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# TEST CASE LITIGATION REGISTER

## AS AT 14 December 2022

### **INFORMATION**

The Test Case Litigation Register contains information about:

- Cases approved for test case funding and their impact and status.
- Cases declined for test case funding and the reasons why.
- A list of all test case funded matters and their outcomes.

The Register is published after each Panel meeting takes place where applications are considered for funding.

### **Test Case Panel meeting dates and closing application dates**

- 22 February 2023 meeting: closing date for applications is 1 February 2023
- 3 May 2023 meeting: closing date for applications is 12 April 2023
- 12 July 2023 meeting: closing date for applications is 21 June 2023
- 20 September 2023 meeting: closing date for applications is 30 August 2023
- 29 November 2023 meeting: closing date for applications is 8 November 2023

For queries related to the Test Case Litigation Register or the Test Case Litigation Program more generally please contact:

- [testcaselitigationprogram@ato.gov.au](mailto:testcaselitigationprogram@ato.gov.au)
- 13 28 69 and ask for the Test Case Litigation Program
- Test Case Litigation Program, GPO Box 4889, SYDNEY NSW, 2001

**APPROVED MATTERS IN PROGRESS**

ATO Reference: 03/2022-23	
<b>Venue</b>	Federal Court of Australia (Full Court)
<b>Issue</b>	Whether, where there has been a single sale of multiple freehold interests, the margin scheme provisions in Division 75 of the <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth) ( <b>GST Act</b> ) apply separately to each freehold interest or collectively to the whole area of land sold.
<b>Why does the issue involve uncertainty and/ or contention?</b>	<p>This case considers the interaction between real property legislation and tax law, noting that real property legislation dictates that land can only be supplied on separate titles. This appeal may provide greater clarity on the application of the margin scheme provisions (and corresponding provisions relating to GST-free land grants) to supplies of land across multiple titles.</p> <p>There are differing views between the Commissioner and some State and Territory organisations about how Division 75 of the GST Act operates in relation to the margin scheme in situations where multiple land titles are sold as part of a single transaction (and their on-supply in the supply chain). This case may provide certainty given these conflicting views.</p>
<b>Impact on other taxpayers and mitigation strategies</b>	<p>This issue will be significant to government organisations and property developers, being the two groups likely to be making or acquiring supplies of multiple land titles in one transaction.</p> <p>If the transaction constitutes multiple supplies, this may increase compliance costs, such as for calculations and valuations to be conducted for each parcel of land. On the other hand, for government agencies seeking the benefit of unimproved land concessions, the application of the relevant provisions to land covered by each title may result in significant reduction in notional GST payable (where there are found to be no improvements on that individual title).</p> <p>Clarification of the issue will impact on the quantum of GST liabilities and profit margin on these transactions.</p>
<b>Status</b>	The Full Court of the Federal Court of Australia heard this appeal on 21 November 2022. Judgment has been reserved.
ATO Reference: 01/2022-23	
<b>Venue</b>	Administrative Appeals Tribunal

<b>Issue</b>	Whether the supply of the Applicant's product ( <b>Product</b> ) is GST-free under section 38-2 of the <i>A New Tax System (Goods and Services) Act 1999</i> (Cth) ( <b>GST Act</b> ).
<b>Why does the issue involve uncertainty and/ or contention?</b>	<p>The Product, being chosen as a representative of a line of similar products manufactured by the Applicant, was historically treated as GST-free. The Commissioner subsequently changed his view and considered that the supply of the Product was taxable.</p> <p>The Product comprises taxable and non-taxable ingredients respectively stored in two separate compartments. The Applicant intends for these ingredients to be mixed in at the time of consumption and not to be consumed separately.</p> <p>There is uncertainty as to whether such a supply is:</p> <ol style="list-style-type: none"> <li>of a food that is a combination of one of more foods within the meaning of paragraph 38-3(1)(c) (at least one of which is of a kind specified in the 3<sup>rd</sup> column of the table in clause 1 of Schedule 1 to the GST Act); such that it is not GST-free pursuant to section 38-2 of the GST Act; or</li> <li>not such a combination and instead a single, composite supply of one thing that is GST-free under section 38-2 of the GST Act, being made up of a dominant part and other parts that are not treated as having a separate identity as described in paragraph [21] of GSTR 2001/8.</li> </ol>
<b>Impact on other taxpayers and mitigation strategies</b>	This case will have significant commercial implications for taxpayers that supply similar products consisting of taxable and non-taxable elements. In particular, the fast moving consumer goods industry and food industry at large will benefit from clarification of the application of paragraph 38-3(1)(c) as there is a significant number of products with multiple components in the Australian market. This case is expected to provide useful guidance on whether the supply of food comprised of both taxable and non-taxable components is subject to GST.
<b>Status</b>	This case is listed for hearing in May 2023.
<b>ATO Reference: 16/2021-22</b>	
<b>Venue</b>	Federal Court of Australia (Full Court)
<b>Issue</b>	<p>This matter concerns appeals to the Full Court against 2 first instance decisions of the Federal Court of Australia.</p> <ol style="list-style-type: none"> <li>In respect of the first appeal, the issues raised are: <ol style="list-style-type: none"> <li>Whether a present entitlement of a beneficiary to a share of the income of the trust arose out of a reimbursement</li> </ol> </li> </ol>

