

The
Tax Advisers'
Voice



Representing the Tax Agent Community

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NTAA 2022/23 Budget update

On 25 October 2022, Treasurer Jim Chalmers handed down an updated 2022/23 Federal Budget, the first for the Albanese Labor Government.

One of the most important aspects of this Budget was that it provided some measure of certainty for a number of as-yet unlegislated, taxation and superannuation measures.

For example, the Government has announced it will **not** proceed with certain measures that were announced, but not legislated by, the previous Government. These include the 2018/19 Budget measure that proposed changing the annual audit requirement for certain SMSFs to a three-yearly requirement for SMSFs with a history of good record-keeping and compliance. We lobbied against this measure, and it's pleasing to see that it has finally been put to bed.

The Government also confirmed that it would not be proceeding with:

- the 2018/19 Budget measure that proposed introducing a limit of \$10,000 for cash payments made to businesses for goods and services (and which was going to require transactions over that threshold to be made through an electronic payment system or by cheque); *nor*
- the measure to allow taxpayers to self-assess the effective life of intangible depreciating assets (which was announced in the 2021/22 Budget).

However, the Budget confirms that the Government **will** be proceeding with certain other measures, including allowing more people to make 'downsizer contributions' to their superannuation (by reducing the minimum eligibility age from 60 to 55 years of age), and exempting certain electric cars from fringe benefits tax from 1 July 2022.

As always, we have provided a comprehensive summary of the Government's tax and superannuation announcements in the **NTAA's 2022/23 Budget Summary** on our website, along with our **Budget Update Video**.



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The NTAA's Tax on the Couch is a monthly tax update available online, on CD and DVD that we've created to help you (and your practice) keep up-to-date.

DISCLAIMER

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

Director ID awareness campaign

The Government has launched an awareness campaign to help company directors get their director identification number ('director ID') as the 30 November deadline approaches.

A director ID is a unique 15-digit identifier that a company director will apply for once and keep forever.

Director IDs are administered by the Australian Business Registry Services ('ABRS'), which is managed by the ATO.

All directors of companies registered with ASIC will need a director ID and must apply by the 30 November deadline (although directors of Aboriginal and Torres Strait Islander corporations may have additional time to apply).

Some people may not realise they are directors, so the campaign is targeting those that run small businesses, self-managed superannuation funds, charities, not-for-profits, and even some sporting clubs.

The fastest way to apply is online at abrs.gov.au, and the director ID will be issued instantly once the application is complete. It is free to apply and directors must apply themselves, as they are required to verify their identity (and it is this "robust identification process" that will help prevent the use of false and fraudulent director identities).

More information about director IDs including who must apply is available on the ABRS website.

Ref: Assistant Treasurer's media release, 19 October 2022

Child care Bill introduced

The Government has introduced legislation to Parliament to cut the cost of child care for about 1.26 million families.

Editor: This is the Family Assistance Legislation Amendment (Cheaper Child Care) Bill 2022.

The Government provides an assurance that 96% of families with children in early childhood education and care will benefit from this reform, and no Australian family will be worse off.

Under these reforms, a family on the median combined income of \$120,000 with one child in early childhood education will save \$1,780 in the first year of this plan.

The Higher Child Care Subsidy for families with multiple children aged five or under in early childhood education will be retained.

The legislation also introduces measures to increase transparency in the early childhood education and care sector by requiring all large providers to publicly report revenue and profits, together with commercial leasing information.

Ref: Joint Media Release from the Minister for Education and Minister for Early Childhood Education and Minister for Youth, 27 September 2022

IGTO review of ATO's administration and management of taxpayer objections

The Inspector-General of Taxation and Taxation Ombudsman ('IGTO'), Karen Payne, has released her latest report comprising an initial review of the ATO's handling of objections by taxpayers.

Voice

The interim report is Phase 1 of the IGTO's investigation, announced in December 2021, looking into the ATO's Administration and Management of Objections.

Noting that the right to object is a statutory right, Karen Payne said *"Our most recent investigation – An investigation into the effectiveness of ATO communications of taxpayer rights to complain, review and appeal – concluded that the ATO is generally effective in communicating taxpayers' rights to object. However, we also receive strong feedback from taxpayers that the ATO objection process itself could be improved. This is evidenced on our register of suggested areas for investigation – which can be found on our website. Stakeholder consultation and feedback has really been the catalyst for this latest investigation."*

Ms Payne noted that, currently, the ATO's Annual Report, only captures the number of objections **resolved**, and there was a need to look at the entire data set in order to better understand this important area, emphasising this also speaks to the rights of taxpayers and the exercise of those rights.

