which Mr Sinclair was entitled under the contract of sale. I accept that he expected to receive rent and was surprised when he found that the Georges, to whom the property had been rented, were no longer there and there were only two sub-tenants remaining on the property for a short period.
66. An entitlement to receipt of the income and rent does not equate with an entitlement to lease the property of one's own volition. The transfer of risk to Mr Sinclair does not change my view. There is no evidence that Towerlake took any steps to find a tenant for the property. There were no tenants, no receipt of rent and no possibility of the receipt of income in the absence of any attempts to find tenants. If I am incorrect in my view that Mr Sinclair was not entitled to find a tenant for the property, I am satisfied on the basis of his evidence that he did not take any steps to do so. Initially, he did not want to do that because the presence of tenants would interfere with the access that any architect or builder would have to the property. Once he had decided to use the property as the family home, the idea of leasing the property seems to have faded altogether. That decision was made in September or October 2005 even though the family did not move into the property until Easter 2006.
67. These findings lead me to conclude that, so far as rental is concerned, Mr Sinclair did not gain any assessable income. No steps were taken by either Towerlake or Mr Sinclair with the intention of there being any rental income generated by the property at any time following 23 June 2005 or in the financial year ending 30 June 2006.
68. Mr Jasper also submitted that I should have regard to Mr Sinclair's plan to develop the property. While I accept that Mr Sinclair had that plan in mind when he purchased the property, it lasted but a short time. Other than having an architect look at the property as a friend, he did not take any steps to bring it to fruition. He did not even take preliminary steps such as gaining formal architectural advice, considering whether he would continue with Towerlake's plans, examining how he would finance the development, assessing when it would be completed and how it would be marketed and so on. Mr Sinclair did not pay the sum of \$99,000 to pursue or fund any of those steps. He did not pay it with an eye to carrying out the development at any future stage let alone incur it in gaining or producing assessable income in the financial year ending 30 June 2006 or with the hope of gaining it in the future when a development was complete. Although Mr Sinclair is involved in property development as a director of his family company, he had but acquired the property in this matter with the idea of developing it; nothing more. By the time he lodged his return in August 2005, he had spent the sum of \$99,000 as part of the price he had to pay to obtain the property so that he could have a practical basis on which to implement his idea if he decided to implement it at all. That sum was capital expenditure, and so not deductible. Had it not been capital expenditure, I am not satisfied that it was spent by Mr Sinclair to bring his idea to fruition or even to explore whether it was an idea that might bear fruit in the future. I am not satisfied that the sum paid by Mr Sinclair is properly characterised as a loss or outgoing incurred for the purpose of gaining or producing assessable income at some future time.
69. In view of my findings, I have decided that the Commissioner's objection decision relating to his assessment for the year of income ending 30 June 2005 should be affirmed.

PENALTIES

Liability to an administrative penalty

71. The Commissioner has taken the view that Mr Sinclair made a statement that was false or misleading in a material particular and so is liable to an administrative penalty. In view of the findings of fact that I have made, I am satisfied that Mr Sinclair has done so. On the basis of those findings, I have decided that he had no basis on which to claim the deduction. ...Having heard Mr Sinclair give evidence, I do not consider that he made the statement knowing it to be false but s 284-75(1) does not refer to the statement's being intentionally false or misleading; only that it is. I cannot read that additional requirement into either the words themselves or in the section....
73. The principles established in *Dela Cruz* seem equally applicable in this case. A statement claiming a deduction when none is claimable is false in a material particular. ...taxpayer may properly reduce what would otherwise be the amount of taxable income for any year of income by claiming a deduction. ...
74. That does not mean that every false claim for a deduction is false "*in a material particular*". Regard must be had to the impact of the false statement upon the assessment of a taxpayer's taxable income and tax payable upon it. In this case, Mr Sinclair's claim for a deduction of \$99,000 had a significant impact upon the assessment of his taxable income and so the tax that would otherwise be payable upon it. His claim for a deduction was false in a material particular. Therefore, I have concluded that he is liable to an administrative penalty under s 284-75(1) of the TA Act.

Determining the amount of the administrative penalty

78. Mr Jessup submitted that Mr Sinclair had taken reasonable care when he obtained appropriate **legal** and taxation advice in relation to the matter. What amounts to reasonable care is a matter that has caused me some concern..
79. ...I have reconsidered the issue and have begun by looking to MT 2008/1 issued by the Commissioner. It is a Miscellaneous Taxation Ruling that is a public ruling for the purposes of Division 358 of Schedule 1 of the TA Act. Although it took effect on 14 May 2008 and so after the year of income in issue in this case, it may be relied upon in respect of matters both before and after that date.⁹
81. ...The first question that I have asked myself is whether I am bound by MT 2008/1. ...
82. Rulings may be relied upon by a taxpayer if it applies to that taxpayer. If that is the case, the ruling binds the Commissioner in relation to that taxpayer.¹⁰ ...
83. There is nothing in the provisions of the TA Act relating to public rulings that suggests that the Tribunal is bound by a public ruling. ...
90. Read in isolation, s 284-90(1) of the TA Act can be read as I found in *Re Confidential and the Commissioner of Taxation*. ... Once reference is made to the Explanatory Memorandum and it is read in its entirety, it becomes quite clear that Parliament intended s 284-90(1) to have the meaning adopted by the Commissioner in MT 2008/1.
91. That means that I must first identify the personal attributes of Mr Sinclair and his circumstances and then consider what could be expected of a reasonable person in that position. Mr Sinclair is a person of mature years who works as a stockbroker. I do not accept Ms Lecordier's submission that his being a stockbroker gives him any particular insight into taxation law. I accept Mr Sinclair's evidence that he does not give advice that is financial advice and nor should he as he does not hold an Australian Financial Licence under the *Corporations Act 2001*. He has knowledge of property development for he is a director of a family company which is actively involved in development projects. None of Mr Sinclair's personal attributes give him any particular knowledge or awareness of the taxation law. What they do give a reasonable person with his attributes is an awareness that there may be taxation implications attaching to a purchase of the sort Mr Sinclair agreed to make when he signed the contract with Towerlake. A reasonable person would be on notice to obtain legal advice about those consequences.
92. On the basis of the evidence, and particularly that of his solicitors, I find that Mr Sinclair did not approach them for formal legal advice regarding the taxation consequences of the contractual arrangements he had made with Towerlake. He did approach Mr Jasper who worked with him and the solicitors on the arrangements. Mr Jasper said that the three of them, Mr Sinclair, the solicitor and he himself, worked on the matter. I accept his evidence that they all felt that an amount paid as pre-paid interest in respect of an activity that produced income would be deductible. As I have found, though, the solicitors did not put that in writing and do not admit to giving specific

⁹ MT 2008/1 at [6] and see also TA Act, s 358-10(1)

¹⁰ TA Act, s 357-60(1)

legal advice about the particular arrangement entered by Mr Sinclair. Mr Jasper is a Fellow of the Tax Institute of Australia but he could not give legal advice regarding the taxation implications of the arrangements.¹¹

93. I am satisfied that a reasonable person with Mr Sinclair's attributes would have sought **legal** advice before he lodged his taxation return in August 2006. That person would have checked whether rental income had actually been received from the property and would have given thought to how he or she would generate that income in the future or, if he went the development route, how he or she would achieve that outcome and so assessable income. A reasonable person would have done that in deciding whether or not to claim the sum of \$99,000 as a deduction. That person would also have sought advice regarding Mr Sinclair's view that he could claim as a deduction an amount he has paid on behalf of another when that other owes a debt. He appears to have taken none of these courses of action when he came to claim the deduction. I am satisfied that a reasonable person would have sought legal advice from a tax lawyer before claiming the deduction. That means that I am not satisfied that Mr Sinclair acted with reasonable care within the meaning of item 3 of s 284-90 of the TA Act. Therefore, I affirm the Commissioner's objection decision imposing a base penalty amount of 25% of Mr Sinclair's shortfall amount.
94. For the reasons I have given, I affirm the objection decision made by the respondent on 19 September 2007 disallowing the applicant's objection to the Notice of Assessment dated 27 March 2006 and the Notice of Assessment and Liability to Pay Penalty dated 28 March 2006.

(2) ** No effective salary sacrifice in relation to accrued entitlements (Heinrich and C of T)

[Source: Month 01-2011-34 ~ 1-2\(b\) – Heinrich and C of T \[2011\] AATA 16 \(17 January 2011\), Mr Frank O'Loughlin, Senior Member](#)

What is the issue?

Does part of your accrued annual and long service leave entitlements which were paid by your employer as a lump sum not form part of your assessable income under either s.83-10 or 83-80 on account of being an effective salary sacrifice arrangement (SSA)?

[This formulation of the question was agreed to be appropriate by both taxpayer and Commissioner]

What was the outcome?

The Tribunal found that the salary sacrifice agreement did not deal with the accrued entitlements in the way required by the legislation.

What were the facts?

The taxpayer unsuccessfully sought a ruling that part of the payment he received, on termination for medical grounds, be treated as it would have been treated had his 'salary sacrifice' arrangement continued, disclosing that:

- ◆ five years ago the taxpayer entered into an agreement with his employer to forgo part of the salary in exchange for superannuation contributions but **did not agree** to forgo the taxpayer's annual and long service leave entitlements under the agreement; [emphasis added]
- ◆ the taxpayer's entitlements to the accrued annual and long service leave were paid out in a lump sum in September 2009.

The additional facts to be found based on evidence led at the hearing are:

- ◆ had the taxpayer continued in employment and taken his leave in the ordinary way, the 'salary sacrifice' arrangements would have continued in relation to his remuneration entitlements while he was on leave;

¹¹ Section 2.2.2(1) of the *Legal Profession Act 2004* (Vic) provides that "A person must not engage in legal practice in this jurisdiction unless the person is an Australian legal practitioner." Section 2.2.2(2) provides for a number of qualifications to the prohibition and notes another provided for in the *Estate Agents Act 1980* (Vic) but none applies to an accountant.

- ◆ upon being forced to retire by reason of his medical condition the taxpayer wanted to roll over his payment entitlements for his annual leave and long service leave directly into a superannuation fund;
- ◆ based on advice the taxpayer sought about rolling over his accrued entitlements to superannuation the taxpayer instructed his employer to calculate a payout figure and pay it after appropriate tax was deducted;
- ◆ after he had given the instructions regarding payment the taxpayer realised that he could have ‘salary sacrificed’ a portion of the amount under pre-existing arrangements; and
- ◆ the taxpayer decided he would accept the payment and contest the taxation treatment at a later date.

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

Many salary sacrifice arrangements carry technical deficiencies or limitations such as this one did.

What was the decision?

The Commissioner's ruling

15. The Commissioner has determined that the payments were properly assessable under ss.83-10 (in the case of the payment for unused annual leave) and 83-80 (in the case of the payment for unused long service leave) of the 1997 Assessment Act. Those sections provide as follows:

83-10 Unused annual leave payment is assessable

Application--annual leave

- (1) This section applies to leave (annual leave) of the following types (whether it is made available as an entitlement or as a privilege):
- (a) leave ordinarily known as annual leave, including recreational leave and annual holidays;
 - (b) any other leave made available in circumstances similar to those in which the leave mentioned in paragraph (a) is ordinarily made available.

Unused annual leave payments

- (2) Your assessable income includes an * unused annual leave payment that you receive.
- (3) A payment that you receive in consequence of the termination of your employment is an unused annual leave payment if:
- (a) it is for annual leave you have not used; or
 - (b) it is a bonus or other additional payment for annual leave you have not used; or
 - (c) it is for annual leave, or is a bonus or other additional payment for annual leave, to which you were not entitled just before the employment termination, but that would have been made available to you at a later time if it were not for the employment termination.

83-80 Taxation of unused long service leave payments

Assessable and tax free parts of unused long service leave payments

- (1) If you receive an * unused long service leave payment, your assessable income includes the part of the payment shown in this table:

* Unused long service leave payments		
Item	To the extent the payment is attributable to the ...	Your assessable income includes this part of it...
1	* pre 16/8/78 period	5%
2	* pre 18/8/93 period	100%
3	* post 17/8/93 period	100%

- (2) The remainder of that part (if any) of an * unused long service leave payment that is attributable to the * pre 16/8/78 period is not assessable income and is not * exempt income.

Note 1: If your employment was wholly full time or wholly part time during a period, see sections 83-95, 83-100 and 83-105 to work out the amount of an unused long service leave payment that is attributable to the period.

Note 2: If your employment was partly full time and partly part time during a period, see section 83-110 to work out the amount of an unused long service leave payment that is attributable to the period.

18. In the present circumstances it is not necessary to explore this contention in detail, but it can be remarked that what accrues from time to time in an employment setting is a right to continue to be remunerated in a particular way without the need for attendance to normal employment duties. In many cases any such entitlement cannot be measured at the time of accrual because periodical remuneration entitlements might change, for example by reason of pay rises caused by promotion or remuneration review. It was clearly this right that was not sacrificed

by the Applicant. If a right to be remunerated entails a right to money only, then on termination the accrued right is to salary and wages and such a right cannot be dealt with at the direction of the employee without the taxing criterion being met, for example by operation of s.6-10(3) of the 1997 Assessment Act. However, where the right to be remunerated is split between salary and wages and other, non taxable, benefits and the right on termination is to have the accrued leave entitlement to non taxable benefits discharged by provision of further, non taxable, benefits then there may not be any relevant dealing with accrued rights to salary and wages and there may not be a taxing point. It will be observed that s.6-10(3) requires the right that is dealt with first be statutory income before the product of the dealing is treated as statutory income.

