The

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Voice®

Representing the Tax Agent Community

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Your Association

NTAA submission — Denying Deductions for Interest Charges

The NTAA recently made a written submission to Treasury, in which we outlined in detail our concerns in relation to the exposure draft legislation denying deductions for the general interest charge ('GIC') and the shortfall interest charge ('SIC').

In our written submission, we highlighted the following concerns in particular:

- Removing the deductibility of these interest charges increases the after-tax cost of the GIC and SIC and is tantamount to a double penalty (given that, under the current rules, the high interest rates on these charges have factored in the tax deductibility of these amounts).
- The proposed amendments will increase the cost of interest charges associated with a tax debt. We are concerned about the timing of implementing the proposed amendments, given the current economic environment.
- The proposed amendments may have a disproportionate effect on lower-income earners and small business taxpayers, as they are generally less likely to be able to absorb the increased interest costs.
- Linking the application of the amendments to interest charges incurred on or after 1 July 2025 means that the charge is potentially, in effect, retrospective. In particular, a 'retrospective' application of the changes can arise where:

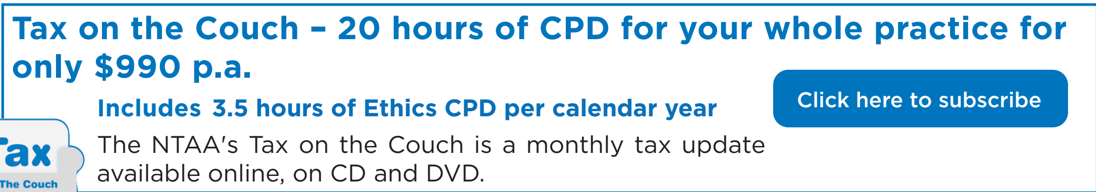
  — interest charges accrued on a tax debt prior to 1 July 2025; or

  — a tax debt arose prior to 1 July 2025.

  These types of outcomes should be avoided to promote the principles of certainty and fairness within the tax system. We strongly believe that that it is appropriate to grandfather deductions for interest charges on existing unpaid tax liabilities and to ensure SIC accrued prior to 1 July 2025 continues to be deductible.

A copy of this written submission is on our website — *click here*.

*Editor: This issue is discussed further on page 5 of this edition of **Voice**.*



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This publication has been prepared for the members of the National Tax & Accountants' Association Ltd. Many of the comments contained in **Voice** are general in nature and anyone intending to apply the information to practical circumstances should independently verify their interpretation and the information's applicability to their particular circumstances.

Practice Notes

Super on paid parental leave now law

Legislation was recently passed to establish the 'Paid Parental Leave Superannuation Contribution' ('PPLSC'), a superannuation contribution for people receiving parental leave pay ('PLP') in respect of children born on or after 1 July 2025.

*Editor: The April edition of **Voice** included the Treasurer's Media Release outlining this measure.*

The PPLSC will be calculated as a percentage of the total amount of PLP paid in the preceding income year, plus a nominal interest component. The percentage will align with the superannuation guarantee rate as at 1 July of the income year that the PLP is paid.

PLP recipients will not need to make a separate claim to access the PPLSC entitlement. The PPLSC will be payable for all recipients of PLP, regardless of their gender or period of PLP taken during the income year.

The PPLSC will be treated as a concessional contribution when it is received by a person's superannuation fund, in line with the treatment of employer superannuation guarantee contributions.

According to the Explanatory Memorandum, *"Paying superannuation on Commonwealth-funded Paid Parental Leave. . . recognises the important contribution parents make to society, by reducing the impact that career breaks to care for young children have on superannuation balances. This will help to improve equity in the superannuation system."*

The amending legislation also makes a minor technical amendment to the *Fair Work Act 2009* to clarify that an employee may take 'keeping in touch' days during a period of continuous unpaid parental leave ('UPL'), irrespective of whether they have previously taken flexible UPL.

Ref: Paid Parental Leave Amendment (Adding Superannuation for a More Secure Retirement) Act 2024

Administrative Review Tribunal has now replaced the AAT

The Administrative Review Tribunal ('ART') replaced the Administrative Appeals Tribunal ('AAT') on 14 October 2024.

Key features of the ART include:

- improved accessibility for users;
- a responsive, demand-driven funding model;
- more flexible procedures and greater harmonisation across different case types;
- mechanisms to effectively escalate issues of significance to administrative law and decision-making; and
- funding for a new case management system.

All matters that were before the AAT have now automatically transferred to the ART. People who have applied to the AAT for review of a decision do not need to submit a new application to the ART.

The ART has the same jurisdiction as the AAT, and people can now apply to the ART for review of a decision. Information on how to make an application can be found on the ART's new website *art.gov.au*.

All AAT decisions that have already been finalised will not be considered again by the ART.