	<p>agreement within the meaning of section 100A of the <i>Income Tax Assessment Act 1936</i> (Cth) (<b>ITAA 1936</b>).</p> <p>b. Whether the Commissioner's posited reimbursement agreement was entered into in the course of ordinary family or commercial dealing within the meaning of subsection 100A(13).</p> <p>c. Whether the Commissioner's posited reimbursement agreement was entered into for the requisite tax reduction purpose within the meaning of subsection 100A(8).</p> <p>2. In respect of the second appeal, the issues raised are:</p> <p>a. Whether there was a scheme to which Part IVA applied.</p> <p>b. Whether, in relation to the '2012 related scheme' and '2013 related scheme' as defined in the first instance judgment, the taxpayer obtained a tax benefit in connection with one or both schemes.</p> <p>c. Whether, in applying section 177CB to the 2013 financial year, the Commissioner's posited counterfactual has comparable substance and achieves comparable results and consequences (other than tax consequences).</p> <p>d. Whether one, or both schemes was carried out for the sole or dominant purpose of obtaining a tax benefit.</p>
<b>Why does the issue involve uncertainty and/ or contention?</b>	<p>This matter involves the clarification on the operation of section 100A and the new section 177CB of the ITAA 1936.</p> <p>At the time of test case funding being approved, section 100A and in particular subsection 100A(13) had not been subject to significant recent judicial analysis. Further, the observations in the first instance decision on the operation of the purpose test in subsection 100A(8) and the meaning of 'ordinary family or commercial dealing' in subsection 100A(13) did not fully align with the Commissioner's draft public advice and guidance (<b>PAG</b>) in TR 2022/D1 on what agreements would be subject to section 100A.</p> <p>Additionally, section 177CB has not been previously considered in any court or tribunal decisions. This case may provide a precedent on the application of section 177CB to post-2012 Part IVA arrangements, and whether and to what extent these provisions impact on the application of <i>RCI Pty Limited v Commissioner of Taxation</i> [2011] FCAFC 104 to Part IVA schemes.</p>
<b>Impact on other taxpayers and mitigation strategies</b>	<p>On 8 December 2022 the Commissioner released the final Taxation Ruling TR 2022/4: Income tax: section 100A reimbursement agreements, which acknowledges that there are current cases concerning section 100A that are subject to appeal in the Full Federal Court. The clarification on the operation and</p>

	<p>application of section 100A, provided by the Taxation Ruling, will affect the management of many discretionary trusts in respect of the appointment of income to beneficiaries. Although the PAG has now been finalised, the decision will nevertheless provide additional recent authority on the application of section 100A.</p> <p>This case may also provide a precedent on the application of section 177CB for post-2012 Part IVA schemes.</p>
<b>Status</b>	<p>The Full Court of the Federal Court of Australia heard the appeals on 24 and 25 August 2022. Judgment has been reserved.</p>

## DECLINED MATTERS

ATO Reference: 06/2022-23

<b>Panel Meeting Date</b>	30 November 2022
<b>Issues</b>	<ol style="list-style-type: none"> <li>1. What constitutes a 'foreign transaction' in section 14 of the <i>Income Tax Assessment (1936 Act) Regulation 2015</i> (Cth), which is not a defined term.</li> <li>2. What is required for income to come 'from' the foreign transaction identified.</li> <li>3. What is required to satisfy that a foreign transaction has been 'identified'.</li> </ol>
<b>Panel Reasons</b>	<p>The panel observed that for a 4-year period of review to apply, there needs to be a foreign transaction, which is not a defined term. Here, it seems clear that the transaction is a foreign transaction given the platform is located overseas, and the identity of the acquirer is unknown.</p> <p>The panel acknowledged there may be situations where this issue is more nuanced, such as if you have an Australian buyer and seller but that transaction is executed on a foreign exchange, or if a payment originates from an offshore entity for work done in Australia. In those situations, it may be argued that those are not foreign transactions.</p> <p>The panel noted that the underlying question is not of sufficient contention. Most of the considerations in favour of funding in this matter are about sending a compliance message to the community, which is not within the remit of test case funding. This will be achieved in any event if the applicant does proceed to litigate.</p> <p>Further, it was unclear on what basis the applicant sought to argue that the transaction was not a foreign transaction. For example, he has not argued that he believes the transaction did not take place on a foreign exchange, or that the transaction was</p>

	<p>completed on a computer in Australia. Instead, the applicant's submissions are about the lack of guidance provided by the Commissioner.</p> <p>The panel also observed there is nothing particularly novel about this transaction. Foreign exchanges or servers are utilised every day to conduct millions of transactions.</p> <p>The panel also drew analogies to contract law: acceptance takes place where the transaction is received, and defamation law: the defamation occurs where the defamatory material is read. Similarly, in the OECD's work in taxing digital transactions, the source of income is based on where the platform that processes the transaction is located. Accordingly, it does not seem controversial to say that a transaction that took place on a foreign exchange is a foreign transaction.</p> <p>For these reasons, the panel recommended that funding should not be approved. The chair accepted the recommendation and declined funding.</p>
<b>ATO Reference: 04/2022-23</b>	
<b>Panel Meeting Date</b>	29 September 2022
<b>Issues</b>	<ol style="list-style-type: none"> <li>1. What constitutes the private ruling under review when the objection has been allowed in part and the objection decision purports to have provided two distinct documents being a:             <ol style="list-style-type: none"> <li>a. notice of objection decision; and</li> <li>b. reason for decision.</li> </ol> </li> <li>2. Can additional documents not mentioned in the original private ruling material be relied upon to interpret the terms of a contract where the scheme in the private ruling is inclusive of the terms of that contract and there is a dispute about the interpretation of the terms of agreement:             <ol style="list-style-type: none"> <li>a. where that additional material was not before the Commissioner; or</li> <li>b. where that additional material was before the Commissioner but not mentioned in the private ruling or the objection decision; and/or</li> <li>c. where that material was mentioned under "we looked at this information" in relation to issue a.</li> </ol> </li> <li>3. Can an attachment to a document be relied upon by the applicant where the document and selected attachments have been considered by the Commissioner and the attachment the applicant wishes to rely upon was provided at</li> </ol>