19. In the present case it is not clear what the terms of the entitlements in respect of remuneration for unused leave were to consider this analysis further.
20. The second basis of defence of the ruling is more problematic for the Applicant. He in fact received the payout of his unused leave entitlements.
21. The criterion for ss.83-10 and 83-80 has been attracted. Once attracted the amounts are to be taxed in accordance with the operation of these provisions.
22. For this reason, the decision under review is to be affirmed.

Editor

The Tribunal also noted that:

- ◆ changes to the phrasing of the question ruled upon so that it expresses what the parties intended and what each of them acted upon is considered permissible.
- ◆ incorporating additional facts that do not change the subject matter ruled upon in a material way can be included in the subject matter ruled upon on review: s.359-65 of Schedule 1 to the Taxation Administration Act 1953 (C'th) and A Taxpayer and Commissioner of Taxation [2007] AATA 1759 at [12] and [13] per Deputy President Hack SC.

- ③ ** Taxpayer says not legally advised so its conclusion was reasonable (Clontarf Developments and C of T)

[Source: Month 12-2010-49f ~ 2-2\(b\) – Clontarf Developments Pty Ltd and C of T \[2010\] AATA 1065 \(24 December 2010\), Senior Member Bernard J McCabe](#)

What is the issue?

Did a building deal amount to a creditable acquisition?

Was the taxpayer entitled to input tax credits claimed after more than four years?

What was the outcome?

The taxpayer was represented by an employee of his tax agent of whom the Tribunal said:

37. *At the conclusion of the hearing, I insisted that the taxpayer's representatives take time to prepare written submissions in relation to this issue. I had become increasingly conscious of the inexperience of Messrs Tomlinson, who represented the taxpayer, and I wanted them to have the opportunity to clearly reflect on the Commissioner's oral and written submissions on this issue.*

Having made that observation and allowance this later observation by the Tribunal carries a real sting in its tail:

44. *The taxpayer did not argue that the penalty should be remitted in its grounds for objection. If there are any arguments to that effect, they are not before me.*

What were the facts?

The sole shareholder and director of the taxpayer company, incorporated in June 2002, was Dr Nirmal Taluja.

On the day of its incorporation:

- ◆ the taxpayer purchased a block of land in Clontarf, near Brisbane and registered for GST on a non-cash basis with quarterly tax periods.
- ◆ was represented by a tax agent, Gambhir Watts.

Gambhir Watts acted on behalf of the company until April 2004 when that agent was replaced by DL Business Services Pty Ltd the principal of which was Mr David Luong.

In August 2005, the taxpayer's agent at the time advised the Commissioner that the taxpayer would account on a cash basis from 1 January 2003.

A new tax agent, the firm of Peter Green Accountants, was appointed in April 2008. (That firm remains the agent for the taxpayer.)

The agent notified the Commissioner on 29 July 2008 and 23 September 2008 that the taxpayer would not be accounting on a cash basis and asked that the Commissioner accept that the taxpayer would proceed on the basis that it had not been accounting on a cash basis since 1 July 2002. The Commissioner replied the taxpayer would be regarded as having ceased accounting on a cash basis as of 1 October 2008.

On 26 August 2008 Peter Green Accountants subsequently lodged activity statements for the quarterly tax periods ending on 31 December 2002 through the period ending 30 June 2004 claiming refunds of \$191,447.

A BAS for the quarterly period ending 31 March 2005 was lodged on 1 September 2008. The taxpayer claimed a GST refund in the amount of \$500,000.

Further activity statements were lodged on 10-11 September 2008 in respect of the quarterly tax periods ending 31 March 2006 and 30 September 2006 through 31 December 2007. Those activity statements claimed refunds totalling \$212,094.

On 18 September 2008, Peter Green Accountants lodged activity statements for the quarterly tax periods ending 30 September 2004 and 31 December 2004.

The Commissioner and Peter Green Accountants engaged in a lengthy round of correspondence in connection with an audit that initially focused on the quarterly period ending 31 March 2005.

The inquiry widened to include other quarterly periods, which led to the Commissioner issuing amended assessments on 14 January 2009.

The objections and the objection decision followed in due course.

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

For many months we have drawn attention to the lack of success of tax agents who represent the client in situations where the tax agent acted for the client in the underlying factual circumstances that are being considered by the Tribunal (in this regard also see Sinclair):

46. *I would add one further observation about the difficulties that may arise in proceedings conducted on behalf of a taxpayer by a tax agent or accountant where the outcome of the dispute may turn on the Tribunal's view of advice provided by that tax agent to its client. A tax agent has duties to its client, and there is a risk that those duties might conflict with the agent's own interests when the quality of the agent's advice is in issue before the Tribunal. It would usually be preferable for the taxpayer to obtain independent advice and representation at a hearing in those circumstances.*

What was the decision?

ISSUE ONE: THE TAXPAYER'S CLAIM IN RESPECT OF AN INPUT TAX CREDIT OF \$500,000 IN QUARTERLY TAX PERIOD ENDED 31 MARCH 2005.

9. The first issue arose out of a deal between the taxpayer and a builder in 2005 to construct a block of flats. That dispute turned on whether the deal – such as it was – amounted to a creditable acquisition within the meaning of s 11-5 of the A New Tax System (Goods and Services tax) Act 1999 (“the GST Act”).
14. The taxpayer says there was a completed contract embodied in a letter from an entity called Coveco to the sole director and shareholder of the taxpayer. ...
15. I am satisfied this document is not capable of being considered a completed contract. ... the document as amended and returned to the builder is not, in truth, an acceptance but a counter-offer that would need to be considered and accepted by the other party before it could be regarded as a complete contract.
16. The letter of 26 August 2005 is drafted in a way that is consistent with that conclusion. ... That letter refers to a set of standard terms that were not executed until 22 September 2005. A fair reading of those documents suggests that there was no contract to do anything in existence until 22 September 2005. I accept that is so.

18. Events overtook the contract. It was common ground between the parties that the Crown gave notice during September 2005 of its intention to resume the property for a public purpose. We know the property was finally resumed early the following year. We do not have any reliable evidence as to what occurred after the notice of intention to resume was received. I cannot be sure if any work was done on the property after 1 October 2005, ...

APPLICATION OF THE LAW

19. I turn to the question at hand: is there a creditable acquisition? It will be apparent from my findings that I do not accept there was a creditable acquisition during the quarter ending 31 March 2005 because the contract in question was not concluded until 22 September 2005. What of that contract? Does it satisfy the statutory criteria in s 11-10?
22. I am satisfied the Commissioner has the better view of the September contract. It is, in my view, a contract for the supply of building services. I am not aware of credible evidence that suggests building services were ever supplied under that contract because the resumption process presumably prevented the actual acquisition of any services.
23. Even if I am wrong about that and it is possible to characterise the contract as a contract to acquire a right, I am not satisfied the right in question was actually acquired because the resumption process appeared to interfere in what occurred before the property could be made available.
24. It follows I do not accept there was a creditable acquisition within the meaning of the GST Act in the March quarter of 2005. The dispute in relation to the quarterly tax period ending 31 March 2005 must be decided against the taxpayer. Even if I am wrong about the contract in September 2005 and it is to be regarded as a creditable acquisition that would otherwise give rise to an input tax credit of \$500,000, the fact is the taxpayer did not make that claim until quite recently. It may be too late to amend the relevant activity statement.

ISSUE TWO: ENTITLEMENT TO REFUNDS IN RESPECT QUARTERLY TAX PERIODS ENDING ON 31 DECEMBER 2002 THROUGH THE PERIOD ENDING 30 JUNE 2004

29. A careful reading of that section [105-55] confirms there is no difference whether the statements were lodged as amended statements or originals. The claim for a refund was first brought to the Commissioner's notice *more than four years after the end of the tax period*. That is the end of the matter: see *Australian Leisure Marine Pty Ltd and Commissioner of Taxation* [2010] AATA 620 at [17] per Dr McDermott.

ISSUE THREE: THE APPLICANT'S CLAIM FOR AN INPUT TAX CREDIT OF \$212,094 IN RESPECT OF THE QUARTERLY PERIOD ENDING 31 MARCH 2006 AND THE PERIODS ENDING 30 SEPTEMBER 2006 THROUGH 31 DECEMBER 2007 AND ISSUE FOUR: THE TAXPAYER'S CLAIM FOR AN INPUT TAX CREDIT OF \$24,629 IN RESPECT OF THE QUARTERLY PERIODS ENDING 30 SEPTEMBER 2004 AND 31 DECEMBER 2004

30. If a claim is made in respect of a period and that claim fails because it was made more than four years after the tax period ended, that exhausts the claim because the activity statement can no longer be amended: s 105-55(1). It follows I would affirm the objection decision to the extent that it disallows claims made by the taxpayer in later periods that have already been attributed to earlier periods.
31. The Commissioner acknowledged that s 29-10(4) of the GST Act effectively permitted a taxpayer to hold off making a claim in respect of a period and attribute an ITC to a later period if it had a tax invoice – provided of course there was no “double dipping” in the sense that the same claim was attributed to more than one period.

ISSUE SIX: PENALTIES

36. The last matter I must consider is the question of penalties. Given I have affirmed the objection decision in other respects, it seems there is a substantial shortfall, so the question of penalties is a live one.
38. ... The Commissioner argues that the shortfall amount has arisen as a result of the recklessness of the taxpayer or its agent. Recklessness justifies a penalty levied at the 50% rate. ...

40. The taxpayer's written submissions say there is no suggestion that the taxpayer or its agents have knowingly made false statements to the Commissioner. The submissions agree that confusion had arisen prior to 2008 over the taxpayer's GST affairs but insist that the taxpayer and Peter Green Accountants acted appropriately and reasonably once that firm was retained in 2008. The submissions point out that the activity statements lodged for the 2002-2004 period were lodged on the good faith assumption that activity statements had not already been lodged. The submissions suggest the Commissioner acted precipitously when this mistake was uncovered. It will be apparent from my reasons that I accept the Commissioner's argument that it did not matter whether the statements in question were the first or amended statements: the taxpayer should not have been seeking refunds in the first place because of the time limit that is applicable. The taxpayer (through its agent) should have known of that time limit and its implications.
41. The taxpayer's submissions also seek to excuse the error in claiming an input tax credit in relation to the construction contract in the March 2005 quarter. The taxpayer says it was not legally advised and it was reasonable to form the view that it did in relation to the document it signed in February 2005. I disagree.
43. The taxpayer in this case has made basic mistakes in its dealings with the Commissioner which led to the tax shortfall. Given it was advised by a tax agent, those mistakes should have been foreseen and avoided. I am satisfied its behaviour was reckless in all the circumstances. The 50% penalty rate is appropriate.

(4) ** One very lucky tax agent avoids a penalty bullet (Johnston and C of T)

[Source: Month 01-2011-35 ~ 1-2\(b\) – Johnston and C of T \[2011\] AATA 20 \(20 January 2011\), Senior Member SE Frost](#)

What is the issue?

Was the taxpayer entitled to a deduction in respect of personal superannuation contribution?

[The taxpayer accepted that the claim for a deduction cannot be sustained because the strict terms of the income tax law, authorising such a deduction, were not complied with.]

What was the outcome?

The Tribunal decided that:

- ◆ the circumstances leading to the lodgment of the taxpayer's tax return for the 2008 year disclosed a failure on the part of the taxpayer's agent to take reasonable care;
- ◆ the administrative penalty at the rate of 25% of the tax shortfall was properly imposed;
- ◆ in the particular circumstances of this case, it is appropriate to remit the administrative penalty in full.

What were the facts?

In 2007, when Mr Johnston sold an investment property that he had held for many years, he saw the opportunity to obtain significant tax benefits by depositing the sale proceeds, over a period of several years, into his superannuation account.

Mr Gregory Hollands of Hollands & Partners, who had assisted Mr Johnston with his tax affairs for around 30 years, thought the strategy was sound.

Mr Johnston needed to give the trustee of his superannuation fund a "valid notice, in the approved form, of [his] intention to claim the deduction", and the trustee must have given him an acknowledgment of receipt of that notice: s 290-170 of the Income Tax Assessment Act 1997 (ITAA).

Mr Johnston provided the notice to his superannuation fund, but he only after the Tax Office had queried his deduction claims and indicated that there were some shortcomings in the paperwork.

The inflexible time limit for the notice set by s 290-170(1)(b) of the ITAA had been exceeded.

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

Under the Tax Agent Services Act it is increasingly likely that taxpayer's advocates will seek to identify any failure of a tax agent that results in a penalty being imposed.

Tax Agents should not be under the impression that they will be as lucky as Mr Hollands was in this matter. In future one could reasonably expect to see tax agents in the witness box facing questions about CPE undertaken in relation to an issue, checking procedures when work is undertaken by juniors, training for juniors and the maintenance of CPE records.