Ref: Attorney-General's Department, Media Release, 14 October 2024

Regulations issued for sharing of tax whistleblower information

Regulations have recently been issued to allow the regulators of the tax system, including the ATO, Tax Practitioners Board ('TPB'), the Commissioner of the Australian Charities and Not-for-profits Commission ('ACNC') and the Inspector-General of Taxation ('IGT') to share whistleblower information for more effective regulatory responses to suspected breaches of the law.

The tax whistleblower laws (which came into effect in 2019) gave eligible whistleblowers appropriate protection if they made an eligible disclosure to the ATO or another eligible recipient about the tax affairs of a possible non-compliant taxpayer. However, the existing tax whistleblower framework did not extend to disclosures to the TPB about the affairs of entities providing tax agent services, to the ACNC about the tax-related affairs of charities, or to the IGT for the purposes of administering their roles and functions.

This meant that these three entities were unable to receive information from an eligible whistleblower or an eligible recipient (such as the ATO) unless consent was provided by the whistleblower.

The regulations overcome the above issues by allowing effective collaboration between the regulators (including the ATO, IGT, TPB and ACNC).

The regulations do not modify the nature or scope of the protections already provided, including the nature of the information that may be disclosed.

Ref: Taxation Administration Amendment (Extending Tax Whistleblower Protections) Regulations 2024

Latest legislative changes to Code of Conduct rules

A legislative intrument ('the instrument') was recently issued which amends the *Tax Agent Services (Code of Professional Conduct) Determination 2024* ('Determination') to clarify new obligations in relation to *"false or misleading statements"* and *"keeping clients informed"*.

*Editor: The October edition of **Voice** briefly outlined the instrument (then in draft form), including our concerns about it and our ongoing lobbying efforts.*

The Determination sets out additional professional and ethical obligations of tax practitioners under the *Tax Agent Services Act 2009*. Compliance with the new obligations is required by 1 July 2025 for smaller tax practitioner firms, and 1 January 2025 for all other tax practitioner firms.

The instrument repeals and replaces S.15(2) of the Determination, which sets out a tax practitioner's obligations when they become aware that a statement that they prepared or made (directly or indirectly) to the ATO, Tax Practitioners Board or both, was materially false or misleading. The updated S.15(2) clarifies the current provision by:

- expressly stating that the obligation applies only to statements made or prepared by the practitioner (or permitted or directed someone else to make or prepare the statement) instead of relying on the narrative to carry this limitation over from S.15(1);
- aligning the situations in which a tax practitioner will have an obligation to take some action (including advising the client of certain things) to only those cases where they have reasonable grounds to believe that the statement was relevantly and materially false or misleading because of a failure by someone involved in preparing or making the statement (including the client, tax practitioner or someone else permitted to prepare or make the statement) to take reasonable care, or because someone involved in preparing or making the statement intentionally disregarded, or was reckless to the operation of, a taxation law;
- setting out the factors in the Determination about what amount of time is considered a reasonable amount of time for a tax practitioner and/or a client (or former client) to provide a defensible explanation or to take action to correct a false or misleading statement;

- improving the language to better align with existing provisions and concepts;
- making clear what a practitioner's obligations under this new Code item are, in cases where the client does not act to correct a false or misleading statement after being advised by the practitioner within a reasonable time period; and
- making clear that the obligations set out in the above dot point do not apply where taking such a course of action would pose an unreasonable risk to the practitioner's personal safety, or the safety of a member of their family or staff, or to the extent that such action would be unlawful under another law of the Commonwealth, or of a state or territory.

The instrument also repeals and replaces S.45(1) of the Determination, which sets out the different types of information that clients must be advised of by tax practitioners. The updated S.45(1) clarifies the current provision by listing each of the matters, events and circumstances that tax practitioners need to disclose to current and prospective clients (rather than requiring them to disclose 'any matter' that may influence the client to engage, or continue to engage, them).

The instrument also makes various other small refinements to other sections of the Determination to remove ambiguity and make clear the intent and scope of the provisions.

Ref: Tax Agent Services (Code of Professional Conduct) Amendment (Measures No. 2) Determination 2024

Proposed denial of deductions for interest charges

The Goverment recently consulted on a measure from the 2023/24 Mid-Year Economic and Fiscal Outlook to deny deductions for general interest charge and shortfall interest charge incurred from 1 July 2025.

Currently all entities can claim a deduction for the:

- General interest charge ('GIC') — for late payment of a tax liability; and
- Shortfall interest charge ('SIC') — when incorrect self-assessment led to a shortfall in tax paid.

SIC applies to shortfalls of tax liabilities that are revealed when the ATO amends an assessment of an amount of tax payable, whereas GIC is generally imposed on unpaid tax liabilities. Both GIC and SIC apply on a daily compounding basis and are charged at uniform rates.