Karen Payne also highlighted that receiving, administering and managing objections was a key aspect of the ATO's administration of the tax system. She said an objection is an important taxpayer right to internal review and it is a 'gateway' step to dispute a tax decision through the courts and AAT. It is important that the process has integrity and works fairly and that taxpayers clearly understand how to engage with the process. The IGTO's independent review therefore supports both transparency and integrity of the tax system.

The Interim report is also intended to inform Phase 2 of the IGTO investigation. Stakeholders have previously identified the following issues in their submissions to the IGTO:

- The objection process lacks independence and impartiality, or is perceived to lack independence and impartiality;
- There is a lack of clarity in objection decisions;
- The objection function is insufficiently resourced, leading to objection officers reviewing decisions of more senior staff; or officers being involved in objections where they previously provided advice on the matter;
- Some taxpayers lack sufficient knowledge of the objection process and how to lodge effective objections, leading to unnecessary time and effort to consider objections that are ultimately unable to proceed.

Ref: IGTO media release, 10 October 2022

TPB asks practitioners to talk to their clients about scams

The Tax Practitioners Board ('TPB') has reminded practitioners that, when it comes to scams, *"prevention is better than a cure"* and the *"number one way you can prevent scams is by talking about them to spread awareness"*.

Scams Awareness Week is an annual campaign dedicated to raising awareness of scams, with this year's Scams Awareness Week being held from 7 to 11 November.

As at 31 August 2022, Scamwatch received 146,700 reports, with losses over \$381.2 million so far this year (a 100% increase in losses compared to the same period last year).

Investment scams, such as those involving promises of big payouts, quick money or guaranteed returns, cause the most financial loss in Australia. According to Scamwatch, over \$267 million has been lost so far this year.

Cryptocurrency scams are the most popular type of investment scams and the most common contact modes are phone, SMS and email. It is very difficult to identify legitimate cryptocurrency investments from scams. Scammers take advantage of the hype and the less regulated environment to 'invest' in Bitcoin or another cryptocurrency on a victim's behalf. Before investing, individuals should ask themselves if they are willing to lose some or all of the money they have invested and know that, if they go ahead, they are investing with little or no protections behind them.

Apart from raising awareness of scams and talking about them with family, friends, colleagues and clients, some other simple steps practitioners can take to protect themselves and their businesses are:

- ❑ Never give any personal information to someone who has contacted you.
- ❑ Don't click on hyperlinks in text/social media messages or emails, even if it appears to come from a trusted source.
- ❑ Go directly to a website through your browser. For example, to reach the MyGov website type 'my.gov.au' into your browser.
- ❑ Never respond to unsolicited messages and calls that ask for personal or financial details, even if they claim to be from a reputable organisation or government authority – just press delete or hang up.
- ❑ Never provide a stranger remote access to your computer, even if they claim to be from a company you use.
- ❑ To verify the legitimacy of a contact, find them through an independent source such as an online search or past bill.
- ❑ Hang up and verify the identity of the person contacting you by calling the relevant organisation directly – find them through an independent source such as a phone book, past bill or online search.
- ❑ Search for reviews before purchasing from unfamiliar online traders.
- ❑ Be wary of sellers requesting unusual payment methods such as upfront payment via money order, wire transfer, international funds transfer, preloaded card or electronic currency, like Bitcoin.
- ❑ Verify any request to change bank details by contacting the supplier directly using trusted contact details you have previously used.
- ❑ Consider a multi-factor approval process for transactions over a certain dollar amount.
- ❑ Keep the security on your network and devices up-to-date, and have a good firewall to protect your data.

Ref: TPB Newsroom, 12 October 2022

Dishonest tax agents banned to ensure superannuation integrity

Following an ATO referral, the Tax Practitioners Board ('TPB') has recently terminated the registration of 2 tax agents who prepared and lodged self-managed superannuation fund ('SMSF') annual returns with incorrect details about the funds' annual audit.

The 2 tax agents falsely stated audits had been completed and were found to have acted dishonestly. They have been banned from practice as they no longer meet the tax practitioner registration requirement of being a 'fit and proper' person.