The questions may come from the ATO counsel seeking to maintain a penalty or from a taxpayer's advocate seeking to isolate the reason for the penalty being imposed.

What were the contentions?

The taxpayer says that neither he nor his agent failed to take reasonable care, but if either of them did, then the penalty should be remitted, in whole or in part.

What was the decision?

WAS THERE A FAILURE TO TAKE REASONABLE CARE?

7. Mr Johnston could hardly be blamed for not being aware that he had to provide a "notice of intent to claim a deduction" to his superannuation fund. He is not a superannuation expert or a taxation expert, and the requirement for a "notice of intent" is not particularly well highlighted in the public material dealing with the tax treatment of superannuation contributions. Mr Johnston's research, undertaken around the time of the then Government's announcement in late 2006 and early 2007 of the so-called "simpler super" proposals, uncovered the deduction limits for a person his age but did not alert him to any additional administrative requirements for deductions to be allowable. In my view, the inclusion of the deduction claim in his 2008 tax return is not attributable to any extent to a failure on Mr Johnston's part to take reasonable care to comply with a taxation law.
8. Unfortunately the same cannot be said in relation to his agent Mr Hollands. Mr Hollands said in his witness statement, at paragraph 8:

It was my direct experience as a tax agent to that point in time that superannuation funds asked contributors the type of contribution that was being made so that the appropriate allocation could be made by them. It was my understanding that this was done either at the time of the contribution being made or at the end of the financial year. In the past we had been asked by clients to clarify correspondence received by them from superannuation funds as to the correct classification of their contributions if they were in any doubt.

9. Mr Hollands also noted in his witness statement that Mr Johnston had not asked him in any detail about specific superannuation investments or any of the processes by which tax advantages might be achieved.
10. When Mr Johnston provided to Mr Hollands' firm the information that would be used to prepare Mr Johnston's tax return, no questions were asked as to whether Mr Johnston had sent any notifications to his superannuation fund, or whether the fund had provided any correspondence to Mr Johnston. Mr Hollands conceded in his oral evidence that it was "assumed" within the firm that the superannuation fund had properly attended to the paperwork and that Mr Johnston was properly entitled to a deduction for the personal superannuation contribution he had made.
11. It is clear that the single most significant factor that led to the lodgment of the 2008 return with an unsupportable deduction claim was the failure of Mr Hollands, or any member of staff at Mr Hollands' firm, to ask Mr Johnston for confirmation that the administrative requirements to support the claim had been complied with.
12. The deduction, if allowable, would have reduced Mr Johnston's taxable income by almost 75%. In those circumstances, reasonable care on the part of a registered tax agent should have triggered an enquiry of Mr Johnston to confirm the availability of the deduction. The failure to make that enquiry constitutes a failure on the part of Mr Johnston's agent to take reasonable care to comply with a taxation law. As a result, the administrative penalty of 25% of the shortfall amount was properly imposed under s 284-75(1) and item 3 in the table in s 284-90(1) in Schedule 1 to the Taxation Administration Act 1953 (TAA).

IS REMISSION OF THE PENALTY WARRANTED?

13. Section 298-20 in Schedule 1 to the TAA gives the Commissioner (and the Tribunal, on review) the discretion to remit a shortfall penalty.
14. In *Dixon v Federal Commissioner of Taxation* (2008) 167 FCR 287, the Full Court of the Federal Court stated (at 292) that the relevant question to be determined when exercising the discretion to remit is:

whether any part of the penalty should be remitted on the basis that the outcome is harsh, having regard to the particular circumstances of the Taxpayer.

15. This is a taxpayer who contributed a significant amount to his superannuation fund in the honest but mistaken belief that he would be entitled to a tax deduction. He would, in fact, have been entitled to the deduction if the paperwork had been properly attended to. The disallowance of the deduction increased his tax bill by almost \$40,000. It is harsh, in the circumstances, that he should pay a penalty of almost \$10,000 when it was a shortcoming in the paperwork, pure and simple, that led to the denial of the deduction.
16. To the extent that administrative penalties serve the combined purposes of encouraging compliance with the law and deterring non-compliance, the penalty in this case does not achieve either of those ends. Mr Johnston struck me as a person of integrity who already treats his tax obligations seriously. Mr Hollands impressed me as a competent tax agent who regrets his error and the impact it has had on a client of 30 years' standing. There is no good purpose to be served by leaving the penalty in place.

CONCLUSION

17. The penalty should be remitted in full.

(5) ** Director's obligation in relation to deregistering company (DC of T v ASIC (in the matter of Civic Finance))

[Source: Month 12-2010-46 ~ 1-2\(a\) – DC of T v ASIC; in the matter of Civic Finance Pty Limited \(Deregistered\) \[2010\] FCA 1411 \(16 December 2010\), Jagot J](#)

What is the issue?

Was the Commissionr entitled to:

- ◆ an order that ASIC reinstate the registration of two companies, Civic Finance Pty Limited ACN 087 623 541 (Civic) and Advance Finances Pty Limited ACN 078 272 867 (Advance);
- ◆ orders that, upon reinstatement, Advance and Civic be wound up; and
- ◆ orders for the appointment of a liquidator.

Some background

On 31 July 2006 and 8 September 2006 the **ATO** wrote to Mark Douglass of MDA Lawyers (later Argyle Lawyers), the solicitors for Advance and Civic, advising that the ATO intended to audit a number of entities associated with Emil Binetter.

On 13 September 2006 Advance and Civic each lodged an application with ASIC for administrative deregistration under s 601AA of the Corporations Act.

What was the decision?

Winding up

35. For the reasons given above I am satisfied that the Commissioner is a contingent creditor of Advance and Civic. Insofar as leave under s 459P(2) and (3) of the Corporations Act is relevant, I am satisfied that there is a prima facie case that the companies are insolvent. Each has substantial tax related liabilities that it cannot pay. The tax liabilities are contingent in the sense that they accrue on service of the notices of assessment and are subject to objection under Pt IVC of the Taxation Administration Act. The evidence discloses the Commissioner's intention to serve the notices of assessment as soon as the orders for reinstatement take effect. On service the tax liabilities will become present debts of the companies to the Commissioner. Sections 175 and 177 of the Income Tax Assessment Act will also operate. Further, and as the Commissioner submitted: - (i) there is no likelihood of any payment being made to discharge the tax liabilities outside the liquidation, (ii) there are substantial issues about the offshore transactions which are appropriate for investigation by a liquidator, (iii) apart from the tax liabilities, there is no evident business purpose for the companies to exist, and (iv) the former directors opposed the reinstatement of the registration of the companies.

36. Contrary to the submissions for Gary Binetter, the collection of tax liabilities and a liquidator's investigation are a bona fide purpose for the seeking of the winding up orders. **In this regard, it must not be overlooked that a former director of the companies procured their administrative deregistration at a time when he knew that companies associated with him were subject to a tax audit and, in so doing, did not advise the ATO of the proposed deregistration or ASIC of the tax audit.** The winding up orders will not be futile. They will permit the liquidator's investigation into the dealings of the companies in circumstances which call for such investigation. Those powers are different from those able to be exercised by the Commissioner in the audit process. The fact that Gary Binetter has indicated a willingness to fund the Pt IVC rights of the companies if their registration is reinstated, but not if a liquidator is appointed, cannot dictate the position on the winding up applications. There is no basis for any suggestion that the liquidator, if funded, would not pursue rights of the companies as considered proper and appropriate at the time. Further, the various options presented by Gary Binetter as precluding any finding of insolvency (such as requesting a deferral of the due date for payment, reaching an agreement that the Commissioner not take recovery proceedings pending the completion of the Pt IVC process, or seeking a stay of recovery proceedings) are unpersuasive. None of those steps involve a challenge to the assessments. In any event, if proper and appropriate at the time, those steps may be taken by the liquidator if Gary Binetter decides to provide funding for those purposes. [emphasis added]
37. All of these considerations confirm that this is an appropriate case for the grant of leave under s 459P(3) of the Corporations Act and the making of winding up orders under s 459A.

(6) ** From Lichtenstein with love? (Kevin Denlay v C of T) & (Mirja Denlay v C of T)

Source: Month 12-2010-47 ~ 1-2(a) – Kevin Denlay v C of T [2010] FCA 1434 (17 December 2010), Logan J

What is the issue?

Were purported assessments tainted with jurisdictional error due to “conscious maladministration”?

Did the Commissioner obtain information relating to the taxpayer's taxable income:

- ◆ from a third party who, according to foreign law, stole that information?
- ◆ abroad?

Did the Commissioner breach s.400.9 of the Criminal Code 1995 (Cth) in receiving stolen information?

What was the outcome?

The Court held that the Commissioner:

- ◆ has a duty under the Taxation Acts to assess the income of taxpayers from “any other information in his possession, or from any one or more ... sources”; and
- ◆ is to enjoy “full and free: access for that purpose”;
- ◆ could not be in breach of s 400.9 if the alleged breach was undertaken with a justification at law

What were the facts?

In reliance on documents originating from the LGT Group and provided by a Mr Heinrich Keiber the Commissioner issued amended assessments to the taxpayer for the 2002 to 2007 income years which left Mr Denlay indebted to the Commonwealth in a total amount of \$1,103,578.45 excluding penalties.

Between 23 and 25 October 2006, somewhere outside Australia, a Mr Heinrich Kieber was interviewed by three senior officers of the ATO at which time he gave the officers a letter dated 23 October 2006 entitled “Australia and Heinrich Kieber” which covered his handing over copies of documents in paper format and also in electronic format.

Collectively, the paper documents and CDs comprise the LGT documents.

What was the decision?

102. The importance for Mr Denlay's argument of identifying the commission of an Australian offence entailed in the receipt of the LGT documents was that it side-stepped a question which has arisen abroad namely, the extent to which a revenue officer may use information which has come into his possession from a third party which was obtained as a result of that third party's illegal activity.

..., in the United States there has developed a body of authority which permits the Internal Revenue Service (IRS) to use information obtained from a third party in circumstances where that third party has illegally obtained that information: ... An Australian example analogous to these United States cases is *Awad v Commissioner of Taxation* [2000] FCA 1288; (2000) 104 FCR 106. In *Awad*, the third party had, without the involvement of the

Commissioner, failed to comply with the requirements of an Australian state law in obtaining the information which later came into the Commissioner's possession and was used by him for the purposes of taxation legislation, including assessment. The court found that there was no basis raised upon which the assessment should be quashed. Here, such laws as Mr Kieber may have or did violate to obtain the information were not even the laws of any Australian jurisdiction. A fortiori in this case, the innocent receipt by the Commissioner of the information and its subsequent use for assessing means that the assessment should not be quashed.

103 ... It is interesting to note that a like position appears to prevail in Germany, having seemingly arisen in a case in respect of information having a similar nature to that in the LGT documents the use of which grounded a search authority in relation to a suspected offence of criminal tax evasion. The Federal Constitutional Court has recently held that, "[With] regards to the constitution, there is no rule of law which says that, in the case of legally defective evidence procurement, the use of evidence obtained in this manner would always be inadmissible ... [t]he evaluation of the question, what consequences a possible breach of criminal procedure has on process regulations and whether this includes, in particular, a prohibition for use of evidence is primarily a matter for the expert courts.": ...In the lower courts in Germany objections to the use of such information had been over-ruled:

104. It does not follow from the existence of a discretion to receive, in court, in a criminal or civil case evidence obtained illegally by a government agency that what does or does not constitute conscious maladministration is a matter of discretion. *Pearce v Button* is though relevant in this sense. In the exercise of the discretion which he found existed, Pincus J (at 403) regarded it as relevant to take into account that the customs officers concerned "did not consciously break the law or consciously demand more of the bank, in particular, than they thought the law entitled them to". That, with respect, is a pithy expression of why the conduct of those officers did not constitute "conscious maladministration" of, in that case, Australian customs legislation. It might be paraphrased as a way of describing why, on the facts which I have found, there was no conscious maladministration by those officers who interviewed Mr Kieber abroad in this case. They did not consciously break any Australian law or consciously obtain from Mr Kieber more than they thought Australian law entitled them to. The same may be said in respect of those who made the amended assessments (or, more accurately, it has not been proved that they consciously used information which they knew was unlawfully obtained).

105. Such conclusions have this corollary. Mr Denlay's submissions assumed that, if the existence of a breach of s 400.9 of the Criminal Code were demonstrated, that also demonstrated conscious maladministration. I do not accept that this follows. There was no conscious breach at any stage. If, contrary to my conclusions as to the effect of s 166 and 263 of the ITAA36 and s 400.9 itself, s 400.9 were applicable, the absence of a conscious breach would not, in the circumstances of this case, warrant a finding of conscious maladministration. That would also mean that the application should be dismissed. A like approach is evident in New Zealand in a case in which *Futuris* was considered: *Westpac Banking Corporation v Commissioner of Inland Revenue* [2009] NZSC 36; (2009) 2 NZLR 99 (*Westpac v CIR*) (leave to appeal subsequently refused: *Westpac Banking Corporation v Commissioner of Inland Revenue* [20

[*\(Mirja Denlay v C of T\)* Source: *Month 12-2010-48 ~ 1-2\(a\) – Mirja Denlay v C of T \[2010\] FCA 1435 \(17 December 2010\), Logan J*](#)

For the reasons outlined in the judgment in proceeding QUD 347 of 2010 – *Kevin Vincent Denlay v Commissioner of Taxation* (*Kevin Denlay v Commissioner of Taxation* [2010] FCA 1434) the application was dismissed with costs. [2009] NZSC 36).