The exposure draft explanatory materials state that *"Denying the deductibility of GIC and SIC will level the playing field for individuals and businesses who already correctly self-assess their tax liabilities and pay tax on time and assist in lowering the amount of collectable debt owed to the ATO."*

While the proposed amendments would deny deductions for GIC and SIC, taxpayers would continue to have the ability to apply to the ATO and request the remission of any GIC or SIC payable. The ATO would have the discretion to remit the interest charges where it is fair and reasonable to do so, taking into consideration the circumstances which led to the delayed payment of tax liabilities or the tax shortfall.

As GIC and SIC would no longer be deductible, the remittance of the interest charges would no longer be considered an assessable recoupment as provided under the ITAA 1997. This proposed measure is subject to the passage of legislation, and would only apply to SIC and GIC incurred in income years commencing on or after 1 July 2025.

*Editor: We recently made a written submission to Treasury outlining our concerns about this proposed measure. Refer to page 2 of this edition of **Voice**.*

Ref: Treasury website, 'Deny deductions for the general interest charge and shortfall interest charge', 16 October 2024

Latest developments regarding promoter penalty laws

The Government recently announced that it *"continues its crack down on unethical tax avoidance behaviour with a consultation paper released (on 4 October 2024) to review the tax promoter penalty laws. This forms the next part of the government's steadfast response to the PwC tax scandal."*

The promoter penalty laws are designed to capture tax agents who promote illegal and fraudulent schemes to clients to reduce their taxes. *"However, the PwC scandal exposed gaps in these laws, which did not capture the heinous activity of those involved in the promotion of illegal tax dodging schemes to multinational corporations."*

Legislation was passed in May 2024, which significantly increased the maximum civil penalties for promoters of tax exploitation schemes.

The Government's latest consultation is considering whether the regime, as amended in response to the scandal, is fit for purpose, adequately addresses current types of promoter activity, and effectively safeguards taxpayers from being enticed into illegal tax exploitation schemes.

The Government seeks feedback on:

- the effectiveness of the current regime in deterring and addressing the promotion of tax exploitation schemes;
- operation of the framework, including whether existing exemptions provide appropriate safeguards to tax practitioners providing genuine advice; and
- how other existing, comparable regimes effectively deter misconduct.

This is the fifth of eight Treasury-led reviews announced by the Government in its PwC response.

Ref: Treasury website, Media Release, 4 October 2024

ATO's notice of government payments data-matching program

The ATO will acquire government payments data from government entities which administer government programs for the 2024 to 2026 income years, including the following:

- service provider identification details (names, addresses, phone numbers, email, dates of birth, service type, ABN, ACN); and
- payment transaction details (service provider ID, name of service, type of service linked to program, value of payments received for the financial year, count and type of claim, withholding and re-credit amount).

The ATO estimates that records relating to approximately 60,000 service providers will be obtained each financial year.

It expects that, of those 60,000 service providers, approximately 9,000 individuals each income year will be included, with the remainder consisting of companies, partnerships, trusts and government entities.

For this data-matching program, the ATO will match data regarding government payments made to service providers against ATO records.

The data collected under this program will be used to (among other things):

- identify and address tax and super risks, trends and non-compliance by service providers receiving government payments for delivering services; and
- support government entities by providing feedback at an aggregate agency and/or program level and where allowed by legislation at an individual provider level.

Ref: Government Notices Gazette, C2024G00610, 18 October 2024

Direct from the ATO

ATO publishes its first R&D tax incentive transparency report

The ATO recently published its first annual research and development ('R&D') tax incentive transparency report, providing transparency on the claims made by R&D entities, and an explanation of the data contained in the ATO's *'Report of data about research and development tax incentive entities 2021-22'*.

The report provides information on companies that have claimed the R&D tax incentive ('R&DTI') in the 2021/22 income year. The R&DTI program incentivises companies, regardless of size or industry, to perform R&D activities they may not otherwise undertake due to the associated costs and risks involved.

The report details data the R&D entity (being an entity eligible to register R&D activities and claim R&D tax offsets in any given year) reported in its company tax return.

There was significant investment in R&D activities by businesses in the 2021/22 income year.

Small businesses engaged heavily, with 5,574 entities involved in the R&D program over the 2021/22 income year, although public and multinational businesses invested the most in R&D with a total of $4.9 billion in expenditure claimed.

The professional, scientific and technical services industry (which includes businesses such as scientific research, computer system design and accounting services) invested more than any other industry, with 43% of the claims.

Ref: ATO website, R&D tax incentive transparency report 2021/22, 3 October 2024

Everett assignments: ATO's compliance approach

When a partner assigns their partnership interest to an individual or other entity (the 'assignee'), it is usually an entity related to the partner (the 'assignor'). These assignments are commonly known as 'Everett assignments', after the 1980 High Court case *Federal Commissioner of Taxation v Everett* (*'Everett'*).