One of the tax agents lodged over 90 SMSF annual returns for more than 20 clients, including falsifying auditor details indicating that the funds had been audited. However, the auditor advised that they had not audited the funds. The tax agent was also found to have misled clients by advising them their SMSFs had been audited, and charging them for the audit, even though an audit had not been completed.

Justin Micale, Assistant Commissioner of the ATO's SMSF Regulatory Branch, welcomed the TPB decisions as an important outcome that helps maintain the integrity of the SMSF regulatory regime, stating:

"The SMSF annual audit is a critical integrity check to ensure the validity and accuracy of an SMSF's financial statements and its compliance with superannuation legislation and regulations. The TPB decisions follow referral of intelligence from ATO compliance activity where we have worked with SMSF auditors to identify where their auditor numbers are being deliberately misused."

Voice

The ATO will continue to work with auditors to identify instances where SMSF auditor number ('SAN') misuse may have deliberately occurred. Where appropriate, referrals will be made to the TPB for further action to be considered.

Ref: TPB media release (with the ATO), 17 October 2022

Tax agent deregistered for criminal conduct

Maitland tax agent, Michael Unicomb, has had his registration terminated for serious misconduct which led to a criminal conviction in the District Court of New South Wales.

It was found that Mr Unicomb had, by deception, submitted false information about the income and assets of a former client in a loan application to Westpac bank. As a result, Mr Unicomb dishonestly gained a financial advantage for himself by receiving funds that the bank advanced under that loan.

Mr Unicomb had pleaded guilty in the court proceeding, and admitted that he had submitted the false application to obtain a loan of \$1.16 million.

Following his fraud conviction, Mr Unicomb was sentenced to a term of imprisonment, but he failed to notify the TPB of this conviction and sentence (as required by law). He also made a false declaration in his application for renewal of registration that there were no matters affecting his good fame, integrity and character, in circumstances where he had pleaded guilty to the fraud offence.

In addition to this criminal matter, Mr Unicomb failed to lodge his tax returns for multiple years by their due date.

The TPB determined that Mr Unicomb's conduct amounted to multiple, serious breaches of the Code of Professional Conduct, and on that basis, he ceased to meet the tax practitioner registration requirement to be a 'fit and proper' person. He also failed to maintain professional indemnity insurance as required by the TPB.

Considering the seriousness of the conduct, the TPB terminated Mr Unicomb's registration and applied the maximum ban of 5 years prohibiting him from reapplying for registration.

Chair of the TPB, Mr Ian Klug AM said, *"We will not accept this type of behaviour from anyone in the tax profession. Mr Unicomb has let the system down by making deliberate choices to disregard his obligations as a trusted tax adviser. This case sends a strong message to any tax practitioner doing the wrong thing and we will do everything in our power to protect taxpayers and the tax system."*

Ref: TPB media release, 28 September 2022

MONTHLY TAX TIP – Providing exempt or concessional fringe benefits through a personal services business

Where a personal services entity ('PSE') receives personal services income ('PSI') but also carries on a personal services business ('PSB'), the ATO generally accepts that it can provide exempt and concessional benefits to the main individual (or their associate). This is the case even if the benefit produces a more favourable tax result than had the benefit been provided as salary and wages to the individual.

Note that these benefits are available notwithstanding that the ATO generally only accepts the provision of exempt benefits where this is "unavoidable".

Editor: Our brand-new "Managing and planning for all your professional clients" seminar, which will be streaming throughout November and early December, provides comprehensive guidance on tax issues for all professionals, whatever their structure, and whether deriving PSI or business income (or a combination of them). We will advise members as soon as this seminar becomes available for purchase.

Direct from the ATO

Why are credits and refunds being offset?

The ATO has reached out to small businesses who may have recently received a letter advising that they have a debt on hold and any credits or refunds would be offset against this debt.

As a result, such a small business may find that their refund or credit is less than expected.

Editor: The ATO has advised that this process of offsetting refunds or credits temporarily paused due to the pandemic and its financial impact on taxpayers. However, they have restarted offsetting refunds and credits to pay off debts on hold since June 2022.

The ATO also sent out 'awareness letters' to some not-for-profits and individuals in September 2022, similarly advising them they had a debt on hold and any credits or refunds would be offset against this debt.