	<p>the same time attached to the same document but not listed amongst the attachment by the Commissioner.</p> <p>4. Concerns an interlocutory application to stay the Commissioner's objection decision. That stay application has now been withdrawn. However, for completeness issue 4 relates to validity of the objection decision.</p>
<b>Panel Reasons</b>	<p>The panel noted that the application is more about the legal technicalities in relation to process and not related to a question of substantive law that would arise before the AAT and will not impact upon how a private ruling is approached.</p> <p>The panel found it difficult to identify the error of law put forward by the applicant and noted the issue being advanced in the funding application appeared to be procedural in nature and confined towards the factual circumstances.</p> <p>For these reasons, the panel recommended that funding should not be approved. The chair accepted the recommendation and declined funding.</p>
<b>ATO Reference: 05/2022-23</b>	
<b>Panel Meeting Date</b>	29 September 2022
<b>Issues</b>	<ol style="list-style-type: none"> <li>1. What constitutes payment or constructive payment under section 11-5 of Schedule 1 to the <i>Taxation Administration Act 1953</i> (Cth) (<b>TAA</b>)?</li> <li>2. Whether a journal entry constitutes payment or constructive payment under section 11-5 of Schedule 1 to the TAA?</li> <li>3. What other conditions, circumstances, and/or evidence is required for a journal entry to constitute payment or constructive payment under section 11-5 of Schedule 1 to the TAA?</li> <li>4. Can you have a sole or dominant tax avoidance purpose under an anti-avoidance provision where you seek to avoid a different anti-avoidance provision?</li> </ol>
<b>Panel Reasons</b>	<p>The panel noted that the matter turns on its own facts and would not be suitable for funding.</p> <p>The panel also considered that this case does not require consideration as to the substantive law in relation to the anti-avoidance provisions. The way the issues have been identified are in general terms.</p> <p>The panel noted that the taxpayer appears to have been vague as to the historical events and did not discharge the burden proof during AAT proceedings. The panel agreed that this appeared to demonstrate an unwillingness to progress the issues in a timely manner to avoid delays. The panel considered that there also</p>

	<p>appears to be contrived arrangements to rewrite accounting history which may result in a benefit that is contrary to the law.</p> <p>The panel considered that there are uncertainties and curiosities as to the facts of the case, but the matter has limited use as to the application of the substantive law.</p> <p>For these reasons, the panel recommended that funding should not be approved. The chair accepted the recommendation and declined funding.</p>
<b>ATO Reference: 02/2022-23</b>	
<b>Panel Meeting Date</b>	13 July 2022
<b>Issues</b>	<ol style="list-style-type: none"> <li>1. Whether the Commissioner has discretion to remit penalties imposed pursuant to the <i>Superannuation Guarantee (Administration) Act 1992</i> (SGAA) below 100% of the superannuation guarantee charge (SGC)</li> <li>2. Whether the Commissioner has discretion to remit penalties below the level of 100%, and whether the correct or preferable decision is to remit the penalties in full to nil</li> <li>3. Whether the Commissioner's audit should have been formally put on hold</li> <li>4. Whether the COVID-19 pandemic materially reduced the capacity of the taxpayer to lodge SG statements and make disclosures</li> <li>5. Whether the discretion to remit SGC was narrowly applied</li> <li>6. Whether the principles in the Taxpayer's Charter were applied.</li> </ol>
<b>Panel Reasons</b>	<p>The Panel acknowledged the taxpayer's circumstances and, in view of the information provided, expressed an understanding of the taxpayer's position regarding the impact of COVID-19 on the business.</p> <p>The Panel acknowledged and discussed an inconsistency in the application regarding the 'nudge' letter and whether it was received by the taxpayer. The Panel concluded it was received based on the taxpayer's written response, that the process is clear with respect to the limitation of the Commissioners discretion if a 'nudge' letter is received by the taxpayer and it was incidental that the letter was received prior to the start of the COVID-19 pandemic as the issues relate to prior periods.</p> <p>The Panel noted that the fundamental issue pertains to the Commissioner's ability to remit the penalties imposed to less than 80% due to the exceptional circumstances experienced by the taxpayer at that time. On this point, the Panel noted that there is sufficient judicial instruction regarding exceptional circumstances</p>

	<p>and agreed that the issue did not require further judicial clarification.</p> <p>The Panel also observed that the matter is likely one which will rely on an evaluation of facts that are particular to the taxpayer and that the penalty remission powers were altered in 2018. Accordingly, the Panel agreed both elements would further limit any potential law clarification for other cases dealing with similar issues and recommended that funding be declined.</p> <p>The Chair accepted the recommendation and <b>declined</b> funding.</p>
<b>ATO Reference: 17/2021-22</b>	
<b>Panel Meeting Date</b>	4 May 2022
<b>Issues</b>	<p>In a dispute already determined by the Federal Court, the issue was the interaction between:</p> <ul style="list-style-type: none"> <li>a. the Commissioner of Taxation's obligation under s 166 of the <i>Income Tax Assessment Act 1936</i> (Cth) (<b>ITAA</b>) to use all information in his possession to make an assessment of a taxpayer's taxable income and the amount of tax payable by the taxpayer; and</li> <li>b. the Commissioner's implied undertaking, commonly referred to as a <i>Harman</i> undertaking in reference to the decision in <i>Harman v Secretary of State for the Home Department</i> [1983] 1 AC 280, in relation to documents and information obtained through the curial processes not to make use of such documents and information other than in the litigation.</li> </ul>
<b>Panel Reasons</b>	<p>The panel discussed the retrospectivity of the application. It was noted that this was a decision on an interlocutory application and not binding precedent, however it may be influential. It was noted that the terms of the order were unusual as the terms were: 'Leave be granted to the respondent (The Commissioner) to inspect the documents' which was not an issue. Rather, the issue was whether the Commissioner was entitled to go further and to use the information obtained as a basis for the s166 assessment. This was an anodyne order granted to inspect the documents and not a declaration for leave.</p> <p>The panel noted that the issues had previously been determined in the cases of <i>Deputy Commissioner of Taxation v Rennie Produce (Aust) Pty Ltd (in liq)</i> [2018] FCAFC 38 and <i>Deputy Commissioner of Taxation v Shi</i> [2021] HCA 22. It was considered that the matter does not relieve any ambiguity in those cases and is not entirely new or novel. Further, the matter does not narrow the application or does not contribute anything by way of precedent.</p>