The principles established in *Everett* and similar cases may be summarised as follows:

- A partner's interest in a partnership is a 'chose in action', which is assignable in whole or in part by way of equitable assignment.
- The effect of this type of assignment is that the assignor holds that assigned partnership interest on trust for the assignee.
- The assignment does not make the assignee a partner in the partnership or give the assignee any entitlement to the assets, management or administration of the partnership or the right to inspection of books and accounts.
- As a partner's partnership interest is an entire chose in action, a partner's entitlement to participate in profits is not separate and severable from the interest of the partner.
- A partner's income is not income from personal exertion but income from property, with the property being the partner's fractional interest in the partnership.

PCG 2021/4 (Allocation of professional firm profits — ATO compliance approach) clarifies how the ATO assesses the risk and its compliance approach relating to the allocation of profits within professional firms. The PCG applies from 1 July 2022 and outlines that the ATO's risk assessment framework is only available to taxpayers if their arrangements are commercially sound and do not exhibit high-risk features.

An arrangement would be materially different in principle to *Everett* and may be high risk where:

- it purports to admit an individual who is not an owner or equity holder in the partnership as a partner of the partnership;
- a partner's relationship with the partnership has characteristics indicating that relationship is akin to a contractor or employee of the partnership.

The ATO also considers a partner undertaking an *Everett* assignment as high risk if they:

- do not have rights to full participation in management and the benefits of partnership;
- receive a fixed draw or salary when they have limited or no exposure to the risks and benefits associated with the performance of the partnership to that draw or salary;
- are indemnified by partners for any professional liability in respect of actions against the partnership.

If an *Everett* assignment has high risk features, the ATO is likely to give closer attention to the individual facts and circumstances of the arrangement, including a deeper consideration of whether anti-avoidance provisions, such as Part IVA, apply.

Ref: ATO website, Businesses and organisations, 26 September 2024

Small business litigation funding

Small businesses in dispute with the ATO in the Administrative Review Tribunal ('Tribunal') may be eligible for litigation funding of their reasonable legal expenses under the Small Business Litigation Funding program if certain criteria are met.

*Editor: As discussed on page 4 of this edition of **Voice**, the Government's new Administrative Review Tribunal replaced the Adminstrative Appeals Tribunal on 14 October 2014.*

Entities must meet the following three criteria to apply for funding:

- They must be a small business (sole trader, partnership, company or trust). This means for the year in dispute they operated a business for all or part of the income year, **and** had a turnover less than $10 million.
- The Tribunal confirms the dispute is in the Taxation and Business jurisdictional area and is in relation to a 'small business taxation decision' as defined, and the entity is not, and has not been, legally represented in the Tribunal in the dispute.
- The ATO has engaged external legal representation in the Tribunal dispute. The date the ATO decides to engage external legal representation is the date the entity's eligibility for funding starts.

Once the above criteria have been met, the ATO will consider the application for funding. It will need to be satisfied of the following:

- The legal representative chosen by the small business must not be a related party, such as a director or shareholder of the small business, or a family member of the director or shareholder.
- The matter must not involve:
  - — a tax avoidance scheme;
  - — a scheme to avoid superannuation regulatory provisions;
  - — fraud or evasion where a formal finding has been made by the ATO; or
  - — cash economy issues.
- The matter must not appear to be an attempt to gain a windfall or an outcome contrary to the original intent of the legislation or public policy.
- The small business must not have a history of failing to lodge returns, or not lodging returns on time, or failing to respond to informal or formal requests made by the ATO for information.

Also, the small business and their legal representatives must demonstrate their willingness to progress the dispute in a timely and efficient manner to avoid delays.

Entities that are eligible for small business litigation funding and accept the ATO's offer will be given a funding deed containing the terms for funding. The entity and an ATO representative will need to sign the deed before small business litigation funding can start.

Funding under the program may cover some or all of the small business's reasonable legal costs related to progressing a funded Tribunal matter. It does not cover tax agent or accountant fees and is paid at the discretion of the ATO.

Ref: ATO website, Individuals and families, 14 October 2024

Hiring new employees for the festive season

As the festive season approaches, employers may be considering hiring new employees to help with their business. They should remember the following 'key things' when it comes to their employer tax and super obligations.

- Employers will need to make sure they are withholding the right amount of tax from payments they make to their employees and other payees. This is an important part of their role, as it will help their employees meet their end-of-year tax liabilities.

  Employers' accounting or payroll software, the ATO's *tax tables* or its *online tax withheld calculator* will help employers do this.
- Employers must pay super guarantee ('SG') to all eligible employee's super funds in full and on time to avoid paying the super guarantee charge. The ATO's *Super guarantee contributions calculator* can help employers work out how much SG they need to pay.
- If employers are still not reporting through single touch payroll ('STP') and they do not have an approved exemption, deferral or concession in place, they should start reporting now. If they have just started a business or recently employed staff, they will need to report through STP from their first payday.