(7) Section 167 assessments (*DC of T v Chemical Trustee Limited*)

[*Source: Month 12-2010-35 ~ 1-2\(a\) – DC of T v Chemical Trustee Limited \[2010\] FCA 1297 \(25 November 2010\), Kenny J*](#)

What is the issue?

Was the Commissioner entitled to summary judgment under section 31A of the Federal Court of Australia Act in relation to section 167 assessments issued:

- ◆ in the amount of \$4,783,775 against *Chemical Trustee Ltd*?
- ◆ in the amount of \$9,624,253 against *Derrin Brothers Properties Ltd*?
- ◆ in the amount of \$15,497,964 against *Bywater Investments Pty Ltd*?

Each of the taxpayers had failed to lodge tax returns for several years.

The Commissioner of Taxation:

- ◆ issued section 167 default assessments against each of the taxpayers for each of the years in which they had failed to lodge tax returns; and
- ◆ obtained orders restraining them from removing assets from Australia or otherwise diminishing them in value; and
- ◆ sought summary judgment against each of the taxpayers in respect of the debts arising under the section 167 notice, interest under section 204 and administrative penalties for failing to lodge returns.

The Court found that the the Commissioner was entitled to summary judgment.

Editor

These decisions are unremarkable but they clearly indicate the Commissioner's new found willingness to rely on section 167 assessments, a vital tool that he has not really used in recent years. Taken together with restraining orders on the disposal of assets and reliance on section 31A of the Federal Court Act the Commissioner has shown a willingness to move quickly and aggressively to both create and recover tax debts.

⑧ Another section 167 assessments (DC of T v Southgate Investments Funds)

[Source: Month 12-2010-36 ~ 1-2\(a\) – DC of T v Southgate Investments Funds Limited \[2010\] FCA 1298 \(25 November 2010\), Kenny J](#)

What is the issue?

Was the Commissioner entitled to summary judgment under section 31A of the Federal Court of Australia Act in relation to section 167 assessments issued in the amount of \$2,884,611 against Southgate Investments?

Each of the taxpayers had failed to lodge tax returns for several years.

The Commissioner of Taxation:

- ◆ issued section 167 default assessments against each of the taxpayers for each of the years in which they had failed to lodge tax returns;
- ◆ obtained orders restraining them from removing assets from Australia or otherwise diminishing them in value; and
- ◆ sought summary judgment against the taxpayer in respect of the debts arising under the section 167 notice, interest under section 204 and administrative penalties for failing to lodge returns.

What was the decision

The Court found that the the Commissioner was entitled to summary judgment.

- (9) ** And another section 167 assessment matter (DC of T v Hua Wang Bank Berhad (No. 2))

[Source: Month 12-2010-34 ~ 1-2\(a\) – DC of T v Hua Wang Bank Berhad \(No 2\) \[2010\] FCA 1296 \(25 November 2010\), Kenny J](#)

What is the issue?

Was the Commissioner entitled to summary judgment against the bank?

What was the outcome?

The Bank wrongly failed lodge income tax returns for the years ended 30 June 2004, 30 June 2006 and 30 June 2007, with the result that, on 12 August 2010, the Commissioner issued notices of assessment to the Bank under s 167 of the ITAA 1936.

The Commissioner moved for summary judgment on the section 167 assessments.

The Court ordered judgment for the Commissione in the in the amount of \$6,600,368.54.

- (10) * Taxpayer fails to show injustice (DC of T v Jane Maria Sakovits; DC of T v Ronald Rudolf Sakovits)

[Source: Month 12-2010-39 ~ 1-2\(a\) – DC of T v Jane Maria Sakovits; DC of T v Ronald Rudolf Sakovits \[2010\] NSWSC 1322 \(29 November 2010\), Davies J](#)

What is the issue?

Was a taxpayer entitled to adduce further evidence on an appeal from an order of a judge refusing a stay of the judgment obtained on the Commissioner's application.

Facts

On 9 September 2010 the Taxpayers filed Notices of Motion appealing from the judgment of Harrison AsJ but only on the basis that her Honour refused a stay of the proceedings, but on 30 September, after apparently realizing that they had additional evidence, sought leave to adduce the additional evidence on the hearing of the appeal.

The hearing:

- ◆ involved only the 30 September Notices of Motion.
- ◆ proceeded without the taxpayers providing an explanation as to why the evidence wasn't before the Court initially?

What was the outcome?

Justice Davies:

- ◆ dismissed the Notices of Motion of 30 September 2010;
- ◆ found that:
 - ~ no injustice will result to the taxpayers if they are not permitted to adduce the further evidence;
 - ~ injustice suggests the happening of events or the perpetration of a wrong without a remedy, either matter being outside the fault or control of the sufferer;
 - ~ the taxpayers have not shown that the inability to present the further evidence has been outside their fault or control;
 - ~ when on the face of things the evidence seems to have been available, and when no evidence has been given to explain why it was not produced at an earlier time, it does not seem that there has been any injustice.

(11) * Appeal for stay of judgment? (Mossimo Systems International v DC of T)

[Source: Month 12-2010-41 ~ 1-2\(a\) – Mossimo Systems International Pty Ltd v DC of T \[2010\] NSWSC 1424 \(8 December 2010\), Barrett J](#)

What is the issue?

Were the seven taxpayer companies entitled to a stay of the 2 December 2010 (see above in these notes)

What was the outcome?

The taxpayer's representative said:

- ◆ the companies question the validity of the decision of the High Court in Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd [2008] HCA 41; (2008) 237 CLR 473; and
- ◆ the companies intend to appeal to the High Court, in some fashion or other, in an attempt to have the Broadbeach decision revisited with particular reference to its conclusions regarding the impact of conclusivity provisions in taxation legislation upon the question whether a genuine dispute can ever arise in relation to a tax debt to which such provisions apply.

The court observed that:

- ◆ the proposition that the Broadbeach case was wrongly decided is not one that the court is able to entertain.
- ◆ the unanimous decision of the High Court is binding on the court and on the New South Wales Court of Appeal to which any appeal from the decision of 2 December 2010 lies.

Therefore, simply to say that Broadbeach is wrong and ought to be revisited and revised does not represent a ground of appeal in the present matter.

(12) * Was the information illegally obtained – the effect of a treaty (Petroulias v C of T)

[Source: Month 12-2010-49d ~ 1-2\(a\) – Petroulias v C of T \[2010\] FCA 1464 \(23 December 2010\), Greenwood J](#)

What is the issue?

Was the taxpayer entitled to a series of declarations the first of which was to the following effect:

that the provisions of sections 16, 167, 168, 175, 177, 263 of the ITAA 1936 and sections 3, 16, 14ZZK(a), 14ZZO(a) and 260-5 of Schedule 1 of the Tax Administration Act 1953; 167 and 168; section 263 and all notices and actions in reliance on these provisions offend chapter III of the Constitution.

Petroulias also claimed the following interlocutory relief:

an order restraining defendant from using information obtained from:

- (i) the New Zealand Inland Revenue Department,*
- (ii) Customs,*
- (iii) the Australian Crime Commission,*
- (iv) Scott Allen,*
- (v) the New South Wales Department of Corrective Services and/or Attorney-General's Department of New South Wales.*

What was the outcome?**The intervening or supervening unlawful purpose**

100. The further argument of the applicant is that irrespective of whether the search and seizure operations undertaken in New Zealand were lawful and the supply of the open documents to the ATO was lawful, an intervening change of purpose has occurred as the Commissioner seeks access to the documents on the disk for use in a criminal investigation and that purpose is not a proper purpose. As already mentioned, Article 26(2) has now become Article 26(3). A new Article 26(2) has been inserted into the Double Tax Agreement. Article 26(2) provides that any information foreseeably relevant to carrying out the provisions of the Convention or the administration of the domestic taxation laws of the Contracting States "shall be disclosed only to persons or authorities concerned with the assessment or collection of, the enforcement or prosecution in respect of ... taxes or the oversight of [such matters]". Such persons or authorities shall use the information only for such purposes. Article 26(2) further provides that:

101. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.

102. Mr Petroulias contends that the Commissioner cannot use statutory and administrative powers in a way which either constitutes a contempt or as an aid to criminal prosecution or a criminal investigation. Mr Petroulias says that there is now an intervening or supervening change of purpose that operates to prevent the Commissioner from using any of the documents on the disk in or for a criminal investigation or criminal prosecution.

The difficulty with this contention is that there is simply no evidence in the affidavits of Mr Petroulias to support the factual contention that an intervening or supervening purpose of aiding a criminal investigation has emerged. The evidence demonstrates that the ATO has received the information from the IRD in accordance with the processes already discussed and the use proposed by the Commissioner is the review and examination of the documents.

Accordingly, I am not satisfied that Mr Petroulias has demonstrated a serious question to be tried in relation to any of the grounds he advances for an interlocutory order.

2 GST

21 Politicians, Boards & Statutory Authorities

(1) ** More consultation but still no action on margin scheme [Shorten]

[Source: Month 12-2010-85 ~ 2-1 - Simplifying GST Rules on Property - Shorten, Media Release No. 023, 10 December 2010:](#)

Following a review by the Treasury of the GST margin scheme in the 2010-2011 Budget the Government announced changes in the 2010-11 Budget.

The GST margin scheme that applies to property will be simplified.

The GST margin scheme allows taxpayers an alternative means of calculating GST on property. When calculating GST in the normal way, GST is one eleventh of the GST inclusive selling price. Under the margin scheme, the GST is calculated as one eleventh of the difference between the selling price and the acquisition cost of the property (the margin), however, the supplier has no entitlement to input tax credits for its acquisition of the property.

The changes will apply from 1 July 2012.

The consultation paper is available on the Treasury website www.treasury.gov.au. Consultation closes on Friday, 21 January 2011. Submissions received in response to the Treasury's review of the GST margin scheme are also available from the Treasury website.

Exposure draft legislation and draft explanatory material for this measure will be released at a later time for consultation.

Editor

Why bother with consultation when the consultation period is over the holiday period? This government and the Rudd Government before it have mastered the art of looking as if they are engaging in consultation when they do not allow realistic consultation or provide realistic timeframes.

One can't help but observe that if the public service were had delivered the paper a couple of weeks earlier then some real consultation could happen before the Christmas shutdown.

(2) ** Simplifying the Tax System: Self Assessment of Indirect Taxes [Shorten]

[Source: Month 01-2011-84 ~ 1-1 - Simplifying the Tax System: Self Assessment of Indirect Taxes ~ Shorten, Media Release No. 009, 18 January 2011](#)

The Assistant Treasurer announced amendments to Australia's tax laws to allow taxpayers to self assess indirect taxes such as the GST and wine equalisation tax (WET).

The Government is consulting on draft legislation that:

- ◆ introduces a self assessment system for GST; and
- ◆ the other indirect taxes;
- ◆ establishes a generic assessment framework that could be applied broadly across the tax system in the future.

The draft measures implement:

- ◆ recommendations made in the Board of Taxation's review of the legal framework for the administration of the GST, released in December 2008;
- ◆ the decision, announced in the 2009-10 Budget, that the Government would harmonise the existing self actuating system for GST, WET, luxury car tax (LCT) and fuel tax credits with the income tax system of self

assessment.

The key features of the amendments include:

- ◆ introducing greater harmonisation between the current self actuating system for GST, WET, LCT and fuel tax credits and the income tax system of self assessment;
- ◆ refreshing the four year period of review for indirect taxes in cases where the amount of tax payable or refund entitlement has been amended in respect of the particular that led to the amendment;
- ◆ clarifying the GST law to confirm that LCT and WET are part of the net amount calculated under the GST Act
- ◆ setting up a generic assessment framework for indirect taxes in the Taxation Administration Act 1953 that could be applied more broadly across the tax system in the future.

The changes are to have effect from 1 July 2011.

The exposure draft legislation is available on the Treasury website www.treasury.gov.au. Consultation closes on Tuesday 15 February 2011.

(3) ** Further Reforms to GST Grouping Rules [Shorten]

[Source: Month 01-2011-87 ~ 2-1 - Further Reforms to GST Grouping Rules ~ Shorten, Media Release No. 012, 20 January 2011](#)

The Assistant Treasurer today released draft legislation to make further reforms to the goods and services tax (GST) grouping rules.

The measures in the draft legislation:

- ◆ will result in more principle-based and simple GST grouping rules;
- ◆ allow GST grouping of non-operating holding entities;
- ◆ clarify that specific contribution amounts, calculated under an indirect tax sharing agreement must, if requested, be provided to the Commissioner of Taxation; and
- ◆ are to apply from 1 July 2011.

Public consultation on the legislative design of these measures was undertaken in 2009. A number of changes were made following stakeholder feedback including:

- ◆ grandfathering of the existing GST grouping membership rules until 1 July 2012 to assist entities in transitioning to the new principle-based rules
- ◆ expanding the scope of the non-operating holding companies measure to also include non operating holding trusts.