Taxpayers can use *Online services for business* to search for debts that were previously put on hold and not included in their account balance.

A debt on hold remains payable and collection action may recommence if:

- the taxpayer's circumstances change, and the ATO has reason to believe they are now able to pay the debt;
- the taxpayer agrees to pay their debt; or
- the taxpayer has a refund or credit balance which will automatically be offset to their debt on hold.

If a business is experiencing financial hardship, they can phone the ATO on 13 11 42 to discuss their support options (or they should speak to a registered tax professional).

Ref: ATO website, Small Business Newsroom, 6 October 2022

Check that holiday employees get the right super

The ATO is reminding employers that the holiday season is fast approaching, and that their holiday casuals may now be eligible for super.

From 1 July 2022, employers need to pay super for employees at a rate of 10.5%, regardless of how much they are paid, because the \$450-per-month threshold for super guarantee ('SG') eligibility has been removed.

The ATO provides the example of Jane, a 22-year-old employee working a short-term job at a restaurant over the holiday season. She works 23 hours in a month, earning \$430 before tax.

In the past, holiday employees such as Jane would not be paid super, as they earned below the \$450 threshold. Now, Jane will be eligible for super paid on her ordinary time earnings at a rate of 10.5%.

This change doesn't affect other eligibility requirements for SG. In particular, workers who are under 18 still need to work more than 30 hours in a week to be eligible.

For example, Anish is a 17-year-old employee working a job at a hotel over the holiday season. Anish works 32 hours in a week at the hotel and earns \$800 before tax. He also works 5 hours at his local café, earning \$150.

As Anish worked more than 30 hours in one week at the hotel, his employer will need to pay him super on the \$800 earned. However, as Anish works less than 30 hours a week at the café, he is not entitled to super from this employer. Likewise, Anish isn't entitled to super for any weeks he works less than 30 hours at the hotel.

Voice

The ATO recommends that employers check their payroll and accounting systems are up to date so they are correctly calculating their employees' SG payments, and (of course), that registered tax agents and BAS agents can help with their tax and other obligations.

Ref: ATO website, Small Business Newsroom, 10 October 2022

Optus data breach

The ATO is aware of the recent Optus data breach and that people who have been affected might be concerned about their personal data, and is assuring people that ATO systems have **not** been affected by the Optus data breach.

The ATO recommends that anyone who thinks they have been affected by the Optus data breach should contact Optus Customer Service on 13 39 37.

Information for those caught up in the data breach is available from the Australian Cyber and Security Centre ('ACSC') at cyber.gov.au.

If a person's identity has been stolen, they can apply for a Commonwealth Victims' Certificate.

The ATO takes data security extremely seriously and has a number of safeguards and systems in place to protect taxpayers.

The ATO also reminds the community that it is important to always be vigilant for suspicious activity. The following tips can help protect accounts and keep personal information safe:

- Use multi-factor authentication for accounts where possible.
- Be careful when clicking on links and providing personal information.
- Make sure contact details are up to date when using online services.

Anyone wanting to make a privacy complaint should contact Optus and, if they are unable to resolve their complaint with Optus, they can lodge a complaint with the Telecommunications Industry Ombudsman and the Office of the Australian Information Commissioner.

Ref: ATO website, Online services, Identity security and scams, 6 October 2022

ATO advice for SMSFs thinking about investing in crypto assets

The ATO recommends that trustees of self-managed super funds ('SMSFs') thinking about investing in crypto assets should seek professional advice from a licensed financial adviser.

There are organisations who offer trustees help to set up a fund or use their existing fund to invest in crypto assets. However, the ATO notes that some of these organisations are not licensed to provide financial advice, which means the usual consumer protections and access to the Australian Financial Complaints Authority ('AFCA') are not available for using these services.

There are many things to consider before deciding to invest in crypto assets, so it's important to get it right, especially since trustees are ultimately responsible for ensuring the investment complies with the super and tax laws.

When investing in crypto assets, trustees must ensure it is allowed under the fund's trust deed, is made in accordance with the fund's investment strategy, and the trustee has considered the level of investment risk given the highly volatile nature of the investment.

From a regulatory perspective it's important that:

- The crypto assets are owned by the fund and are held separately from the trustee's own personal or business assets. This means the fund must have its own digital wallet, separate to any used by the trustee for personal or business purposes.
- The investment is valued at market value in line with the ATO's valuation guidelines.