  Employers should remember that if they report through STP, they do not need to send the ATO their employee's completed TFN declaration, as the ATO has already received this information through their STP reporting. Employers should however keep their employee's completed TFN declaration for their own records.

Employers can refer to *'Obligations when people work for you'* on the ATO's website (QC 67963) for further information in this regard.

Ref: ATO website, Tax Professionals Newsroom, 11 October 2024

Varying PAYG instalments for SMSFs

SMSF taxpayers (and others) who are pay as you go ('PAYG') instalment amount payers should note that their instalments have been increased by the gross domestic product ('GDP') adjustment factor. For the 2024/25 income year, the GDP adjustment factor is 6%.

The ATO will use the latest information taxpayers have provided to it when they lodged their SMSF annual return to calculate their new PAYG instalments amount or rate.

Taxpayers can vary their PAYG instalments if they think their current instalments will be more or less than their expected tax liability for the year. Their varied amount or rate will apply for the remainder of their income year or until they make another variation. They can lodge their variation through *'Online services for business'*.

Taxpayers are encouraged to review their tax position regularly, so that their PAYG instalments reflect their expected tax for the year. Calculating and paying the right PAYG instalments will help them manage SMSF investments. Taxpayers are advised to contact a registered tax agent if they need help or tax advice.

Ref: ATO website, SMSF Newsroom, 17 October 2024

FBT on plug-in hybrid electric vehicles

From 1 April 2025, a plug-in hybrid electric vehicle ('PHEV') will not be considered a zero or low emissions vehicle under fringe benefits tax ('FBT') law and will not be eligible for the electric car exemption.

However, an employer can continue to apply the electric car exemption if:

- use of the PHEV was exempt from FBT before 1 April 2025; and
- they have a financially binding commitment to continue providing private use of the vehicle to an employee or their associate on and after 1 April 2025 (although any optional extension of the agreement is **not** considered binding).

If there is a change to a pre-existing commitment on or after 1 April 2025, the FBT exemption for the PHEV will no longer apply from the date of that new commitment.

For these purposes, an employer enters into a commitment at the point there is an obligation to undertake a transaction and it cannot be backed out of. The commitment must be financially binding on one or more of the parties, and relate to the private use, or availability for private use, of the car for an employee or associate.

An example of entering into a commitment is where an employer commits to the purchase or lease of a car, including a novated lease arrangement.

An employer is not entitled to an exemption from FBT after 1 April 2025 if there was no binding financial commitment to provide the car to a particular employee in place before then.

Ref: ATO website, Businesses and organisations, 8 October 2024

Eligibility for compassionate release of super

The ATO has been responsible for the administration of the early release of superannuation on compassionate grounds since 1 July 2018.

The ATO will only approve a release of superannuation on compassionate grounds if the applicant meets all the conditions set out in the regulations. These conditions include that the applicant has no other means to pay the expenses.

The five main grounds of eligibility are:

- medical treatment or transport for the applicant or their dependant;
- accommodating a disability for the applicant or their dependant;
- palliative care for a terminal illness for the applicant or their dependant;
- funeral expenses for a dependant of the applicant; or
- preventing foreclosure or forced sale of the applicant's home.

In relation to applications for compassionate release of superannuation for medical treatment, the law states the treatment must be necessary to:

- treat a life-threatening illness or injury;
- alleviate acute or chronic pain; or
- alleviate acute or chronic mental illness.

To access superannuation early for medical treatment expenses, the applicant must provide two medical reports with their application. At least one of the reports must be from a specialist treating one of the above conditions.

The reports must state that the treatment is necessary to treat or alleviate one of the conditions above, and that the treatment is not readily available in the public health system.

Ref: ATO website, Research and statistics, 15 October 2024

Recent tax cases update

Editor: The following updates and cases highlight some of the interesting developments in tax-related case law over the past month.

AAT overturns ATO decision that plumber is an employee

In a recent decision, the AAT held that a plumber was not an employee for superannuation guarantee ('SG') purposes, and accordingly set aside assessments of SG charge that had been made.

Facts

The taxpayer (the Trustee for the Peter Hatfield Trust) operated a plumbing business. During the period from 1 January 2010 to 30 September 2020, the taxpayer engaged Mr Hargreaves, a licenced plumber, to perform plumbing work.

In February 2021, Mr Hargeaves contacted the ATO to complain that the taxpayer had not paid superannuation on his behalf for a period of 10 years. The ATO then conducted an audit of the taxpayer's business, and subsequently determined that Mr Hargreaves was an employee of the taxpayer under the extended definition in S.12(3) of the *Superannuation Guarantee (Administration) Act 1992* ('SGAA').

Therefore, the taxpayer was obliged to pay superannuation for Mr Hargreaves, and the ATO calculated the total amount of the SG charge owed by the taxpayer (including interest) was $123,521.

The taxpayer subsequently appealed to the AAT.