	<p>Accordingly, the panel recommended that the funding application be <b>declined</b>. The chair accepted the recommendation and <b>declined</b> funding.</p> <p>The chair noted that in these circumstances retrospective funding could set a difficult precedent and may expand the operation of the Test Case Funding Program. It was further noted that had the application been considered before the proceeding, that funding would have been declined.</p>
<b>ATO Reference: 18/2021-22</b>	
<b>Panel Meeting Date</b>	4 May 2022
<b>Issues</b>	<p>Whether a home can be treated as a place of work by means of the following, that:</p> <ol style="list-style-type: none"> <li>there is a direct link between income and expense for the maintenance of dogs/live animals from home.</li> <li>a 3m x 2m concrete area, which was paid and installed by the applicant's employer at the applicant's home for the maintenance of the dogs/live animals, be considered a place of work.</li> <li>2 dog kennels owned by the South Australian (SA) Government housing dogs/live animals daily at the applicant's home, be considered a place of work.</li> <li>2 live dogs, being SA Government assets and stored at the applicant's home, be considered as a place of work.</li> <li>a SA Government owned gun safe installed in the applicant's home for storage of SA Government guns and ammunition be considered a place of work.</li> <li>section 900-115(3) should have been applied to this matter rather than section 900-195 of the <i>Income Tax Assessment Act 1997</i> (Cth).</li> </ol>
<b>Panel Reasons</b>	<p>On review of the issues raised in the funding application, the panel noted there were matters raised in the application that did not form part of the objection decision and therefore, were not issues before or decided on by the Administrative Appeals Tribunal.</p> <p>Notwithstanding these observations, the panel also noted that the matters pursued in the application did not raise any novel issues requiring law clarification but rather issues that already have clear and established case law principles.</p> <p>Accordingly, the panel unanimously recommended funding application be <b>declined</b>. The chair accepted the recommendation and <b>declined</b> funding.</p>
<b>ATO Reference: 13/2021-22</b>	

<b>Panel Meeting Date</b>	23 February 2022
<b>Issues</b>	The adequacy and sufficiency of the Taxpayer's supporting evidence in relation to its net fuel amount claims for the purposes of discharging its burden of proof under section 14ZZK of the <i>Taxation Administration Act 1953</i> (Cth).
<b>Panel Reasons</b>	<p>During opening discussions, the Panel noted, a Tribunal decision in the Tribunal on the adequacy of supporting evidence would not establish a precedent as s 33(c) of the <i>Administrative Appeals Tribunal Act 1975</i> (Cth) states 'the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such matter in such manner as it thinks appropriate'. Accordingly, the parties would not receive a decision on the evidentiary issue.</p> <p>The Panel noted that funding decisions need to be made with reference to the funding criteria and expectations. Particularly, a case "must be likely to provide legal precedent as a principle of law, capable of being used to decide other cases with similar facts, giving certainty and clarity for taxpayers". Accordingly, it was agreed that the matter was more a question of fact rather than a question of law.</p> <p>The Panel observed that as the issue identified in the application was likely to turn on its specific facts, consequently, it was unlikely to lead to a legal precedent in an area of legal uncertainty. The Panel further added that the way in which different taxpayers evidence their claims and what is considered 'sufficient' evidence in a particular instance depends on the facts and circumstances of each matter.</p> <p>Accordingly, the Panel recommended that funding be <b>declined</b>. The Chair accepted the advice of the Panel and <b>declined</b> funding.</p>
<b>ATO Reference: 14/2021-22</b>	
<b>Panel Meeting Date</b>	23 February 2022
<b>Issues</b>	Whether the position of Chief Executive Officer (CEO) of a company is a declared individual under paragraph 293-145.01(g) of the <i>Income Tax Assessment Regulations 1997</i> (ITAR 1997).
<b>Panel Reasons</b>	<p>During opening discussions, the Panel noted that it is unlikely that the issue will be significant to a substantial section of the public, due mainly to the expectation that the decision will be made having regard to circumstances particular to the taxpayer. It was considered that those circumstances would have quite limited relevance to other members of the public.</p> <p>The Panel noted that there is a lack of sufficient uncertainty or contention about how the law operates because the law is already</p>

	<p>clearly determined. It was considered that this matter was more a question of fact rather than a question of law.</p> <p>The Panel conceded that whilst the matter may add to established case law, it would not provide a precedent for future cases.</p> <p>Accordingly, the Panel recommended that funding be declined.</p> <p>The Chair accepted the recommendation and declined funding.</p>
<b>ATO Reference: 15/2021-22</b>	
<b>Panel Meeting Date</b>	23 February 2022
<b>Issues</b>	<ol style="list-style-type: none"> <li>1. Whether the definition of a “Pension” in the <i>Superannuation Industry (Supervision) Act 1993 (SISA)</i> relating to pre-20 September 2007 recipients of a “disability superannuation benefit”, does not comply with the rules of the sub-regulations of the <i>Superannuation Industry (Supervision) Regulations 1994 (SISR)</i>, pertaining to a pension according to the respective SISR Reg:1.06; specifically, Sub-Reg:1.06(1A).</li> <li>2. Whether Commonwealth and Military superannuation entitlements are unfunded public sector “defined benefit interests”, as provisioned by the Commonwealth Superannuation Corporation (CSC).</li> </ol>
<b>Panel Reasons</b>	<p>The Panel acknowledged the concerns raised by the taxpayer in the funding application and the challenges he had faced. However, with respect to the issues in dispute, the Panel noted that there is no uncertainty or contention as to the operation of the law and that the issues had received law clarification in the previous cases of <i>Douglas</i> and <i>Burns</i>.</p> <p>The Panel also noted that the matter is unlikely to provide precedent as a principle of law as the Tribunal’s decision on this matter is likely to turn on a full evaluation of the facts.</p> <p>The Panel was unanimous in the recommendation that funding should be declined. The Chair accepted the recommendation and declined funding.</p>
<b>ATO Reference: 007/2021-22</b>	
<b>Panel Meeting Date</b>	22 November 2021
<b>Issues</b>	<ol style="list-style-type: none"> <li>1. Whether an applicant’s burden of proof under subsection 14ZZK(b) of the <i>Taxation Administration Act 1953 (Cth)</i> will be satisfied: <ol style="list-style-type: none"> <li>a. by adducing evidence suggesting that all or part of the Commissioner’s methodology in making an assessment may have been flawed.</li> </ol> </li> </ol>