- ❑ Any crypto assets that a member or related party hold personally are not sold to the fund or transferred to the fund as a contribution.
- ❑ The investment is consistent with the sole purpose test, and does not involve the giving of financial assistance to a member.

From a tax perspective, trustees also need to be aware of:

- ◆ Their tax responsibilities when buying, selling or investing in crypto assets, which must be undertaken on arm's length terms.
- ◆ The income tax consequences of common transactions involving crypto assets.
- ◆ As a crypto asset is a CGT asset, there are CGT implications when disposing of it, and any capital gain or loss arising from the disposal must be reported on the SMSF tax return.
- ◆ Income associated with crypto assets held, such as staking rewards, also needs to be reported on the return.

Trustees must keep records of all transactions associated with acquiring, holding, and disposing of crypto assets.

The MoneySmart section on ASIC's website also has some useful information on investing in crypto assets including how to avoid scams.

Ref: ATO website, Super, 20 October 2022

Latest ATO tax crime prosecution case studies

The ATO's latest tax crime prosecution case studies show that people who deliberately cheat the tax system will be held accountable.

Brothers busted for fake document scheme

Two brothers who ran an accounting firm have received criminal convictions for a scheme to falsify Commonwealth documents in order to obtain bank loans.

Yevgeni Bezhenar (also known as James) and Alexander Bezhenar of Halifax Business Consulting Pty Ltd (Halifax) in Melbourne were convicted on all counts after pleading guilty to several charges. They admitted they commissioned the creation of false Commonwealth documents, including business activity statements ('BASs') and notices of assessment ('NOA') to obtain bank loans for their business and a number of clients.

The ATO uncovered the scheme after auditing another matter and launching a subsequent investigation that saw search warrants executed at Halifax's office and an employee's home.

The ATO found evidence that the Bezhenar brothers had paid employees and others to create false BASs and NOAs that inflated sales or earnings, which would then be passed off as genuine to banks and other lenders.

In several cases, they had commissioned the firm's graphic designer, Eugene Vinarsky, to alter documents at their request.

The Bezhenar brothers would make handwritten amendments to the documents – sometimes doubling their clients' actual earnings – before sending them on to Mr Vinarsky to digitally manipulate.

Mr Vinarsky went to great lengths to make the documents look legitimate. In one email, he reminded his boss, Yevgeni Bezhenar, to only provide one of the doctored documents by facsimile or hard copy, to avoid someone noticing he had edited the original document's security stamp.

Mr Vinarsky was convicted for the part he played in the offending, and sentenced to a 12-month Community Correction Order requiring him to complete 200 hours of unpaid community work.

Voice

Yevgeni Bezhenar was convicted and sentenced to 10 months imprisonment, while his brother, Alexander, was convicted and sentenced to 6 months imprisonment (although both were released immediately on a \$1,000 recognisance release order requiring them to be of good behaviour for 18-months).

Receiving a criminal conviction is obviously serious, and can have a significant impact on an individual's reputation, career prospects and ability to travel overseas.

Former tax agent jailed

A former tax agent has been sentenced to 6 years imprisonment with a non-parole period of 3 years and 6 months for claiming more than \$800,000 in fraudulent refunds.

In his capacity as a registered tax agent, Mr Peter Lines managed the tax affairs of numerous individuals and businesses.

Between December 2014 and January 2018, he submitted several false tax returns in his clients' names without their knowledge or consent. He also submitted some valid tax returns for his clients, but directed the corresponding refunds to bank accounts he controlled.

Mr Lines tried to conceal what he was up to, but it all started to unravel when his firm detected a series of abnormal transactions and reported them to the ATO.

In total, Mr Lines obtained \$634,347 in fraudulent refunds, which he has been ordered to pay back. He also *attempted* to obtain an additional \$180,986.

As part of the ATO's response to the shadow economy, it is committed to taking action against the small number of people who threaten the integrity of the tax profession.

This matter was also referred to the Tax Practitioners Board and Mr Lines's tax agent registration has not been renewed.

Ref: ATO website, News and Results, Case Studies, 6 October 2022

ATO's updated Market Valuation Guide

The ATO has updated its '*Market valuation for tax purposes*' Guide, which is intended to assist taxpayers and their advisers in understanding the Commissioner's general expectations on market valuation for tax purposes.