Decision

The principal issue for the AAT to determine was whether the taxpayer was an employer of Mr Hargreaves according to S.12(3) of the SGAA during the relevant period. Section 12(3) provides as follows:

"If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract."

The taxpayer contended the contract between it and Mr Hargreaves was not wholly or principally for Mr Hargreaves' labour and that he undertook work as a sub-contractor *"to benefit (Mr Hargreaves') own business operation."*

The AAT agreed with the taxpayer that the contract was not wholly or principally for Mr Hargreaves' labour, but rather was for the provision of plumbing services. Therefore, Mr Hargreaves was not an employee of the taxpayer for SG purposes, and so the taxpayer was not liable to make superannuation contributions on his behalf.

The AAT noted the following in this regard:

- as a skilled, licensed plumber, Mr Hargreaves was expected to perform the task at his discretion without supervision;
- Mr Hargreaves advertised his services outside of his relationship with the taxpayer;
- the evidence indicated that Mr Hargreaves was operating his own business, and performed work for others independently of the taxpayer;
- Mr Hargreaves could refuse to do work, and the rate of pay was negotiated and nearly double award rates;
- Mr Hargreaves lodged BASs for his business and claimed expenses he incurred while performing jobs for the taxpayer through his business;
- Mr Hargreaves did not have to devote his entire time to the taxpayer's business;

- Mr Hargreaves invoiced the taxpayer at the completion of each job for his labour and materials used plus GST; and
- Mr Hargreaves provided his own vehicle, tools, equipment and paid his own operating costs under an ABN and business entity.

*Editor: It is interesting to compare this case to S&H Investments Pty Ltd v FCT (discussed in the June edition of **Voice**), in which a cleaner **was** held to be an employee under S.12(3) of the SGAA.*

Ref: Trustee for Peter Hatfield Trust v FCT [2024] AATA 3428

AAT rejects taxpayer's claims for work-related expenses

In a recent decision, a taxpayer's claims for various work-related expenses were rejected by the AAT.

Facts

The taxpayer was employed as a PAYG employee for Platinum Traffic Services Pty Ltd as a traffic controller in the 2019/2020 financial year. On 9 July 2020, he lodged his income tax return and claimed $9,800 in work-related deductions, including for car expenses (using the cents per km method), travel expenses, clothing expenses, and self-education expenses, as well as supplemental deductions.

The ATO disallowed all of the deductions made by the taxpayer, primarily because it determined the taxpayer had failed to provide substantiation of the outgoings either by way of receipts/bank statements or any other form of evidence. The taxpayer then appealed to the AAT.

Decision

The AAT agreed that all of the taxpayer's claims for work-related expenses should be disallowed, on the basis that *"he has not established or positively proven that the outgoings claimed in . . . 2019/2020 had a nexus with the production of his income as a traffic controller."*

In relation to the claim for car expenses, the AAT accepted the ATO's position that the taxpayer had been using company vehicles. It noted that the taxpayer *"did provide some evidence that there were times when he was driving between depots in his own vehicle, but without primary evidence and records of such shifts, I fail to reach the necessary level of persuasion."*

The AAT also rejected the taxpayer's claims for work-related travel expenses, self-education expenses, work-related clothing expenses and supplemental deductions, largely because the taxpayer failed to substantiate these expenses. While the AAT accepted that the taxpayer *"would more likely than not have incurred some expenses, particularly in regards to clothing"*, it could *"not be satisfied when those expenses were incurred and if they fell within the relevant financial year."*

In relation to the self-education expenses for *"tickets and training events"*, the AAT noted that *"In the absence of any documentation or even a copy of when the tickets were issued/ renewed, I am not persuaded to the relevant degree of positive satisfaction that the expenses were incurred in the relevant financial year claimed."*

The AAT also noted that there had generally been *"no attempt to apportion work use against private use . . . Even if I could satisfy myself of some apportionment, the amount would likely be so insignificant that it would not result in any real deduction in taxable income."*

In response to the taxpayer's claim that relevant records had been destroyed in a flood, the AAT noted that *"Whilst documents have been destroyed, given that (the taxpayer) had completed his return online, and has done so since, I would have expected as a bare minimum that he would be able to particularise his process of reasoning when making a claim, but his testimony fell short in this regard."*

Ref: Karamanli v FCT [2024] AATA 3398

High Court overturns Full Federal Court's car trading stock decision

The High Court has recently overturned a Full Federal Court decision that a taxpayer that sold cars exhibited at a car museum was liable to increasing luxury car tax adjustments, on the basis that the taxpayer's only purpose was to sell the cars.

*Editor: The original Full Federal Court decision was discussed in the September 2023 edition of **Voice**.*

Facts

Since May 2016, the taxpayer had owned and operated a car museum ('the museum') which housed over 400 vehicles, and which traded under the name 'Gosford Classic Car Museum'. The museum stated on its website that it was a tourist attraction open to the public on payment of an admission fee, and that many of the cars were for sale. The museum's website also provided links for making travel and hotel bookings, and the museum's facilities included a cafe and an outlet selling memorabilia.