	b. by adducing evidence that the Commissioner may have been mistaken as to relevant facts when making an assessment.
<b>Panel Reasons</b>	<p>The applicant applied for funding for the re-hearing of the substantive dispute by the Administrative Appeals Tribunal (AAT) following a test case funded decision of the Federal Court.</p> <p>The Panel noted that questions identified in the application will not deal with the onus of proof issue initially raised by the applicant. It was further noted that a re-hearing by the AAT will not finalise those questions raised. Rather, they would need to be determined by the Federal Court.</p> <p>The Panel noted that because the applicant's matter is now back before the AAT for a fresh review of the objection, she is seeking funding for a fresh merits review of the objection decision. However, the Panel observed that Test Case Funding is not usually granted to fund such matters in the AAT.</p> <p>The Panel remarked that there is no matter of contention or uncertainty which would warrant funding, as the AAT reconsideration of this matter would turn on its own facts.</p> <p>Accordingly, the Panel recommended that funding be declined. The Chair accepted the recommendation and declined funding.</p>
<b>ATO Reference: 10/2021-22</b>	
<b>Panel Meeting Date</b>	22 November 2021
<b>Issues</b>	<p>The Applicant applied for funding to test the constitutional validity of an Excess Transfer Balance determination under s 136-10(1), s 136-55 and s 136-80(1) of Sch 1 to the <i>Taxation Administration Act 1953</i> (Cth), namely:</p> <ol style="list-style-type: none"> <li>1. Whether the above-mentioned sections are laws with respect to the acquisition of property other than on just terms contrary to s 51(xxxi) of the Constitution and not supported by any other head of power, and therefore constitutionally invalid.</li> <li>2. If the provisions are valid, whether s 136-10(1) confers a discretion on the Commissioner to issue an excess transfer balance determination and if so, what are relevant considerations the Commissioner should take into account.</li> <li>3. If s 136-10(1) does confer a discretion on the Commissioner, whether the Commissioner's decision to issue the excess transfer balance determination (and to disallow the objection) was the correct decision on the merits.</li> </ol>

<b>Panel Reasons</b>	<p>In discussing the second and third issues, the Panel did not consider that there was a point of law that was uncertain. The issues are directed to actions that were more of an administrative nature, with no real aspects of broad public interest or uncertainty. The determination is more in the nature of a certification of the excess balance which already exists. These issues turn on their facts and would be akin to a merits review, which is not an appropriate matter for test case funding.</p> <p>The Panel also discussed the issue of constitutional validity and noted that a challenge to constitutional validity is not an issue that the Panel would recommend for funding.</p> <p>The Panel observed that as the first issue on constitutional validity was not a matter to which funding should apply, as framed, the other issues fall away.</p> <p>Accordingly, the Panel recommended that funding be declined. The Chair accepted the recommendation and declined funding.</p>
<b>ATO Reference: 009/2021-22</b>	
<b>Panel Meeting Date</b>	22 November 2021
<b>Issues</b>	<ol style="list-style-type: none"> <li>1. Was a Lump Sum Payment in Arrears (<b>LSPIA</b>) paid to taxpayers under each Deed of Acknowledgement and Assignment, ordinary income within the meaning of section 6-5 of the <i>Income Tax Assessment Act 1997</i> (Cth) (<b>ITAA 1997</b>)?</li> <li>2. Did CGT event A1 (see section 104-10 of the ITAA 1997) happen for the taxpayers in respect of each Deed of Acknowledgment and Assignment entered into by them and that company?</li> <li>3. If CGT event A1 did happen in respect of each Deed of Acknowledgment and Assignment, then: <ol style="list-style-type: none"> <li>a. did the taxpayers make a capital gain and, if so, what was the quantum of the capital gain; and</li> <li>b. was the capital gain made by the taxpayers a 'discount capital gain' within the meaning of Division 115 of the ITAA 1997?</li> </ol> </li> </ol>
<b>Panel Reasons</b>	<p>The Panel noted that there is no uncertainty or contention as to the operation of the law. Rather, the issue is simply one of application of the established principles to the facts. There are no competing lines of authority in this circumstance, but rather the question is which authority applies to the set of facts, and the facts would not be considered novel.</p>

	<p>The Panel also agreed that there is no plausible argument that the amount in question constitutes capital as opposed to revenue income.</p> <p>Accordingly, the Panel recommended that funding be declined. The Chair accepted the recommendation and declined funding.</p>
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## **FINALISED APPROVED MATTERS**

<b>Name: <i>Bosanac v Commissioner of Taxation</i> [2022] HCA 34</b>	
<b>Venue</b>	High Court of Australia
<b>Issue</b>	<p>Is the presumption of advancement still good law? Should the presumption of advancement be abolished on the basis that it is 'discriminatory and anachronistic'?</p> <p>Where spouses purchase a matrimonial home, each contributing to the purchase price and title is taken in the name of one of them only, should it be inferred in the absence of evidence to the contrary that it was intended that each the spouses would have a one-half interest in the property regardless the amounts contributed by them?</p>
<b>Decision or Outcome</b>	<p>The High Court refused the Commissioner's invitation to abolish the presumption of advancement and observed that the 'presumption' of advancement is an entrenched 'land-mark' of the law in Australia.</p> <p>The High Court held that the presumption of resulting trust will not arise where there is evidence from which it may be inferred that the parties' objective intention is inconsistent with the person providing the purchase money obtaining an interest in a property. Here, the inference to be drawn from the facts was that the parties objectively intended for Ms Bosanac to be the sole beneficial owner of the property, and Mr Bosanac was merely facilitating her acquisition of the same.</p>
<b>Why does the issue involve uncertainty and/ or contention?</b>	<p>This matter has wide implications for matrimonial parties and how the beneficial ownership of jointly enjoyed matrimonial assets is determined. At the time of the funding application, it was unclear whether the presumption of advancement of a wife by her husband, which operates to preclude a presumption of resulting trust from arising, was still good law in Australia. The Court has clarified that both presumptions are only relevant in rare cases where the evidence is incapable of founding an inference as to what the purchaser intended.</p>
<b>Status</b>	The High Court handed down its decision on 12 October 2022 and unanimously allowed the taxpayer's appeal.
<b>Name: <i>Commissioner of Taxation v Carter &amp; Ors</i> [2022] HCA 10</b>	