The draft legislation and explanatory memorandum is available at www.treasury.gov.au and consultation will close on 16 February 2011.

(4) ** Exempting Taxes, Fees and Charges from the GST [Shorten]

[Source: Month 01-2011-82 ~ 2-1 - Exempting Taxes, Fees and Charges from the GST ~ Shorten, Media Release No. 004, 11 January 2011](#)

As part of the Government's ongoing efforts to simplify Australia's tax laws, the Assistant Treasurer is proposing new legislation to change the methodology for determining which taxes, fees and charges are exempt from the GST.

The Government announced in the 2010-11 Budget that it would amend the law to replace the current mechanism for exempting Australian taxes, fees and charges under Division 81 of the GST Act with a principles based legislative exemption with effect from 1 July 2011.

The key features of the amendments to Division 81, to operate with effect from 1 July 2011, include:

- ◆ replacing the current mechanism for exempting Australian taxes, fees and charges from the GST with a principles-based legislative exemption
- ◆ allowing government entities to self assess the GST treatment of an Australian tax, fee or charge, rather than having to have it listed in a Determination
- ◆ providing for the GST treatment of a specific Australian tax, fee or charge, or an Australian tax, fee or charge of a kind to be specified by regulation.

In order to allow for a smooth transition to the new mechanism, Australian taxes, fees and charges will continue to be exempt under the A New Tax System (Goods and Services Tax) (Exempt taxes, fees and charges) Determination 2011 (No.1) until 1 July 2012.

The exposure draft legislation is available on the Treasury website www.treasury.gov.au. Consultation closes on Friday, 11 February 2011.

5) GST On Low Value Imports Not the Main Cause of Retail Woes [Shorten]

[Source: Month 01-2011-80 ~ 2-1 - GST On Low Value Imports Not the Main Cause of Retail Woes ~ Shorten, Media Release No. 001, 4 January 2011](#)

Mr Shorten said the Government's crackdown on GST rorters, and the sensible approach taken by calling for a Productivity Commission inquiry into the future of Australian retail, is supported by the vast majority of retailers, including the Australian National Retailers Association and the Fair Imports Alliance.

The Productivity Commission will commence work in early 2011 and report back to Government within 9 months. The sustainability and appropriateness of the current tax settings will be considered by the Productivity Commission.

22 Courts & Tribunals

(a) Courts

- (1) ** How do you determine if a property is *'to be used predominately for residential accommodation'* (Sunchen v C of T)

[Source: Month 12-2010-40 ~ 2-2\(a\) – Sunchen Pty Ltd v C of T \[2010\] FCAFC 138 \(8 December 2010\), Edmonds, Jessup & Gilmour JJ](#)

What is the issue?

Whether residential premises are *'to be used predominately for residential accommodation'* should be determined objectively by reference to:

- ◆ the physical characteristics of the property as at the date of acquisition; *or*
- ◆ by reference to the intention of the purchaser.

What was the outcome?

In two separate judgments reaching the same conclusion for different reasons the Court held that whether residential premises are ‘to be used predominately for residential accommodation’ should be determined objectively by reference to the physical characteristics of the property as at the date of acquisition.

What was the relevant legislation?

Section 40-65 provides as follows:

- (1) *A sale of real property is input taxed, but only to the extent that the property is residential premises to be used predominantly for residential accommodation (regardless of the term of occupation).*
- (2) *However, the sale is not input taxed to the extent that the residential premises are:*
 - (a) *commercial residential premises; or*
 - (b) *new residential premises other than those used for residential accommodation (regardless of the term of occupation) before 2 December 1998.*

The definition of “residential premises” in s 195-1 is:

... land or a building that:

- (a) *is occupied as a residence or for residential accommodation;*
- or*
- (b) *is intended to be occupied, and is capable of being occupied, as a residence or for residential accommodation; (regardless of the term of the occupation or intended occupation) and includes a floating home.*

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

Care still needs to be taken when classifying the supply of a development property as either input taxed or taxable. Demolition of the dwelling on the property prior to settlement will determine the question with finality.

What were the contentions?

Sunchen, on the basis of observations of White J in *Toyama Pty Ltd v Landmark Building Developments Pty Ltd* (2006) 197 FLR 74, contended that the question of whether residential premises are to be used predominantly for residential accommodation is to be determined principally by reference to the subjective intentions of the purchaser.

The Commissioner contended that:

- ◆ the operation of s 40-65(1) does not turn upon the subjective intentions of the purchaser;
- ◆ whether premises are ‘to be used predominantly for residential accommodation’ should be determined objectively by reference to the physical characteristics of the property as at the date of acquisition.
- ◆ The Commissioner’s contended that his approach was consistent with the approach adopted by the Full Court in *Marana Holdings Pty Ltd v Commissioner of Taxation* (2004) 141 FCR 299 to a related, but differently worded, provision of the Act.

What was the decision? Edmonds and Gilmour JJ

- 2 At the end of the day, the issue raised by this appeal is a very narrow one: whether the property, at the time of its supply to Sunchen (as purchaser), was residential premises ‘to be used predominantly for residential accommodation’, within the meaning of s 40-65(1) of the A New Tax System (Goods and Services Tax) Act 1999 (Cth) (‘the Act’).
- 5 With one minor qualification, the primary judge agreed with the contentions of the Commissioner as to the proper test to be applied to s 40-65(1): at [5] – [20]. However, his Honour was not satisfied that the decision of White J in *Toyama* was plainly wrong and, accordingly, felt bound to follow it: at [21].
- 7 It was common ground that if the Court accepts the submission of the Commissioner concerning the correct test to be applied, the appeal must be dismissed because the physical characteristics of the property supplied to Sunchen demonstrated that it was to be used predominantly for residential accommodation (regardless of the term of occupation). The supply of the property to Sunchen was therefore input taxed, with the result that no GST was payable in relation to the supply and no input tax credits were available to Sunchen.

CONSIDERATION

- 20 Both the Tribunal and the primary judge doubted the accuracy of the construction of the expression ‘to be used predominantly for residential accommodation’ set out by White J in *Toyama* and preferred the approach adopted by a Full Court in *Marana* on a related section of the Act. However, both felt obliged to follow *Toyama* in the absence of a decision of the Full Court on s 40-65 itself.

The architecture of section 40-65(1)

- 43 ...It seems to us that the definition of ‘residential premises’ in s 195-1 looks to an existing state of fact: whether the land or building is occupied as a residence or for residential accommodation; or is intended to be occupied, and is capable of being occupied, as such. Again, the second, or para (b), limb of the definition, notwithstanding the phrase ‘intended to be occupied’, is looking to the characteristics or nature of the property, rather than the intention of any person. So much is to be gleaned from the phrase ‘and is capable of being occupied’.
- 44 That being so, and accepting that the phrase ‘to be used predominantly for residential accommodation’ is only concerned with the characteristics of the property in terms of its suitability, and not with any person’s intended use of the property, there is really only one element of s 40-65(1), not two, and so understood, the phrase ‘to the extent’ qualifies all of the words in s 40-65(1) which follow, not just the phrase ‘residential premises’. ...
- 45 Finally, in our opinion the introduction into s 40-65 of the meaning of ‘residential premises’ resulting in the expression ‘intended to be occupied’ as well as ‘to be used predominantly for residential accommodation’ does not lead to a different conclusion. The expressions ‘intended to be occupied’ and ‘to be used’ are synonymous. At most the word ‘predominantly’ in the second phrase qualifies the first phrase in a quantitative way. The two phrases are not separate criteria introducing, respectively, an objective and subjective test.

CONCLUSION

- 46 The appeal must be dismissed.

What was the decision? Jessup J

- 63 When the defined meaning of “residential purposes” is inserted into s 40-65(1), the provision with which we are presently concerned reads as follows (omitting for the sake of simplicity the presently immaterial reference to a floating home):

A sale of real property is input taxed, but only to the extent that the property is land or a building that:

(a) is occupied as a residence or for residential accommodation;

or

(b) is intended to be occupied, and is capable of being occupied, as a residence or for residential accommodation;

(regardless of the term of the occupation or intended occupation) ... to be used predominantly for residential accommodation (regardless of the term of occupation).

67. ... as I have indicated above, the primary Judge was not persuaded that the reasons of White J were plainly wrong, or clearly wrong. Since those reasons related directly to the provision with which the primary Judge was concerned, his Honour felt bound to follow *Toyama*, and he did so.
68. Albeit not without a qualification to which I shall refer, I consider that White J was substantially correct. It is clear from the expanded form of s 40-65(1), which I have set out in para 63 above, that the characteristics of the property, and its present fitness for use in a particular way, must, in accordance with *Marana*, be taken into account under para (b) of the subsection. Those characteristics, and that fitness, govern the disposition of the question whether the property is “intended to be occupied ... for residential accommodation”. The concluding words of the subsection – “to be used predominately” etc – if they are to make any contribution to the meaning of the provision at all, must convey an idea which differs, at least in some respects, from that conveyed by the earlier words of the provision.
- 69 In its most natural meaning, to describe something as “to be used” for a particular purpose conveys the notion of a prediction, based upon the objective, known, facts at the time. While I recognise, with respect, the force of the grammatical analysis offered by the primary Judge at para 15 of his reasons (see para 66 above), I do not consider that such an approach is inconsistent with, or renders inappropriate, the kind of predictive exercise to which White J referred in *Toyama*. All will depend on context. To say that food is “to be eaten” may well convey something about the food, but it necessarily also conveys, in my view, a prediction as to the future destination of the food. Food not consumed at a banquet and destined for the rubbish bin may, in point of physical characteristics, be suitable for eating, but it could never be said that it was “to be eaten”. To say that a goal is “to be achieved” adds little, in my respectful view, to the noun itself – since it is the nature of a goal that it ought to be achieved – but would often have a forward-looking aspect, in the sense that the goal

remained to be achieved. The often delicate nuances conveyed by expressions of this kind makes it inappropriate, in my respectful view, to opine categorically that similar, but different, verbal passive phrases should be understood analogously.

- 70 Although paras (a) and (b) of the expanded form of s 40-65(1) are concerned with occupation of the property, the concluding words of the provision are concerned with the use to which the property is to be put. In my view, these words add an additional layer of meaning to s 40-65, and are not satisfied merely by pointing to the existing physical circumstances of the property, by reference to which the operation of the earlier parts of the provision has been affirmatively established. This does not mean that the question posed by the concluding words should be answered exclusively, or even (necessarily) principally, by reference to the intention of the future owner or lessee of the property. In this respect, I would depart from what White J said in para 92 of his Honour's reasons. I consider that the words "to be used" require an entirely objective prediction to be made as to the use to which the property will be put. The intention of the future owner or lessee will usually be an ingredient in the mix of facts by reference to which that prediction is made. I can see no reason, however, to elevate it, as a matter of construction, to a level of importance higher than other objective circumstances which may exist in particular cases. The future owner or lessee may, for instance, have every intention to use the property in a particular way, but the objective circumstances may indicate that he or she would have a negligible prospect of securing the finance necessary for that kind of use. In such a case, the intention of the future owner or lessee would play only a small part in the objective exercise of prediction to which I have referred.
- 71 The conclusion that the appellant's intentions were relevant to a determination of the question whether the Bridge Street property was "to be used" for residential accommodation does not, however, conclude either its motion or its appeal in its favour. There are two circumstances which, in combination, in my view, require us to determine both matters in favour of the Commissioner. The first is an issue of construction which arises under s 40-65(1). Here the question is not whether the property was, at the relevant time, to be used for a non-residential purpose, such as development. The question is whether the property was to be used for residential accommodation. If the answer to that question is in the affirmative, the operation of the subsection is not excluded by the circumstance, if it be a circumstance, that the property was later to be used for a non-residential purpose.
- 72 At this point, it is relevant also to note that s 40-65(1) contemplates circumstances in which a property might be used for more than one purpose.

(2) ** Does the principle from *Broadbeach* extend to GST debts? (*Mossimo Systems International v DC of T*)

[Source: Month 12-2010-38 ~ 1-2\(a\) – Mossimo Systems International Pty Ltd v DC of T \[2010\] NSWSC 1409 \(2 December 2010\), Barrett J](#)

What is the issue?

Were each of 9 taxpayer companies entitled to have statutory demands in relation to GST debts set aside on the basis of the existence of a genuine dispute?

What was the outcome?

The taxpayer had oldge objections which remained undetermined.

Slattery J:

- ◆ found that seven of the companies applied together to have the seven statutory demands set aside with the result that there was not an application before the Court for any single statutory demand to be set aside;
- ◆ dismissed the seven applications with costs against the taxpayer companies.

Slattery J said:

- 23 Broadbeach Properties was one of three appeals decided together by the High Court in September 2008. ... The case affecting Broadbeach Properties itself involved income tax. The cases affecting the other two relevant companies, MA Howard Racing Pty Limited and Neutral Bay Pty Limited, involved goods and services tax.
- 24 The matters before me concern goods and services tax. The Broadbeach Properties aspect of the matter before the High Court is, however, instructive in an important respect. One difference, I think, between that case

and this is that the objection had been disallowed before the application relating to the statutory demand was heard.