It includes information on what 'market value' means for tax purposes, and the evidence and processes the ATO generally expects to see to support a valuation.

Note that the updated Guide aims to help taxpayers reduce tax risks associated with valuations, but it does not provide instructions or details on how to calculate or determine market value for tax purposes.

Determining market value requires careful consideration of the asset, business or entity, environment, market and any other relevant factors.

If taxpayers follow the ATO's information in the Guide and it turns out to be incorrect, or it is misleading and taxpayers make a mistake as a result, the ATO says it must still apply the law correctly. If that means the taxpayer owes money, although the ATO must ask them to pay it, they will not charge the taxpayer a penalty. Also, if the taxpayer acted reasonably and in good faith, the ATO will not charge interest.

If a taxpayer makes an honest mistake in trying to follow the ATO's information in this Guide and then owes the ATO money as a result, the ATO will not charge a penalty (but will still ask for the money and may also charge interest).

If the Guide does not fully cover a taxpayer's circumstances, or they are unsure how it applies to their circumstances, they are advised to seek further assistance from the ATO.

Ref: ATO Legal database, Market valuation for tax purposes (current as at October 2022)

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.

House bought in wife's name not available to husband's creditors (including the ATO)

The High Court has held that a husband of a couple (Mr Bosanac) did **not** hold a beneficial 50% interest in a property purchased in the name of his then-wife (Ms Bosanac) and that, therefore, the property was not an asset available to the husband's creditors (in particular, the Commissioner of Taxation).

Facts

Ms Bosanac purchased a residential property in Perth ("the Dalkeith property") in 2006. Although she instigated the purchase of the Dalkeith property, the deposit was provided from an existing joint loan account in the names of Ms and Mr Bosanac, and the balance of the purchase price was paid from two loan accounts in their joint names.

However, the Dalkeith property was registered in Ms Bosanac's name alone, and Mr Bosanac never claimed an interest in the property.

She and Mr Bosanac separated in 2012 or 2013 but continued to reside together at the Dalkeith property until September 2015, when Mr Bosanac moved to a new residential address.

Although there was no suggestion that the Dalkeith property was registered in Ms Bosanac's name alone with a view to Mr Bosanac avoiding his commitments to his creditors, the Commissioner (as a creditor of Mr Bosanac) sought a declaration that Ms Bosanac held half of the Dalkeith property on trust for Mr Bosanac.

Specifically, the Commissioner sought to take advantage of the law's presumption (known as a 'presumption of resulting trust') that a person who advances purchase monies for property, which is held in the name of another person, intends to have a beneficial interest in the property. That presumption is subject to an exception that, in the case of purchases by a husband in the name of a wife, or a parent in the name of a child, there is a 'presumption of advancement' or, in other words, a presumption that the purchaser intended that the beneficial interest would pass with the legal interest.

The Commissioner contended that the presumption of advancement of a wife by her husband is no longer part of the law of Australia in relation to the matrimonial home.

Decision

The objective facts arising from the evidence regarding Ms and Mr Bosanac's conduct at the time of the acquisition of the Dalkeith property established that their objective intention was inconsistent with a declaration of trust in favour of Mr Bosanac as to 50% of Ms Bosanac's interest in the Dalkeith property.

Ms and Mr Bosanac made the financial arrangements they did for the acquisition of the Dalkeith property recognising, intending and understanding that the Dalkeith property was Ms Bosanac's — not only was it acquired in her name and registered in her name, but it was her property. In particular, Ms and Mr Bosanac held their other substantial assets separately.

Therefore, the presumption of resulting trust did not arise and no resulting trust was created.

Editor: Since there was no resulting trust, the High Court did not need to consider whether the presumption of advancement applied or whether it should be abolished. However, the Court actually noted that it has long been recognised that the limited classes of relationships of close trust from which the 'presumption' arises "may not accord with contemporaneous practices and modes of thought", and "there may well be scope in the future to extend the 'presumption' of advancement to a broader range of relationships".

Ref: Bosanac v Commissioner of Taxation [2022] HCA 34

Expenses incurred on a property after numerous tenants caused damage was partly deductible repairs, and partly improvements

The AAT has held that a taxpayer was not entitled to claim deductions for the entire amount of expenditure he incurred in the 2018 income year relating to repairs and capital improvements for a residential property he owned and used for investment purposes through residential leasing.