The ATO took the view that the taxpayer was liable for increased luxury car tax for the tax periods from June 2016 to November 2017 in respect of 40 cars acquired by the taxpayer and displayed at the museum, because they were not held **only** as trading stock (and for no other purpose).

On appeal to the Federal Court, the primary judge upheld the ATO's assessments on the basis that the cars were not only held as trading stock but were also used for the purpose of displaying the cars as exhibits in a museum. The taxpayer then appealed to the Full Federal Court.

The Full Federal Court (by majority) dismissed the appeal and upheld the Federal Court's decision. In the dissenting judgment, Logan J would have allowed the taxpayer's appeal, noting that *"To focus . . . on aspects of promotional literature, staff titles and display in isolation is to fail to discriminate between an overarching end and its incidental means."*

The taxpayer then appealed to the High Court.

Decision

The High Court (by a 3-2 majority) allowed the taxpayer's appeal, and held that the taxpayer was not liable to increasing luxury car tax adjustments.

The majority noted that *"The starting point must be an understanding of the difference between "motive", "means" and "purpose". . . It is therefore necessary to characterise the relevant person's purpose or end at the proper level of generality, as distinct from any motive for that purpose or the intended means of achieving that purpose."*

The majority did not accept the 'objective' approach to purpose that was taken by the primary judge and the majority of the Full Federal Court, and preferred the reasoning of the dissenting judge Logan J (refer above).

The majority noted that *"In short, selling cars was the business Mr Denny (the sole director of the taxpayer) intended to pursue and the museum was his means of achieving that purpose . . . The substance and reality here, applying a common sense and commercial approach, is that ultimately the (taxpayer's) business was just to sell cars."*

As the taxpayer's only purpose was to sell the cars, it was not liable to increasing luxury car tax adjustments.

In dissenting judgments, Gageler CJ and Jagot J would have dismissed the taxpayer's appeal, noting that *"while the (taxpayer's) use of each car was the same (display of the car), there were two separate purposes of such use for each car, being display as trading stock for sale and display as part of a tourist attraction."*

Ref: Automotive Invest Pty Limited v FCT [2024] HCA 36

FBT, GST and Income Tax Rulings

The following are summaries of Tax Alerts, Practice Statements, Tax Rulings and Determinations, and Guidelines. Copies are available from the ATO Website.

TD 2024/7 — Income tax: deductions for financial advice fees paid by individuals not carrying on an investment business

TD 2024/7 (previously released in draft form as TD 2023/D4) sets out when an individual may be entitled to a deduction under S.8-1 or S.25-5 of the ITAA 1997 for fees paid for financial advice.

This determination replaces TD 95/60 (now withdrawn) as a result of regulatory reforms to the financial services industry. However, it does not represent a change in the ATO's view on the deductibility of financial advice fees as outlined in TD 95/60.

This determination does not apply to individuals carrying on an investment business, and it does not consider circumstances where fees for financial advice are paid from a superannuation fund.

An individual is entitled to a deduction for fees paid to a financial adviser if they satisfy the requirements in S.8-1 (general deductions) or S.25-5 (tax-related expenses). In certain circumstances, it may be necessary to apportion the deduction under S.8-1 or S.25-5 because the full amount of the fees paid may not be deductible.

An individual is entitled to a deduction for fees for financial advice under S.8-1 to the extent that the loss or outgoing is incurred in gaining or producing assessable income, **unless** the loss or outgoing is of a capital, private or domestic nature.

Fees for financial advice on a proposed investment prior to the acquisition of an asset will **not** be deductible under S.8-1 because they are an expense associated with putting the income-earning investment in place, not with earning income from the investment. This would similarly be the case where an individual's existing adviser provides advice on how they can invest additional funds to grow their investment portfolio.

Fees for financial advice incurred on a regular or recurrent basis for an existing or ongoing income-producing investment **are** deductible under S.8-1. This includes fees for advice from an existing adviser on whether the mix of assets held is still appropriate for the individual's needs and advice on whether to retain or dispose of those assets. However, to be wholly deductible, all of the fee must relate to gaining or producing assessable income, otherwise only a proportion of the fee is deductible.

Even if the amount is incurred in gaining or producing the individual's assessable income, a deduction is not available if the amount is capital or of a capital nature. Fees for financial advice on a new investment are not deductible under S.8-1 because the amount is considered to be capital or of a capital nature.

Fees for financial advice on pre-existing investments are not deductible under S.8-1 when an individual seeks advice from a new financial adviser at the commencement of an advisory engagement, and that advice involves the consideration of the individual's circumstances by that financial adviser for the first time and making recommendations and advising on the income-earning structure.