- 25 The aspects of the High Court's decisions relating to MA Howard Racing and Neutral Bay Pty Limited are relevant for present purposes because of the conclusions reached with respect to the very provisions about goods and services tax that are relevant here.
- 26 In the High Court, Gummow A-CJ, Heydon J, Crennan J and Kiefel J delivered a joint judgment, while Kirby J delivered a short concurring judgment. The court noted that provisions in Schedule 1 to the Taxation Administration Act with respect to assessment of goods and services tax and penalties are "conclusive evidence" provisions. They exist as part of a statutory scheme that creates debts - being debts, moreover, of a special character imparted by the taxation legislation. Among the peculiar characteristics of such debts, as noted at paragraph [52] of the joint judgment, is that an action for recovery cannot be met by a plea of *nunquam indebitatus*, or by a traversing of the declaration that the debt is due and payable, or by pleading the pendency of an objection.
- 27 In short and as is said at paragraph [58] of the joint judgment, the provisions of the taxation legislation "place the existence and amounts of the tax debts outside the area for a genuine dispute for the purposes of section 459H(1) of the Corporations Act."
- 28 This authoritative statement of the law means that the genuine dispute part of the case sought to be made on behalf of the seven remaining plaintiffs must fail. It also means that the offsetting claim aspect must fail.

Editor:

Slattery J noted that the court could do nothing in relation to 2 of the 9 companies that had been deregistered under section 601AB of the Corporations Act. Slattery J applied a recent decision *Amcus Pty Ltd v Hurst Rentals Pty Ltd (No 2)* [2010] NSWSC 239 in coming to that conclusion.

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(1) ** Was the car park at or near primary place of employment? (Virgin Blue Airlines v Cof T)

[Source: Month 12-2010-31 ~ 3-2\(a\) - Virgin Blue Airlines Pty Ltd v C of T \[2010\] FCAFC 137 \(30 November 2010\), Edmonds, Jessup & Gilmour JJ](#)

What is the issue?

Were car parking facilities provided 1.9 to 2 kms from an employee's primary place of employment at or in the vicinity of the employee's primary place of employment?

What was the outcome?

Two concurring decisions resulted in the appeal being allowed.

What were the facts?

Melbourne Airport, at which Virginblue leases part of Terminal 3 and provides the primary place of employment for its employees, covers an area of approximately 23,780,000 square metres.

Virginblue Virginblue arranged for the employees to be issued with passes allowing them to access the Melrose Car Park owned by a third party. Virginblue paid the owner a monthly fee for each pass to access the Melrose Car Park.

The shortest practicable route between the entrance to the Melrose Car Park and Terminal 3 is approximately 1.9 to 2 km by road and take 20 to 25 minutes to traverse by foot.

A shuttle bus service operated between the Melrose Car Park and Terminal 4 or Terminal 2 at Melbourne Airport. The journey from an employee's car space at Melrose Car Park to Terminal 3 via the shuttle bus takes an Employee about 15 to 20 minutes, one way, without counting time waiting for the shuttle bus.

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

While the Court declined to state in numerical fashion when a car park is "at, or in the vicinity of" it will be time to revisit the car parking arrangements and FBT liability generated by many employees.

An FBT liability is also generated when a car is kept at or near the employee's place of residence. On one view the Court's observations about the meaning of vicinity also apply to a synonym of vicinity "near" such that where a car is not kept at an employee's residence but a bus trip distant, or bike ride away, that car will not generate a fringe benefit liability.

What was the decision? Edmonds & Gilmour JJ

7 On 29 October 1986 the Treasurer announced that:

Car parking benefits are to be exempted from fringe benefits tax, whether provided at an employer's premises or elsewhere.

8 In consequence, s 58G was inserted into the FBTA, ... This amounted to a "blanket exemption".

9 That exemption was then partly reversed in 1992 when Div 10A of the FBTA was introduced ... to render some instances of employer-subsidised car parking a fringe benefit. Section 39A, which is found in Div 10A, brought within the fringe benefits tax net the provision of car parking facilities where "the car is parked at, or in the vicinity of, the employee's primary place of employment": s 39A(1)(f) of the FBTA.

10 In other words, Div 10A "carved out" of the blanket exemption a limited liability to tax: "where the car is parked at, or in the vicinity of, the employee's primary place of employment".

11 If, instead of a "carve out", the Legislature had intended to remove the blanket exemption, it could have repealed s 58G. In fact this section was amended with the effect described later in these reasons.

13 Section 39A(1) of the FBTA prescribes the "conditions" which must be satisfied in order for the provision of car parking facilities to an employee to be a fringe benefit. The relevant "condition" for present purposes is found in s 39A(1)(f) which applies where:

(f) during the period or periods, the car is parked at, or in the vicinity of, that primary place of employment...

- 14 If the condition in s 39A(1)(f) is satisfied, the provision of parking facilities at Melrose Car Park will be treated as a benefit provided by an arranger to the employees in respect of their employment with the appellant, and there will be a “fringe benefit” as defined in s 136(1).

CONSIDERATION

- 30 The legislative history of the liability, and the exemption from liability, of car parking benefits to fringe benefits tax, set out at [6]-[11] above, provides a platform from which to construe the words “at or in the vicinity of” in s 39A(1)(f) of the FBTAA. ...
- 31 The phrase “in the vicinity of” in s 39A(1)(f) of the FBTAA refers to a relationship between two places. It is an expression capable of wide application. However, its reach requires consideration in its statutory context before its application to the facts....
- 32 It is common ground in the parties written submissions that the primary judge was correct in concluding that the meaning of the words “in the vicinity of” meant “near”, “proximate” or “close”. Each of those meanings is apt as is the observation of the primary judge that in the context of s 39A(1)(f) the meaning of the phrase “in the vicinity of” does not change. It always means “near”, “proximate” or “close”. Despite this, senior counsel for the respondent in oral submissions sought to argue that expressions such as “neighbourhood” or “region” are capable of coming within her Honour’s conclusion as to the meaning of the expression “in the vicinity of”. There is no warrant for this and there is no notice of contention asserting any such different meaning.
- 33 However, “near” is a relative term which invites the question “how near?” This is to be answered by reference to the statutory context without regard to the facts of the instant case.
- 35 The Explanatory Memorandum to the Bill gave five examples of the intended operation of s 39A. In the first four, the car parking facility was in the basement of the building in which the employee worked. In the fifth example, which illustrated the “in the vicinity” alternative in s 39A(1)(f), the car parking facility was a car park across the street from the employee’s office.
- 36 When regard is had to the statutory context, concerning the imposition of a tax upon a car parking benefit provided to employees who use their cars to commute to and from work, it is apparent that the word “vicinity” in the phrase “at, or in the vicinity of” is a reference to places which are near meaning in close spatial proximity to each other. The word “near” when used to denote spatial proximity according to the Oxford English Dictionary (Second Edition) means “[t]o, within, or at, a short distance; to, or in, close proximity”. Such a conclusion is not affected by the fact that the expression “at or near” is employed in other provisions of the FBTAA: s 7(2)(b); s 47(7)(b); s 58L(1)(e); s 61C(1)(c); s 142(2E)(b)(ii); s 143(1)(j); s 143C(1)(f).
52. ... A consequence of the primary Judge’s construction and the respondent’s submissions is that where employees who work within a large “functional space” such as an airport or hospital, park in employer-provided parking located, for example, 2km from their primary place of employment, this parking is prima facie subject to FBT, whereas employer-provided parking for CBD workers 2km away from the CBD workers’ primary place of employment is FBT-free, on the basis that the functional space of a CBD office is much narrower than 2km. The use of a concept such as “functional space” is an unwarranted layer of meaning which goes beyond the ordinary meaning of the expression “in the vicinity of” having regard to the object and context of the statutory provision.
- 54 The statutory test is whether the car park is in the vicinity of the employee’s primary place of employment. The “primary place of employment” will ordinarily be capable of precise identification. That place is Terminal 3. It is not Melbourne Airport at large. The question is whether the parking provided is in the vicinity of Terminal 3. Consideration of whether or not the primary place of employment is functionally part of a large area such as Melbourne Airport, or a University Campus or a city’s CBD is not warranted by the statutory language and serves only to distract from the question whether the car park is, synonymously, near, proximate or close to that place. It is the spatial and geographical separation between them that is important. To the extent that what lies between them is relevant to the application, as distinct from the meaning, of the statutory test this encompasses geographical features such as rivers, railway lines, freeways and other physical obstacles which might render a car park and an employee’s primary place of employment near or close as the crow flies but not so in terms of the distance of the shortest practicable route between them. For example where a car park provided by an employer was on the other side of a railway line from the primary place of employment the distance between them might be 100 metres but because the nearest rail crossing was 1 km away the actual distance to be travelled to reach one from the other would be 2 km. This is consistent with

the observations of Jacobs J in *Abley* at 152 to which we referred above and which were also referred to by the primary judge. It is in this sense that the expression “in the vicinity of” is flexible.

- 56 The function of s 39A(1)(f) is to limit the size of the area around the primary place of employment in which a parking space will be a fringe benefit. Section 39A reflects a policy that the inequity referred to in the Second Reading Speech is not seen as applicable to all employer subsidised car parking. The policy is not to impose tax on all employer subsidised parking. That would have been achieved if, instead of inserting Div 10A in 1992, the legislature had simply removed former s 58G. Rather, the tax is imposed only if all of the conditions of s 39A, and the other conditions of the FBTAA, are satisfied. Accordingly, not every car parking benefit constitutes a taxable fringe benefit.
59. Ultimately it is a matter of evaluative judgment. This does not put the Court in the role of legislator as the respondent submits. Courts are often required to make such judgments in various contexts. In our opinion a car park which is approximately 2kms away from the appellant’s employee’s primary place of employment is not near, proximate or close to that place. It is not to the point, as the respondent submits, that the fact that an employer considers the car park provided to be appropriate or convenient. Were this relevant s 39A(1)(f) would again be otiose. The question rather, is whether the condition in that provision is satisfied.
- 60 It follows in our opinion that the car parking provided by the appellant to the employees in this case is not “in the vicinity of” their primary place of employment and FBT is not exigible in respect of those benefits. That the bus trip, taken twice a day, between the car park provided and the primary place of employment takes 15-20 minutes, excluding waiting time, serves only to strengthen this conclusion.

What was the decision? Jessup JJ

JESSUP J:

- 63 I agree with the disposition of this appeal proposed by Edmonds and Gilmour JJ and, subject to what follows, with their Honours’ reasons.
- 64 The present controversy arises from the legislature’s adoption of the imprecise term “vicinity” as a condition for the imposition of tax. Because the term is inherently imprecise, recourse to dictionary definitions takes the debate nowhere useful. At base, the sense in which “vicinity” is used in text or conversation depends entirely on context. We are reminded by the Oxford English dictionary, for example, of the maritime context:
- 1891 Science-Gossip XXVII. 14/1 During a severe storm in that year the Port Glasgow ship ‘Marseilles’ capsized in the vicinity of Portpatrick.*
- For a vessel which has capsized, the proximity of a port is of obvious significance, and “vicinity” takes its sense from that context. We are also entertained by the notion, given to us in *The Pirates of Penzance*, that a band of pirates might have it in mind to engage in a kind a mass nuptial with the Major-General’s daughters, an idea apparently rendered the more feasible because there was “... a doctor of divinity ... located in this vicinity”. In this context, “vicinity” was used in a sense which implied convenience of access for an immediate purpose.
- 65 In legislation – and particularly in a taxing statute – the word must, in my view, be given a sense which is rooted in the context of the relevant section.

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5 SUPERANNUATION, ETP'S & PENSIONS

5.1 Politicians, Boards & Statutory Authorities

(1) ** Expanding the definition of 'Instalments Warrants' [Shorten]

[Source: Month 01-2011-83 ~ 1-1 - Expanding the Range of Assets Covered by the Income Tax Look Through Treatment for Instalments Warrants ~ Shorten, Media Release No. 008, 17 January 2011](#)

The Government has announced an extension to the proposed income tax look-through treatment to cover instalment warrants and receipts over direct and indirect interests in listed securities, as well as unlisted securities in widely held entities and bundles of these assets.

The Government previously announced changes to the income tax laws to confirm the practice of treating an investor in an instalment warrant over a listed security as the owner of the security for income tax purposes.

As the Government previously announced, a superannuation trustee who enters into a limited recourse borrowing arrangement, as permitted under the Superannuation Industry (Supervision) Act 1993, will be treated as the owner of the asset for income tax purposes.

Legislation giving effect to these changes will be introduced as soon as practicable. Exposure draft legislation and explanatory material will be released for consultation early this year on the Treasury website www.treasury.gov.au.

Consistent with the previous announcement, these changes to expand the scope of the look-through treatment will apply to income assessments for the 2007-08 and later income years.

(2) * Talk, talk and talk but still it's super spin [Shorten]

[Source: Month 12-2010-88 ~ 5-1 - Government super reforms mean more money in retirement - Shorten, Media Release No. 024, 16 December 2010:](#)

The superannuation industry processes an estimated 100 million transactions a year at a total cost of \$3.5 billion. So the average cost of each transaction is around \$35. Contributing to this inefficiency, each working Australian has, on average, three superannuation accounts.