<b>Venue</b>	High Court of Australia
<b>Issue</b>	<ol style="list-style-type: none"> <li>1. Does a disclaimer of a gift render the gift void ab initio for all purposes?</li> <li>2. Where a beneficiary of a trust disclaims a distribution after an income year, is it nevertheless the case that the beneficiary was “presently entitled” to the distribution at all material times for the purposes of s 97(1) of the <i>Income Tax Assessment Act 1936</i> (Cth) (<b>1936 Act</b>)?</li> <li>3. Does s 97(1) of the 1936 Act operate on the facts as they are at the end of the year of income, or can s 97(1) be applied or disapplied by events occurring after the end of the year of income?</li> <li>4. What was the nature of the beneficiary’s interest in the income of the trust estate prior to their disclaimer?</li> </ol>
<b>Decision or Outcome</b>	<p>Subsection 97(1) is directed to the position existing immediately before the end of the income year for the purpose of identifying the beneficiaries who are to be assessed with the income of the trust. It looks to the right to receive an amount of distributable income, not the receipt of income. Accordingly, events occurring after the end of the income year cannot disentitle a beneficiary who was ‘presently entitled’ immediately before the end of the income year. The beneficiary’s interest was sufficient to amount to present entitlement to the income of the trust estate despite that they did not know about their interest at the end of the income year and had never assented to the gift. The taxpayers’ disclaimers were not effective to retrospectively expunge the rights of the Commissioner against them which were in existence at the end of the income year and gave rise to the assessments.</p>
<b>Why does the issue involve uncertainty and/ or contention?</b>	<p>The questions raised in relation to the effectiveness of a retrospective disclaimer by a beneficiary had not been directly considered by the Courts in relation to the operation of federal tax law, though they have been raised in past matters involving the Commissioner. The issue had been considered at the state appellate level in relation to payroll tax.</p>
<b>Status</b>	<p>The High Court handed down its decision on 6 April 2022 and unanimously allowed the Commissioner’s appeal.</p> <p>The Commissioner issued a Decision Impact Statement on 10 June 2022.</p>
<b>Name: <i>Addy v Commissioner of Taxation</i> [2021] HCA 34</b>	
<b>Venue</b>	High Court of Australia
<b>Issue</b>	Whether Article 25(1) of the <i>Convention between the Government of Australia and the Government of the United Kingdom of Great</i>

	<i>Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains</i> [2003] ATS 22 ( <b>DTA</b> ) prevents the taxpayer (a UK national) from having the working holiday maker tax rates applied in full to her working holiday maker income?
<b>Decision or Outcome</b>	<p>Article 25(1) of the DTA requires a comparison between a national of the United Kingdom and an Australian national who is otherwise than with respect to nationality, “in the same circumstances, in particular with respect to residence.”</p> <p>Those “same circumstances” to be considered cannot include being or not being the holder of a working holiday visa, because that status depends on nationality. The taxpayer was an Australian resident for tax purposes but was subject to working holiday maker tax rates. However, an Australian national deriving taxable income from the same source during the same period would have been taxed at a lower rate. As the higher more burdensome taxation was imposed on the taxpayer because of her working holiday maker status it was regarded as being imposed due to her nationality and for that reason, contravened Article 25(1) of the DTA. The taxpayer should have been given the same treatment as a resident Australian national in the same circumstances, that is the lower amount of tax should have been imposed.</p>
<b>Why does the issue involve uncertainty and/ or contention?</b>	<p>This matter involves testing of provisions (inserted by the <i>Income Tax Rates Amendment (Working Holiday Maker Reform) Act 2016</i>) in respect of contentions that they are inconsistent with obligations in some of Australia’s tax treaties.</p> <p>The case had the potential to establish principles of law that go beyond the working holiday maker provisions, particularly in relation to the operation of the non-discrimination clause in those of Australia’s tax treaties that include it.</p>
<b>Status</b>	<p>The High Court handed down its decision on 3 November 2021 and unanimously allowed the taxpayer’s appeal.</p> <p>The Commissioner issued a decision impact statement on 17 December 2021.</p>
<b>Name: <i>Commissioner of Taxation v Ross</i> [2021] FCA 766</b>	
<b>Venue</b>	Federal Court of Australia
<b>Issue</b>	The case concerns section 167 <i>Income Tax Assessment Act 1936</i> (ITAA 1936) default assessments made using the asset betterment method, the correct <i>onus</i> of proof arising under s14ZZK of the <i>Taxation Administration Act 1953</i> (TAA) and the <i>standard</i> of proof required to discharge that onus. In particular, whether an applicant’s

	<p>burden of proof under subsection 14ZZK(b) of the <i>Taxation Administration Act 1953</i> is satisfied:</p> <ol style="list-style-type: none"> <li>1. by adducing evidence suggesting that all or part of the Commissioner's methodology in making an assessment <i>may have been</i> flawed; and</li> <li>2. by adducing evidence that the Commissioner <i>may have been</i> mistaken as to relevant facts when making an assessment.</li> </ol>
<b>Decision or Outcome</b>	The Court (Derrington J) delivered judgment on 9 July 2021. In allowing the Commissioner's appeal, his Honour held that when seeking a review of a section 167 <i>ITAA 1936</i> default assessment, it is not sufficient for a taxpayer to merely show that there were errors in the Commissioner's calculations or that the methodology employed by the Commissioner was flawed. Rather, the taxpayer is required to prove the amount of the taxpayers' true taxable income. This view is consistent with established case law.
<b>Why does the issue involve uncertainty and/ or contention?</b>	The AAT had set aside the objection decisions on the basis that it was satisfied that there was a possibility that the Commissioner's audit methodology was flawed, or that part of the assessments may have been miscalculated. Those reasons were inconsistent with existing authorities, such as <i>Commissioner of Taxation v Dalco</i> (1990), which stand for the proposition that a taxpayer must show that a default assessment is excessive, not just by showing error on the part of the Commissioner, but by demonstrating the true amount of taxable income.
<b>Status</b>	On 9 July 2021 the Court allowed the Commissioner's appeal, and allowed the taxpayer's cross-appeal (the cross appeal was not test-case funded), finding that the taxpayers were denied procedural fairness as a consequence of prolonged delay between the taking of evidence and the delivery of reasons. The Court ordered that the applications for review be remitted to the Tribunal without the hearing of further evidence.
<b>Name: <i>Commissioner of Taxation v Apted</i> [2021] FCAFC 45</b>	
<b>Venue</b>	Federal Court of Australia, Full Court.
<b>Issue</b>	<ol style="list-style-type: none"> <li>1. Did the applicant have an Australian Business Number (ABN) on 12 March 2020 for the purposes of s 11(6) of the <i>Coronavirus Economic Response Package (Payments and Benefits) Rules 2000</i> ('the Rules'); being a criterion for establishing his eligibility to JobKeeper payments?</li> <li>2. If not, does the Administrative Appeal Tribunal (AAT) have jurisdiction to review the Commissioner's "later time" discretion ('the discretion') to allow a later time for the Taxpayer to hold an ABN (ss11(6) of the Rules)?</li> </ol>