Fees for financial advice an individual incurs may be deductible under S.25-5 of the ITAA 1997 to the extent that the advice relates to managing their 'tax affairs' (e.g., fees for advice in relation to salary sacrifice arrangements).

If the expenses incurred for financial advice meet the requirements of S.8-1 or S.25-5, the individual must have sufficient evidence of that expenditure in order to claim the expense as a deduction, such as a properly itemised invoice.

LCR 2024/1 — Corporate collective investment vehicle regime

LCR 2024/1 (previously released in draft form as LCR 2023/D1) is about amendments made to the taxation law to specify the tax treatment for corporate collective investment vehicles ('CCIVs').

A CCIV is a new type of company limited by shares that is available for funds management. From a regulatory perspective, a CCIV is a registered company with all its assets and liabilities segregated into 'sub-funds' and is operated by a single corporate director. However, the tax framework treats each CCIV sub-fund as a separate tax entity that is a trust.

A sub-fund is all or part of a CCIV's business that is registered as a sub-fund. Each sub-fund may offer investors a different investment strategy under the CCIV umbrella vehicle. Member and third-party rights and obligations may accrue against the assets and liabilities of the sub-fund at the sub-fund level.

A person is a member of a CCIV sub-fund if they hold one or more shares in the CCIV that are referable to the sub-fund. The rights attaching to each share must relate to the assets of one sub-fund of the CCIV and no other sub-fund.

The CCIV tax framework leverages the existing tax framework that applies to trusts and the existing attribution managed investment trusts flow-through regime. This is primarily achieved through the introduction of a deeming principle, under which it is taken that the business, assets and liabilities of a CCIV sub-fund constitute the trust estate of a separate trust, and the CCIV is the trustee and the members of the sub-fund are beneficiaries of this separate trust.

The ruling is effective from 1 July 2022, being the commencement date of the CCIV regime.

MONTHLY TAX TIP — Maximising a pension's tax-free proportion

Under the proportioning rule, a pension interest will have a tax-free and taxable proportion equal to the tax-free and taxable proportions of the accumulation interest the member used to fund their pension. Therefore, a member of an SMSF should consider maximising the tax-free component of their accumulation entitlements before commencing a pension.

Where a member of an SMSF is able to 'lock-in' the highest possible tax-free proportion on the commencement of an account-based pension or a transition to retirement pension, this can be tax-effective for the following reasons:

(a) Benefits for future growth in member's pension — While a member is in pension phase, any growth in the member's pension account balance that is attributable to capital growth and/or investment earnings will effectively form part of the tax-free component of their pension (rather than the taxable component, when in accumulation phase) based on the tax-free proportion established upon the commencement of the pension.

(b) Estate planning benefits — Maximising the tax-free proportion of a member's pension interest can be beneficial for estate planning purposes where the member's superannuation entitlements will be paid out to non-tax dependants (e.g., non-dependant adult children) upon the member's death, as the tax-free component of a lump sum death benefit is tax-free when paid to a non-tax dependant.

Editor: These and many other issues regarding SMSF pensions are discussed in our "NTAA guide to paying a pension from an SMSF" seminar, which has recently been updated in light of the latest changes to TR 2013/5, and which is livestreaming during November 2024 (please check our website for details).

What's on at the NTAA

2025 FBT Seminar

The NTAA's 2025 FBT seminar will provide you with everything necessary so that you will prepare the 2025 FBT Return correctly and with confidence.

Register for our 2025 FBT Face to Face seminar

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2024 Tax Accelerator Series Individual Returns Seminar

Are you a recent graduate or professional looking to master the challenges of preparing the ATO's individual income tax return (the 'I' Return)?

We have gone 'back to basics' and identified the practical knowledge and skills tax practitioners need to confidently complete the 'I' Return.

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Are you a recent graduate or professional looking to master the challenges of preparing the ATO's business income tax returns?

We have gone 'back to basics' and identified the practical knowledge and skills tax practitioners need to confidently complete client business returns.

Click here to download our brochure

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Tax on the Couch — November 2024

In the November 2024 Edition of ***'Tax on the Couch'***, our tax specialists discuss the latest developments in tax and superannuation, including (amongst other things):

- a legislation update, including exposure draft legislation to deny deductions for general interest charge and shortfall interest charge incurred from 1 July 2025;
- the latest tax rulings, including the ATO's new tax determination setting out deductibility for financial advice fees paid by individuals who are not carrying on an investment business;
- the latest Court and Tribunal decisions, including an AAT decision that a licenced plumber was not an employee for superannuation guarantee purposes;
- a discussion with the IGTO Ombudsman on her draft workplan for systemic reviews for 2024/25;
- the **NTAA's Hot Topic**, being the government's plan to reduce tax concessions on certain earnings for superannuation balances above $3 million; and
- the Ethics segment, which considers the TPB's guidance on practitioners managing conflicts of interest.