Stronger Super will improve the operation of the superannuation system and, together with the Government's commitment to increase the superannuation guarantee to 12 per cent, will deliver a comfortable and secure retirement for current and future generations of Australians.

The Government will undertake further consultation with stakeholders on the implementation of its reforms. Further information is available from the Stronger Super website at strongersuper.treasury.gov.au

5.2 Courts & Tribunals

(b) Tribunals

(1) ** Certificate of non-compliance issued to SMSF? (ZDDD and C of T)

Source: [Month 01-2011-30 ~ 5-2\(a\) - ZDDD and C of T \[2011\] AATA 3 \(10 January 2011\), Ms JL Redfern, Senior Member](#)

What is the issue?

The issue is whether, in the circumstances, the notice of non-compliance should be set aside and/or whether the applicant should nevertheless be given a notice stating it was a “complying superannuation fund” in respect of the income year ended 30 June 2005.

What was the outcome?

The Tribunal refused to accept the applicant’s enforceable undertaking and so refused to set aside the notice of non compliance.

What were the facts?

The applicant is the corporate trustee of:

- ◆ the K Superannuation Fund (the Fund) was established on 22 May 1997 and operated as a complying superannuation fund from 8 October 1999; and
- ◆ a unit trust in which the Fund together with the discretionary trust hold all the units.

Mr K, who operates a legal practice, and Dr K, a medical practitioner, are directors of the applicant and are members of the Fund.

Following significant financial pressures and a forced refinancing the Fund’s assets consisted of loans to Mr K, his legal practice and Dr K made in the 2005 year.

The Fund received no income from the loans.

In 2009 the applicant unsuccessfully sought to have the Commissioner put in place an enforceable undertaking as to the future conduct of the Fund.

The Commissioner refused to withdraw the notice of non compliance raising the failure of the applicant to propose a rectification plan that adequately rectified “longstanding contraventions”

The applicant:

- ◆ unsuccessfully sought a review of the Commissioner’s decision and appealed that decision to the Tribunal

The Commissioner issued a notice of non compliance following an audit completed in 2009.

enr ihn. It was accepted as a “complying superannuation fund” by the Commissioner of Taxation for a number of years and as such enjoyed certain tax benefits available under the tax legislation.

What were the contentions?

The applicant contended that:

- ◆ the notice of non-compliance should be set aside and the proposed enforceable undertaking should be accepted as an alternative;
- ◆ the circumstances that gave rise to the contraventions of the SIS Act were exceptional;

- ◆ the tax consequences of not withdrawing the notice of non-compliance are significant such that the Fund and the applicant may become insolvent and would not be in the best interests of the members of the Fund;
- ◆ the contraventions:
 - ~ are serious but at the “low end” of the scale and the applicant and the directors have proposed new undertakings to rectify the contraventions, which should be accepted;
 - ~ were not intentional and Mr and Dr K, as directors of the trustee, did not have sufficient skill or knowledge to understand the SIS Act or the role and responsibilities of trustees of a self managed superannuation fund.

The Commissioner contended that:

- ◆ the notice of non-compliance should not be set aside;
- ◆ the scheme to provide tax concessions to self managed superannuation funds is a privilege that should not be abused, and is dependent on superannuation funds complying with certain key regulatory obligations under the SIS Act which are designed to encourage prudent management of retirement funds;
- ◆ the contraventions identified by the Commissioner, and conceded by the applicant, are serious and have resulted in the Fund holding an investment in a unit trust:
 - ~ the value of which has not increased since 2005 and which has earned no interest; and
 - ~ based on an unsecured and undocumented loan which includes no terms for repayment.

What was the decision?

68. I accept Mr and Dr K, as directors of the applicant, did not understand these were contraventions of the SIS Act because they lacked experience in this area. On the other hand, they did not seek advice or adequately inform themselves about the role of a trustee of a self managed superannuation fund and relied on their accountants. However, the duties of a director cannot be delegated to advisers. While it may be appropriate for a director to rely on the advice of others, indeed, this is recognised by s 189 of the Corporations Act 2001, directors must make their own enquiries and independent assessment of that information or advice. ... In my view, the primary responsibility for this obligation resides with trustees and if the trustee is a corporate trustee, those who manage them.
71. The contraventions identified by the Commissioner are serious. They go to the heart of prudential regulation of superannuation funds as the provisions breached are designed to ensure the assets of a superannuation fund are preserved for retirement benefits. In the present case, the key issue of concern is that the assets of the Properties Unit Trust were used by Mr and Dr K for their own benefit. This would not have been a problem, but for the fact that the units in the Properties Unit Trust were the sole asset of the Fund and this has been the case since the fund was established in 1997. Mr K now accepts these were not “technical breaches”.
75. In my view, the nature and extent of the contraventions are serious and militate against issuing a notice of compliance.

Editor

Even if the investments had been any good and the notice of non compliance had been set aside the SMSF would have been in receipt of non arm’s length income (formerly special income)

7 LISTED ATO PUBLICATIONS FOR THE MONTH

7.1 ATO Publications that you can rely upon

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

TR 2010/8	Income tax: application of subsection 109RB(1) of the Income Tax Assessment Act 1936
TR 2010/D7	Income tax: business related capital expenditure - section 40-880 of the Income Tax Assessment Act 1997 core issues
TR 2010/D8	Income tax: retail premiums paid to shareholders where share entitlements are not taken up or are not available
TR 2010/D9	Income tax: deductibility under subsection 295-465(1) of the Income Tax Assessment Act 1997 of premiums paid by a complying superannuation fund for an insurance policy providing Total and Permanent Disability cover in respect of its members
TR 2010/D10	Income tax: objections against income tax assessments

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

TD 2010/20	Income tax: treaty shopping - can Part IVA of the Income Tax Assessment Act 1936 apply to arrangements designed to alter the intended effect of Australia's International Tax Agreements network?
TD 2010/21	Income tax: can the profit on the sale of shares in a company group acquired in a leveraged buyout be included in the assessable income of the vendor under subsection 6-5(3) of the Income Tax Assessment Act 1997?
TD 2011/1	Income tax and fringe benefits tax: can a non-resident entity be: (a) required to withhold amounts from salary and wages paid to an Australian resident employee for work performed overseas under section 12-35 of Schedule 1 to the Taxation Administration Act 1953? (b) subject to obligations under the Fringe Benefits Tax Assessment Act 1986 in relation to benefits provided to an Australian resident employee in relation to work performed overseas?
TD 2010/D7	Income tax: is 'Australian source(s)' in subsection 6-5(3) of the Income Tax Assessment Act 1997 dependent solely on where purchase and sale contracts are executed in respect of the sale of shares in an Australian corporate group acquired in a leveraged buyout by a private equity fund?
TD 2010/D8	Income tax: does the business profits article (Article 7) of Australia's tax treaties apply to Australian sourced business profits of a foreign limited liability partnership (LLP) where the partners in the LLP are residents of a country with which Australia has entered into a tax treaty and the LLP is treated as fiscally transparent in the country of residence of the partners?
TD 2010/D9	Income tax: Division 7A - unpaid present entitlements - factors the Commissioner will take into account in determining the amount of any deemed entitlement arising under section 109XI of the Income Tax Assessment Act 1936
TD 2010/D10	Income tax: Division 7A - payments and loans through interposed entities - factors the Commissioner will take into account in determining the amount of any deemed payment or notional loan arising under section 109T of the Income Tax Assessment Act 1936

(b) SMSFD

SMSFD	Self Managed Superannuation Funds: for the purposes of the Superannuation
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2011/1	Industry (Supervision) Regulations 1994, is a benefit payable with a cheque or promissory note 'cashed' at the time the cheque or note is received by the member or beneficiary?
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(c) Class Rulings

CR 2010/77	Income tax: capital gains tax: Westfield Group - creating a new stapled security
CR 2010/76	Income tax: treatment of payments received under the Murrumbidgee Catchment Management Authority Murrumbidgee EcoTender II project
CR 2010/75	Income tax: Breville Group - Performance Rights Plan
CR 2010/74	Income tax: demerger of Austgrowth Property Syndicate No. 18 Unit Trust
CR 2010/73	Income tax: Macquarie Group Employee Retained Equity Plan
CR 2010/72	Income tax: Accenture Group reorganisation - scrip for scrip roll-over: exchange of Accenture Limited shares for equivalent Accenture plc shares
CR 2010/71	Income tax: scrip for scrip: merger of Choiseul Investments Limited and Milton Corporation Limited
CR 2010/70	Income tax: itX Group Limited Scheme of Arrangement and proposed Agreed Dividend
CR 2010/69	Income tax: return of capital: Multiplex Acumen Vale Syndicate Limited
CR 2010/68	Income tax: exchange of shares in Suncorp-Metway Limited for shares in Suncorp Group Limited
CR 2011/2	Income tax: demerger of Austgrowth Property Syndicate No.20 Unit Trust
CR 2011/3	Income tax: demerger of Burwood Property Syndicate Unit Trust
CR 2011/4	Income tax: demerger of Brisbane Property Syndicate Unit Trust
CR 2011/5	Income tax: demerger of Canberra Property Syndicate Unit Trust
CR 2011/6	Income tax: demerger of Melbourne Property Syndicate Unit Trust
CR 2011/7	Income tax: off-market share buy-back: Collins Foods Holding Pty Ltd
CR 2011/1	Income tax: early retirement scheme - Queensland Government Department of Education and Training

(d) Product Rulings

PR 2010/27	Income tax: Great Southern 2007 Almond Income Project (Replacement Responsible Entity)
PR 2010/28	Income tax: Great Southern 2008 Almond Income Project (Replacement Responsible Entity)
PR 2010/29	Income tax: 2005 Swan Hill Almond Grower Project (2005 Growers)
PR 2010/30	Income tax: 2005 Swan Hill Almond Grower Project (2006 Growers)
PR 2011/1	Income tax: 2004 Swan Hill Almond Grower Project (2004 Growers)
PR 2011/2	Income tax: Macquarie Eucalypt Project 2011

(e) Decision Impact Statements

S79 of 2010	Travelex Ltd v Commissioner of Taxation
M64 of 2010	Commissioner of Taxation v Symone Anstis uring the 2006 income year, the taxpayer was enrolled as a full time student undertaking a teaching degree at the Australian Catholic University, and received YA payments of \$3,622 under the SSA. She also derived \$14,946 in income from part time work as a sales assistant. The taxpayer did not derive any income during the relevant year from having worked as a teacher. In her income tax return for the 2006 year, the taxpayer claimed a deduction of

	<p>\$920 for expenses (travel expenses, teaching supplies, student administration fees, textbooks and computer depreciation) incurred in gaining or producing the YA payments.</p> <p>The High Court has recognised that YA payments are ordinary income in the hands of recipients. In so deciding, the Court appears to have approved the alternative argument presented by the Commissioner in <i>FCT v. Stone</i> (2005) 222 CLR 289, at 388, which was left open in that case. It is also consistent with the assumption underlying Divisions 51 and 52 of the ITAA 1997 that other regular payments made under the SSA are ordinary income in the hands of recipients, unless specifically made exempt from income tax under those Divisions.</p> <p>The ATO recognises that the High Court decided that the non-depreciation expenses were incurred in this case in 'gaining or producing' the YA income received, and were not of a private nature. The ATO accepts that similar expenses would also be allowable under section 8-1 to other full-time students receiving YA income. The ATO also accepts that, in working out whether a full-time student receiving YA income is entitled to deductions for the decline in value of a computer under section 40-25 of the ITAA 97, a taxable purpose in subsection 40-25(8) includes the purpose of producing such income.</p> <p>The ATO also notes that the Court's decision does not extend to meals expenses incurred by recipients of YA income, and for travelling expenses between a full-time student's home and place of study, whose essential character would still be of a private nature.</p> <p>Further consideration is being given to whether the High Court's decision extends to students receiving other taxable education payments and to recipients of other payments made under the SSA. Of particular importance will be what a recipient was required to expend in establishing and retaining an entitlement to the receipts.</p> <p>Administrative Treatment</p> <p>The ATO invites comment on whether the Court's finding, that the occasion of the taxpayer's study expenses was to be found in what she did to establish and retain her statutory entitlement to the YA receipts, has wider implications under the taxation laws.</p> <p>The ATO will consider whether any further public advice or guidance is necessary, having regard to any comments received.</p> <p>Implications on current Public Rulings & Determinations</p> <p>The ATO recognises that the views expressed in paragraphs 18, 19, 21 and 71 to 77 of Taxation Ruling TR 98/9 are contrary to the views expressed by the High Court in this case. The Ruling will be amended in the light of the guidance provided by the Court.</p>
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(f) Addenda & Errata & Withdrawals to documents intended to be relied upon

(1) Addenda

GSTR 2002/5A1 - Addendum	Goods and services tax: when is a 'supply of a going concern' GST-free?
CR 2010/63A1 - Addendum	Income tax: scrip for scrip: exchange of shares in Lihir Gold Limited for shares in Newcrest Mining Limited

(2) Errata

TR 2010/D7ER - Erratum	Income tax: business related capital expenditure - section 40-880 of the Income Tax Assessment Act 1997 core issues
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(3) Withdrawals