	3. If so, should the discretion be exercised in the applicant's circumstances?
<b>Decision or Outcome</b>	<p>The Full Court handed down its decision on 24 March 2021 (Per Logan and Thawley JJ, Allsop CJ agreeing).</p> <p>On the first issue, their Honours held that the requirement in subsection 11(6) of the Rules that an entity “had an ABN on 12 March 2020” should be construed as a point-in-time requirement. That is, a request that an inactive ABN be reinstated and backdated to before 12 March 2020 will not be effective in meeting the requirements of subsection 11(6). The appropriate enquiry is, ‘if one had inspected the Australian Business Register on 12 March 2020, would the entity be recorded as holding an ABN?’</p> <p>For the second issue, their Honours held that the exercise of the discretion forms part of a single entitlement decision rather than standing alone as a separate decision. Accordingly, the Commissioner's decision not to exercise the discretion could be objected to under section 13 of the <i>Coronavirus Economic Response Package (Payments and Benefits) Act 2020</i>, as it formed part of the reviewable decision in respect of entitlement to JobKeeper payments. The AAT is empowered to review objection decisions made by the Commissioner about entitlement decisions, encompassing the exercise of the discretion.</p> <p>In relation to the third issue, the Court decided that the Tribunal did not err in exercising the discretion in subsection 11(6) to allow the Respondent a later time to have an ABN. The Court concluded that the discretion is constructed broadly according to its terms and its exercise is confined only by statutory purpose and context.</p> <p>It should be noted that, while the Court did not find error in the Tribunal's decision that the discretion should be exercised in relation to the current applicant, it does not follow that the discretion should be exercised in all cases.</p>
<b>Why does the issue involve uncertainty and/ or contention?</b>	<p>The JobKeeper program is part of the broader economic stimulus response to the COVID-19 pandemic. The administration of the program and the integrity rules has wide-ranging impacts on Australian businesses and their employees. Accordingly, it was in the public interest to seek clarification of the JobKeeper rules to resolve controversies that have emerged in the administration of the program.</p>
<b>Status</b>	<p>The decision was handed down on 24 March 2021. The Commissioner did not seek special leave to appeal the decision to the High Court.</p> <p>The ATO issued a Decision Impact Statement in relation to this decision on 29 April 2021.</p>

Name: <i>Slatter Building Group Pty Ltd v Commissioner of Taxation</i> [2021] AATA 456	
Venue	Administrative Appeals Tribunal
Issue	<p>1. Has an entity made a taxable supply in a tax period that applied to it that started on or after 1 July 2018 and ended before 12 March 2020 (as required under paragraph 5(6)(a) of the <i>Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020</i>) where:</p> <ol style="list-style-type: none"> <li>an individual carrying on a business prior to December 2019 restructures the business to operate through the entity, which was created on 17 January 2020</li> <li>the entity was registered for GST on a quarterly basis effective from 20 January 2020, and</li> <li>the entity made its first taxable supplies in January 2020?</li> </ol>
Decision or Outcome	<p>The Tribunal (McCabe DP and Olding SM) held that the term “tax period that applied to it” in subsection 5(6) should be construed as “tax period that applied to [the entity]” rather than being a reference to a tax period that applied to a taxable supply in itself.</p> <p>The Tribunal further held that activities of the business conducted by another entity prior to incorporation were not relevant in determining whether the corporate entity made taxable supplies in the required period. As a matter of law, business activities carried on by the company are separate and distinct from the activities carried on by the individual as a sole trader.</p> <p>The Tribunal commented in <i>obiter</i> that the requirement to notify the Commissioner of taxable supplies for current purposes is not expressly tied to the statutory requirement that a return or Business Activity Statement be lodged.</p>
Why does the issue involve uncertainty and/ or contention?	This matter raised issues in relation to the proper construction of the eligibility requirements for Cash Flow Boost payments as a part of the administration of the Coronavirus Economic Relief packages.
Status	The Tribunal handed down its decision on 10 March 2021.
Name: <i>Commissioner of Taxation v Douglas</i> [2020] FCAFC 220	
Venue	Federal Court of Australia (Full Court)
Issue	This matter involved 3 appeals brought by the Commissioner in respect of the following decisions of the Administrative Appeals Tribunal: <i>Burns and Commissioner of Taxation</i> [2020] AATA 671 (Burns); <i>GDGR and Commissioner of Taxation</i> [2020] AATA 766