The relevant expenditure was in the amount of \$53,225.89 and related to work done on the rental property in a family bathroom, ensuite, toilet, laundry and kitchen.

A number of tenants in the property from 2014 until 2018 had caused substantial damage to the property, in some cases, deliberately (such as where they blocked water drainage in the showers of the main bathroom and ensuite, plugged the bath in the main bathroom, plugged the bathroom sinks in both bathrooms and the kitchen sinks, and turned on all the taps before vacating).

The AAT found that significant damage had occurred to the stud walls and floor of the kitchen, bathroom, ensuite, laundry and toilet as a consequence of water ingress, and much of the work to examine and then fix this damage was a repair and not in the nature of an improvement.

The AAT ultimately held that expenditure totalling \$28,342.54 was for capital improvements and not deductible in the 2018 income year, but that expenditure totalling \$2,819.35 was for repair expenses and deductible. In addition, further expenditure totalling \$22,064 for associated labour costs had to be apportioned in accordance with TR 97/23.

Ref: Wulf and Commissioner of Taxation [2022] AATA 3094

Taxpayer renting out property to ex-husband for uncommercial rent only allowed deductions up to rental income

The AAT has held that a taxpayer could not claim her full deductions in relation to periods when she rented her property to her separated husband for below market rent.

The taxpayer had acquired a newly constructed property in 2009 and she moved back into it with her new husband in 2015, but the couple's relationship was 'on and off', and they formally separated at the end of 2015 (before reconciling again in 2017).

She entered into a 'temporary' tenancy agreement with her separated spouse commencing on 25 September 2015, with monthly rent agreed at \$1016 in cash (which is what the husband said he could afford to pay at the time).

The husband did make rental payments in respect of his tenancy of the property during the relevant period, but he was unable to pay rent regularly as he was still dealing with a gambling addiction.

The taxpayer continued to pay for the utilities, contents insurance, strata fees, council rates and all expenses related to the maintenance of the property.

For the 2016 income year, the taxpayer reported rent of \$12,000 and deductible rental expenses of \$37,520 (comprising interest expenses, capital allowances and other deductions including repairs/maintenance).

For the 2017 income year, the taxpayer reported rent of \$12,200 and included \$39,620 as deductible rental expenses.

The AAT held that the rent payable under the tenancy agreement was based on private or non-income earning considerations, and therefore the whole of the losses and outgoings in connection with the rental property could not be said to have the character of those incurred in gaining or producing assessable income. Instead, she could only claim deductions up to the amount of the rental income in the relevant years.

Ref: Rizkallah and Commissioner of Taxation [2022] AATA 3081

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 2022/14 – A non-contingent liability that is deductible cannot be included in the cost base of a CGT asset

If a non-contingent liability to pay a specified amount is included in the cost base of a CGT asset and the taxpayer then deducts, or can deduct that amount, the amount does **not** form part of the cost base of the CGT asset.

This is broadly because, in principle, an item of expenditure should **either** be deductible for income tax purposes **or** included in the cost base of an underlying asset for CGT purposes, but **not both**.

Consistently with that principle, for CGT assets acquired after 7:30 pm ACST on 13 May 1997, where a taxpayer claims a deduction for 'expenditure', S.110-45(2) of the ITAA 1997 generally applies to exclude the expenditure from the CGT asset's cost base. In this context, a non-contingent liability to pay a specified amount (for example, a loan or other debt, but not a liability subject to one or more contingencies) is a presently-existing **liability to expenditure**, even if the liability is yet to be discharged.

If the non-contingent liability can be included in the cost base under S.110-25(2) or S.112-35 (i.e., when the taxpayer acquires an asset or assumes a liability when acquiring an asset), and the taxpayer has deducted or can deduct an amount of expenditure which it represents, then S.110-45(2) operates such that the amount included in cost base at the time of acquisition of the asset will **not** form part of the cost base (provided it does not fall within an exception).