TR 96/12W	Income tax: objections against income tax assessments
PR 2007/76W	Income tax: Palandri Global Supply Challenge 2007-2008 (2008 Growers)
PR 2007/46W	Income tax: Palandri Global Supply Challenge 2007-2008 (2007 Growers using finance from Allco Managed Investment Ltd)
PR 2007/34W	Income tax: Great Southern 2007 Almond Income Project
PR 2007/10W	Income tax: Palandri Global Supply Challenge 2007-2008 (2007 Growers)
PR 2007/102W	Income tax: Great Southern 2008 Almond Income Project

7.2 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 [NIL]

MT 2010/1	Miscellaneous tax: restrictions on GST refunds under section 105-65 of Schedule 1 to the Taxation Administration Act 1953
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(b) ATO ID's

ID 2010/218	Assessable recoupment: recoupment - grant of the right to create renewable energy certificates - solar system on a rental property
ID 2010/219	Fringe benefit: shares provided to employees upon exercise of rights granted under an employee share scheme
ID 2010/220	Functional currency: the interaction between 'functional currency' for accounting purposes and the 'applicable functional currency' for taxation purposes
ID 2010/221	Division 3B: foreign exchange (forex) gains and losses - re-exchange of currencies under a cross currency swap
ID 2010/222	Functional currency: translation requirements where an entity withdraws its 'applicable functional currency' choice
ID 2010/223	Fuel tax credits: GST groups - applications for private rulings
ID 2010/224	GST and mortgagees in possession: selling the property of a corporation
ID 2010/225	GST and provision of a prepaid card facility by an Australian authorised deposit-taking institution
ID 2010/226	Amendment of assessments: time limits for amending assessments where Regulation 20 of the Income Tax Regulations 1936 applies and the matters for which assessments may be amended
ID 2010/227	Energy grants credits scheme: Off road - marine transport - whether a jet ski is a vessel
ID 2010/228	Capital gains tax: majority underlying interests - partnership to company roll-over
ID 2011/1	Capital allowances: depreciating asset - jointly held - composite asset
ID 2011/2	Capital allowances: depreciating asset - segments of a fibre optic cable system
ID 2011/3	Capital allowances: primary production - water facilities - sprinkler system used for frost protection
ID 2011/4	Irish Investment Limited Partnerships and managed investment trusts

ID 2011/5	Wine equalisation tax: grape wine product and the addition of the flavour of an alcoholic beverage
ID 2011/6	Primary production: conditions for election to spread or defer profit on disposal or death of livestock
ID 2011/7	Application of section 295-85 of the ITAA 1997: where a complying superannuation fund is a partner in a venture capital limited partnership
ID 2011/8	Division 7A: interest component of shortfall in minimum yearly repayment and section 109D of the ITAA 1936

(c) Practice Statements

PS LA 2010/5	Technical discussion papers To explain: * when technical discussion papers should be published * the status of technical discussion papers, and * the processes for development and finalisation of technical discussion papers
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(e) Other ATO publications

TA 2010/8	Gift deductions for donation of pharmaceuticals to charities operating overseas
OPS 2010/3	Occasional payroll donations to deductible gift recipients No. 2

7.3 Addenda & Errata & Withdrawals to documents not intended to be relied upon**(a) Addenda**

TR 2010/1A - Addendum	Income tax: superannuation contributions 1 Paragraph 71 Omit the paragraph; substitute: 71. A superannuation provider will no longer hold a contribution, or at least a part of it, if the member has chosen to roll-over or withdraw a part of the superannuation interest held by the provider. In such a case, a deduction notice cannot be given for the entire contribution. A valid deduction notice will be limited to a proportion of the tax free component of the superannuation interest that remains after the roll-over or withdrawal. That proportion is the value of the relevant contribution divided by the tax free component of the superannuation interest immediately before the roll-over or withdrawal - see Examples 10 and 10A. Editor: This amendment may impact adversely on a person who uses an industry fund as a conduit fund and rolls over the pre 30 June to a SMSF too quickly.
TD 94/60A1 - addendum	Income tax: are bar shouts and in-house competition prizes of cash and liquor, supplied by hoteliers to encourage patronage, allowable deductions, and if so, what documentation is acceptable to support the amount claimed? Refer
TD 93/242A1 - Addendum	Income tax: what is the income tax treatment of a deferred salary payment agreement?
PR 1999/29A2 - Addendum	Income tax: Margaret River Wine Business
PR 2000/114A1 - Addendum	Income tax: Palandri Wine Project
PR 2000/93A2 - Addendum	Income tax: Margaret River Wine Business (Project No.2)

PR 2001/11A1 - Addendum	Income tax: Palandri 2000 Project - Second Offering
PR 2001/130A1 - Addendum	Income tax: Palandri 2000 Project - Second Offering
PR 2002/120A1 - Addendum	Income tax: Palandri America Wine Business (Revised Arrangement)
PR 2002/13A1 - Addendum	Income tax: Income tax: Palandri America Wine Business
PR 2002/144A1 - Addendum	Income tax: Palandri America Wine Business - 2003
PR 2004/47A3 - Addendum	Income tax: Palandri America Wine Business - 2004
PR 2005/107A1 - Addendum	Income tax: Palandri Winegrape Project 2005 - Late Members
PR 2005/109A2 - Addendum	Income tax: Palandri Winegrape Project 2005 - 2006 Growers
PR 2005/83A1 - Addendum	Income tax: Palandri Winegrape Project 2005
PR 2006/124A1 - Addendum	Income tax: Palandri Winegrape Project 2005/2006 - Late Growers
PR 2006/3A2 - Addendum	Income tax: Palandri Winegrape Project 2005 - 2006 Growers (using finance from Palandri Finance Ltd)
PR 2009/21A1 - Addendum	Income tax: tax consequences of investing in ANZ Protected Equity Leveraged Solutions II
PR 2010/29A1 - Addendum	Income tax: 2005 Swan Hill Almond Grower Project (2005 Growers)
PR 2010/30A1 - Addendum	Income tax: 2005 Swan Hill Almond Grower Project (2006 Growers)

(b) Errata [NIL]**(c) Withdrawals****(1) Rulings and determinations**

IT 2175W - Notice of Withdrawal	Income tax: exempt income: public radio station: charitable institution: gifts
PR 2010/5W	Income tax: Gunns Plantations Limited Woodlot Project 2010

(2) ATO IDs

ID 2001/28 (Withdrawn)	Overseas income: Salary of Resident Employed on Project In a Foreign Country
ID 2002/1076 (Withdrawn)	GST and arranging insurance for international transport

ID 2002/344 (Withdrawn)	Non-resident professor in receipt of Australian employment income
ID 2002/468 (Withdrawn)	Medicare Levy Surcharge - deemed hospital cover for Lifetime Health Cover entry age purposes
ID 2002/521 (Withdrawn)	GST and transport of goods to a destination outside Australia
ID 2003/1186 (Withdrawn)	Assessability of dividends received from South Africa by Australian resident
ID 2003/178 (Withdrawn)	Assessability of arrears of pension received as a lump sum from the United Kingdom
ID 2003/392 (Withdrawn)	Consolidation - Multiple FDA declarations and MEC groups
ID 2003/511 (Withdrawn)	Assessability of reward payment received by a French student from an Australian resident entity
ID 2003/543 (Withdrawn)	Assessability of widow's pension received by Australian resident from the French government
ID 2003/606 (Withdrawn)	Assessability of employment income received by Australian resident working in the United States
ID 2003/607 (Withdrawn)	Assessability of employment income received by Australian resident working in Argentina
ID 2003/608 (Withdrawn)	Assessability of employment income received by Australian resident working in Spain
ID 2003/609 (Withdrawn)	Assessability of employment income received by Australian resident working in France
ID 2003/610 (Withdrawn)	Assessability of employment income received by Australian resident working in Korea
ID 2003/611 (Withdrawn)	Assessability of employment income received by Australian resident working in New Zealand
ID 2003/853 (Withdrawn)	Annuity payments received under a will by a New Zealand resident
ID 2004/176 (Withdrawn)	Are certain preference shares which give a right of security of tenure over a unit in a retirement village 'debt interests'?
ID 2004/284 (Withdrawn)	Assessability of employment income received by a teacher working in Germany who is a resident of Australia and of Germany
ID 2004/300 (Withdrawn)	Assessability of employment income received by dual resident of Australia and Taiwan from working in Taiwan
ID 2004/305 (Withdrawn)	Assessability of employment income received by an Australian resident working in Afghanistan
ID 2004/307 (Withdrawn)	Assessability of dividend income of a South African / Australian dual resident
ID 2004/308 (Withdrawn)	Assessability of a pension received by a South African / Australian dual resident
ID 2004/341 (Withdrawn)	Assessability of salary and wages received by an Australian resident working in Russia under a cyclical roster (2004 and prior income years)
ID 2004/342 (Withdrawn)	Assessability of salary and wages received by an Australian resident working in Russia under a cyclical roster (2005 and subsequent income years)
ID 2004/482 (Withdrawn)	GST and salvage services provided to a vessel stranded in Australian waters
ID 2004/546 (Withdrawn)	Assessability of business income derived by a non-resident
ID 2004/588	Assessability of foreign employment income derived by an Australian resident

(Withdrawn)	taxpayer in Thailand
ID 2004/590 (Withdrawn)	Assessability of arrears of salary and wages received from employment with the Italian Government
ID 2004/606 (Withdrawn)	Assessability of interest income sourced in South Africa received by an Australian resident individual
ID 2004/647 (Withdrawn)	Assessability of employment income received by an Australian resident working in Jordan
ID 2004/705 (Withdrawn)	Assessability of salary and wages received by an Australian Defence Force (ADF) member from service in Cambodia as part of Operation Banner
ID 2004/728 (Withdrawn)	Assessability of employment income received by an Australian Defence Force member serving in Western Sahara with Operation CEDILLA as part of the United Nations Mission for the Referendum in Western Sahara (MINURSO)
ID 2004/753 (Withdrawn)	Assessability of employment income received by Australian Defence Force member serving in Tuvalu with the Pacific Patrol Boat project
ID 2004/90 (Withdrawn)	Income tax: Transfer from a share capital account - excluded transfer - sale of an asset
ID 2004/91 (Withdrawn)	Income tax: Transfer from a share capital account - excluded transfer - anticipated loss on the planned sale of an asset
ID 2005/22 (Withdrawn)	The meaning of financial intermediation services in the context of the Foreign Investment Funds measures?
ID 2006/126 (Withdrawn)	Assessability of net capital gain from the sale of South African real property by an Australian resident
ID 2007/94 (Withdrawn)	Capital allowances: business related costs - in relation to a business proposed to be carried on
ID 2008/126 (Withdrawn)	Employee share options: assessability of an unrealised gain by an Australian resident taxpayer from share options granted to the taxpayer when they were working in the UK
ID 2008/150 (Withdrawn)	Assessable income: South African double tax agreement - trust income
ID 2009/132 (Withdrawn)	Administrative penalty: failure to withhold from royalty payments to a French resident
ID 2009/37 (Withdrawn)	Capital Allowances: business related costs - limitation of deduction - forms part of the cost of land
ID 2009/84 (Withdrawn)	Capital Allowances: business related costs - amount incurred indifferently - most relevant business

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

[Legislation Enacted](#)

[Bills Before Parliament](#)

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

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

Interpretation

In these Tax Update Notes a reference to the:

- ◆ AAT is a reference to the Administrative Appeals Tribunal
- ◆ Administration Act is a reference to the Taxation Administration Act 1953
- ◆ ADJR is a reference to the Administrative Decisions Judicial Review Act
- ◆ ITAA 1936 or the 1936 Act is a reference to the Income Tax Assessment Act 1936
- ◆ ITAA 1997 or the 1997 Act is a reference to the Income Tax Assessment Act 1997
- ◆ ITR is a reference to the Income Tax Regulations
- ◆ FBTA is a reference to the Fringe Benefits Tax Assessment Act 1986
- ◆ GST Act means is a reference to the A New Tax System (Goods and Services Tax) Act 1999
- ◆ GST Regulations is a reference to the A New Tax System (Goods and Services Tax) Regulations 1999
- ◆ SGAA means Superannuation Guarantee (Administration) Act 1992
- ◆ The SIS Act is a reference to the Superannuation Industry (Supervision) Act 1993
- ◆ Tribunal is a reference to the Administrative Appeals Tribunal
- ◆ The Regulations is a reference to the Income Tax Regulations

Status of ATO Documents:

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

Status of a draft Taxation Ruling:

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

Status of a Class Ruling:

Certain parts of a Class Ruling constitute a 'public ruling' in terms of Part IVAAA of the Taxation Administration Act 1953. CR 2001/1 explains Class Rulings.

Status of a Product Ruling:

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

Product Ruling PR 1999/95 explains Product Rulings

Status of an ID and Private Binding Ruling:

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

Accordingly, an ATO ID must be followed where:

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

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

Status of a GST Ruling:

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

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

*** indicates the item is in the “must read category - will impact on your current practices” (legislation will not receive ***rating unless it has received Royal Assent.)

** indicates the item is in the “should read category”.

* indicates the item is in the “read if you have plenty of time” category.

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