	<p>(Walker – GDGR is a pseudonym for Walker); and <i>Douglas and Commissioner of Taxation</i> [2020] AATA 494 (Douglas).</p> <p>Two of the decisions, Burns and Walker, concerned the taxation of invalidity benefits paid from the Military Superannuation and Benefits Scheme (MSBS) and the third, Douglas, concerned the taxation of invalidity benefits paid from the Defence Force Retirement and Death Benefits Scheme (DFRDBS).</p> <p>The matter raised a significant number of issues for consideration. Central to all was whether the invalidity benefits received by the taxpayers should be taxed as superannuation income stream benefits or superannuation lump sums.</p> <p>Three primary issues were identified for resolution (resolution of the other issues turned on the resolution of these issues):</p> <ol style="list-style-type: none"> <li>1. Whether subregulation 995-1.01(2) of the Income Tax Assessment Regulations 1997 (ITAR), as it was prior to the <i>Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2018</i> (2018 amendments), properly prescribed 'superannuation benefits' for the purposes of the definition of 'superannuation income stream benefit' in subsection 307-70(1) of the Income Tax Assessment Act 1997 (ITAA);</li> <li>2. Whether the invalidity benefits paid to Burns and Walker were a superannuation income stream as defined in subregulation 995-1.01(1) of the ITAR. A sub-issue for Burns was whether the invalidity benefits paid to him were a superannuation income stream that commenced to be paid before 20 September 2007.</li> <li>3. Whether the invalidity benefits paid to Douglas were a superannuation income stream as defined in subregulation 995-1.01(1) of the ITAR. A sub-issue was whether the invalidity benefits paid to him were a superannuation income stream that commenced to be paid before 20 September 2007.</li> </ol> <p>If the invalidity benefits were found not to be superannuation income streams the payments would not be superannuation income stream benefits and would be superannuation lump sum benefits under section 307-65 of the ITAA.</p>
<b>Decision or Outcome</b>	<p>The Full Court (Griffiths, Davies and Thawley JJ) handed down its unanimous decision on 4 December 2020. The Court allowed the Commissioner's appeal in relation to Burns but dismissed the appeals in relation to Walker and Douglas.</p> <p>In relation to issue 1, the Court raised concerns about the drafting of the definition of 'superannuation income stream benefit' in the ITAR as it read prior to the 2018 amendments, but held that the definition did properly prescribe superannuation benefits for the purposes of section 307-70 of the ITAA.</p>

	<p>In relation to issue 2, the Court held that the invalidity benefits satisfied the definition of pension in section 10 of the <i>Superannuation Industry (Supervision) Act 1993</i> (SISA), but that the rules of the MSBS do not satisfy the standards set out in subregulation 1.06(2) and subparagraph 1.06(9A)(b)(iii) of the <i>Superannuation Industry (Supervision) Regulations 1994</i> (SISR) because they do not ensure the invalidity benefits are payable for the lifetime of the recipient.</p> <p>Accordingly, the Court held that the invalidity benefits paid to Walker, which commenced to be paid after 20 September 2007, were not a superannuation income stream as they did not satisfy the requirements of subparagraph (a)(ii) of that definition in subregulation 995-1.01(1) of the ITAR.</p> <p>Hence, the invalidity benefits paid to Walker are superannuation lump sums. However, the Court held that the invalidity benefits paid to Burns were a pension that commenced before 20 September 2007 and, hence, were a superannuation income stream as they satisfied the requirements of subparagraph (b)(i) and (ii) of that definition in subregulation 995-1.01(1) of the ITAR. Hence the invalidity benefits paid to Burns are superannuation income stream benefits.</p> <p>In relation to issue 3, the Court held that the invalidity benefits satisfied the definition of pension in section 10 of the SISA but the rules of the DFRDBS did not satisfy the standards of subregulation 1.06(2) and subparagraph 1.06(9A)(b)(iii) of the SISR because they do not ensure the invalidity payments are paid annually for the person's lifetime.</p> <p>The Court further held that the invalidity benefits paid to Douglas were not a pension that commenced before 20 September 2007.</p> <p>Accordingly, the Court held that the invalidity benefits were not a superannuation income stream as they did not satisfy the requirements of subparagraph (a)(ii) or (b)(i) and (ii) of that definition in subregulation 995-1.01(1) of the ITAR.</p> <p>Hence, the invalidity benefits paid to Douglas are superannuation lump sums.</p>
<b>Why does the issue involve uncertainty and/ or contention?</b>	Prior to the Full Court's decision, there was little in the way of existing case law on whether or not military superannuation invalidity payments are superannuation income streams or superannuation lump sums under the ITAA and ITAR.
<b>Status</b>	The Full Court handed down its decisions on 4 December 2020. None of the parties have sought special leave to appeal any of the decisions to the High Court.
<b>Name: <i>N &amp; M Martin Holdings Pty Ltd v Commissioner of Taxation</i> [2020] FCA 1186</b>	
<b>Venue</b>	Federal Court of Australia

<b>Issue</b>	Whether section 855-10 of the <i>Income Tax Assessment Act 1997</i> (ITAA 1997) applies to disregard a capital gain in circumstances where a share of the net income of a resident non-fixed trust referable to a non-resident beneficiary's entitlement includes a capital gain.
<b>Decision or Outcome</b>	The Court (Steward J) held that the applicants had not shown that the earlier judgment of Thawley J in <i>Peter Greensill Family Co Pty Ltd (as trustee) v FCT</i> [2020] FCA 559 (' <i>Greensill</i> ') was plainly wrong. Following <i>Greensill</i> , his Honour decided that the non-resident beneficiary was not entitled to rely on section 855-10 of the ITAA 1997 to disregard his capital gains.
<b>Why does the issue involve uncertainty and/ or contention?</b>	There has been contention whether section 855-10 of the ITAA 1997 can be construed broadly so as to apply to beneficiaries of non-fixed trusts. At the time of funding approval, this issue had not been subject to judicial consideration. This matter provided an opportunity for the Commissioner to seek clarity and resolve that contention.
<b>Status</b>	The Court handed down its decision on 18 August 2020. The taxpayer subsequently appealed to the Full Federal Court in respect of the s 855-10 issue, which was heard and unanimously dismissed on 10 June 2021. The taxpayer further sought and was refused special leave to appeal to the High Court of Australia on 21 February 2022.

If you think that you have an issue which may be an issue that the ATO seeks to test, please contact the Test Case Litigation Program at [testcaselitigationprogram@ato.gov.au](mailto:testcaselitigationprogram@ato.gov.au).

**DISCLAIMER:** There is no guarantee that a case will produce the law clarification sought and that the litigation underway may have consequences for other taxpayers.

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