TD 2022/15 – Value of goods taken from stock for private use for the 2022/23 income year

This Determination provides the amounts the Commissioner will accept for 2022/23 as estimates of the value of goods taken from trading stock for private use by taxpayers in certain specified industries (although the ATO recognises that greater or lesser values may be appropriate in particular cases). The amounts (which exclude GST) are:

Type of business	Amount for adult/ child over 16 years	Amount for child 4 to 16 years old
Bakery	\$1,360	\$680
Butcher	\$990	\$495
Restaurant/café (licensed)	\$4,830	\$1,950
Restaurant/café (unlicensed)	\$3,900	\$1,950
Caterer	\$4,120	\$2,060
Delicatessen	\$3,900	\$1,950
Fruiterer/greengrocer	\$1,010	\$505
Takeaway food shop	\$4,030	\$2,015
Mixed business (includes milk bar, general store and convenience store)	\$4,870	\$2,435

SGR 2009/2A2 (Addendum) – Super guarantee: meaning of the terms 'ordinary time earnings' and 'salary or wages'

The Addendum amends Superannuation Guarantee Ruling SGR 2009/2 to reflect changes made to S.27(2) of the *Superannuation Guarantee (Administration) Act 1992* ('SGAA'), by the *Treasury Laws Amendment (Enhancing Superannuation Outcomes for Australians and Helping Australian Businesses Invest) Act 2022* (the 'amending Act').

Section 27 of the SGAA specifies salary or wages that are not to be taken into account for the purposes of calculating an individual superannuation guarantee shortfall under S.19 of the SGAA.

Editor: Among other changes, the amending Act removed the \$450-a-month threshold, which previously had to be met before an employee's salary or wages counted towards the superannuation guarantee. The \$450-a-month threshold was removed with effect from 1 July 2022, so the ATO's superannuation guarantee ruling has been updated accordingly.

This Addendum also amends SGR 2009/2 to reflect the repeal of the *Superannuation Guarantee (Administration) Regulations 1993* and its remake via the *Superannuation Guarantee (Administration) Regulations 2018*.

PCG 2019/5 (regarding the disposal of dwellings by deceased estates) updated

The ATO updated PCG 2019/5 on 30 September 2022. This Guideline deals with CGT and deceased estates and, specifically, the Commissioner's discretion to extend the 2-year period to dispose of dwellings acquired from a deceased estate.

Editor: If a taxpayer disposes of an ownership interest in a dwelling that passed to them as an individual beneficiary or as the trustee of the deceased's estate within 2 years of the deceased's death, any capital gain or loss they make on the disposal is disregarded.

The Commissioner also has the discretion to extend the 2-year period.

That ATO states in the Guideline that the Commissioner will generally allow a longer period where the dwelling could not be sold and settled within 2 years of the deceased's death due to reasons beyond the taxpayer's control that existed for a significant portion of the first 2 years.

*The Guideline also outlines a safe harbour compliance approach that allows taxpayers to manage their tax affairs **as if** the ATO had exercised the discretion to allow them a longer period.*

While the update made multiple minor content and style updates throughout that do not otherwise affect the principles of the Guideline, the ATO also made some more substantive changes, including (among others):

- ◆ adding a diagram to illustrate how the ATO's safe harbour can be relied on;
- ◆ adding clarity on the ATO's administrative approach when managing discretion requests;
- ◆ adding an example where a taxpayer can rely on the safe harbour due to the complexity of the estate (i.e., the complex asset and liability position of the estate, including the dwelling being used as security for business debts); and
- ◆ extending the application of the Guideline in response to the COVID 19 pandemic and adding new Example 10 (which provides an example on the COVID-19 pandemic impact).

Editor: We are currently working on our Deceased Estates seminar for 2023, and this seminar will include all the relevant updates in relation to this and many other issues affecting deceased estates.

What's on at the NTAA

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Tax on the Couch – November 2022

In the November 2022 edition of 'Tax on the Couch' our tax specialists discuss the latest developments in tax, including (amongst other things):

- a consideration of recent amendments to **regulations affecting superannuation for nurses** and a new **GST legislative instrument**;
- a look at recent ATO Tax Rulings and Determinations, including the ATO's new draft **Taxation Ruling regarding residency tests for individuals**;
- the latest guidance from the ATO on their Section 100A compliance approach (and new 'green zone' examples);
- the **latest Court and Tribunal decisions** of interest (including in-depth discussions of the three cases summarised in this edition of **Voice**, along with some further cases regarding remission of penalties);
- our Hot Topic, which looks at the **2022/23 Federal Budget**; and
- we chat to the ATO about the **Tax debts and lodgment**.

