

TEST CASE LITIGATION REGISTER

AS AT 18 March 2021

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

- 4 May 2021 meeting: closing date for applications is 13 April 2021
- 13 July 2021 meeting: closing date for applications is 22 June 2021
- 21 September 2021 meeting: closing date for applications is 31 August 2021
- 30 November 2021 meeting: closing date for applications is 9 November 2021

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

- 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: Commissioner of Taxation v Jeremy Apted (QUD11/2021)	
Venue	Federal Court of Australia
Issue	<ol style="list-style-type: none"> 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? 2. If not, does the Administrative Appeal Tribunal (AAT) have jurisdiction to review the Commissioner's discretion to allow a later time for the Taxpayer to hold an ABN (ss11(6) of the Rules)? 3. If so, should the discretion be exercised in the applicant's circumstances?
Why does the issue involve uncertainty and/ or contention?	<p>The AAT's decision is inconsistent with the Commissioner's view in respect of all key issues considered by the Tribunal. In particular:</p> <ul style="list-style-type: none"> • an ABN which has been backdated to have effect on or before 12 March 2020 will not meet the requirement for an entity to have had an ABN on 12 March 2020 for the purposes of the Rules. • the Commissioner's discretion is not reviewable by the Tribunal, although review could be sought under the <i>Administrative Decisions (Judicial Review) Act 1977</i>. • a favourable exercise of the discretion is not appropriate based on the reasons given by the Tribunal.
Impact on other taxpayers and mitigation strategies	<p>It is in the public interest to clarify the issues raised in this case to ensure efficient and proper administration of the JobKeeper rules. Accordingly, the Commissioner has filed an appeal in respect of the decision to the Full Federal Court of Australia and has also made application for an expedited hearing, in recognition of the importance of resolving the issues considered by the Tribunal as soon as possible.</p>
Status	Proceedings are underway in the Federal Court. The matter is set to be heard on 19 March 2021.
ATO Reference: 15/2020-21	
Venue	High Court of Australia
Issue	<ol style="list-style-type: none"> 1. Does a disclaimer of a gift render the gift void ab initio for all purposes? 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

	<p>for the purposes of s 97(1) of the Income Tax Assessment Act 1936 (Cth) (1936 Act)?</p> <p>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?</p>
Why does the issue involve uncertainty and/ or contention?	The questions raised in relation to the effectiveness of a retrospective disclaimer by a beneficiary has 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 has been considered at the state appellate level in relation to payroll tax.
Impact on other taxpayers and mitigation strategies	A large number of taxpayers are trust beneficiaries that are ordinarily entitled to distributions of the trust's income. Each year, many beneficiaries seek to disclaim their entitlements. There are numerous objections currently being considered that raise issues in relation to the efficacy of purported disclaimers.
Status	The Commissioner filed a Special Leave Application on 13 October 2020. The Application has been listed for oral hearing on 16 April 2021.

ATO Reference: 26/2019-20	
Venue	Federal Court of Australia
Issue	<p>Whether an applicant's burden of proof under subsection 14ZZK(b) of the <i>Taxation Administration Act 1953</i> will be satisfied:</p> <ol style="list-style-type: none"> 1. By adducing evidence suggesting that all or part of the Commissioner's methodology in making an assessment <i>may have been</i> flawed 2. By adducing evidence that the Commissioner <i>may have been</i> mistaken as to relevant facts when making an assessment.
Why does the issue involve uncertainty and/ or contention?	This matter is an appeal by the Commissioner from a decision of the AAT. The AAT overturned assessments on the basis that the member was satisfied that there was a possibility that he Commissioner's methodology was flawed or that part of the assessment may have been miscalculated. This appears to be inconsistent with existing authorities, such as <i>Commissioner of Taxation v Dalco</i> (1990), which held that a taxpayer must not only show that the Commissioner was in error, but also provide evidence of their correct taxable income.
Impact on other taxpayers and mitigation strategies	The uncertainty created by the AAT decision may have an impact on other proceedings in which a taxpayer is seeking to challenge an assessment by the Commissioner. A Federal Court decision addressing the uncertainty will provide clarity on the taxpayer's burden of proof.

Status	The matter is progressing through the preliminary stages. No court timetable is in place.
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DECLINED MATTERS

ATO Reference: 19/2020-21	
Panel Meeting Date	23 February 2021
Issue	Whether the taxpayer had possession, custody or control of excisable goods which were not kept safely pursuant to section 60(1)(a) of the Excise Act 1901 (Cth)?
Panel Reasons	<p>The Panel observed that the case is distinct in fact and that a decision on the issue will likely to turn on these facts and is improbable of having any broader significance beyond the dispute. In addition, the Panel agreed that the facts do not appear to identify a controversy that would enhance existing precedent.</p> <p>The Chair accepted the recommendation of the Panel and decided to decline funding primarily on the basis that the matter is likely to turn on the facts and noted existing recent precedent from the High Court.</p>
ATO Reference: 18/2020-21	
Panel Meeting Date	23 February 2021
Issue	<ol style="list-style-type: none"> Whether a taxpayer that has been nominated as an eligible employee for the purposes of JobKeeper payment is permitted to nominate themselves under a sole trader ABN as an eligible business participant in circumstances where the employer has failed to make JobKeeper payments in line with their nomination. Whether the applicant is liable to repay an overpayment under section 9 of the <i>Coronavirus Economic Response Package (Payments and Benefits) Act 2020</i>.
Panel Reasons	<p>The Panel noted that the first issue in relation to nomination is a live issue for other matters that are more advanced in the Tribunal. It was noted that some of those matters are more straightforward in the framing of the nomination issue, and that those matters may provide the law clarification sought.</p> <p>The Panel also acknowledged that there may be some additional issues beyond those in the application to be considered by the Tribunal, such as eligibility conditions for business participants in the JobKeeper program and satisfaction of the decline turnover test.</p>

	<p>It was considered that these other issues may distract the Tribunal from any potential law clarification and that the Tribunal may make its decision without substantively considering the issues in the funding application.</p> <p>The Panel considered that the matter is not an appropriate vehicle for test case funding and recommended that funding be declined. The Chair accepted the recommendation and declined funding.</p>
ATO Reference: 22/2019-20	
Panel Meeting Date	23 February 2021
Issue	Whether the properties used by the applicants in the business of short-term holiday accommodation were supplied to guests under a "licence to occupy" for the purposes of the active assets test in section 152-40 of the <i>Income Tax Assessment Act 1997</i> .
Panel Reasons	<p>The Panel noted that the application was not in the name of the Tribunal applicant. However, the Panel agreed that this did not interfere with the whether the substance of the matter would be suitable for funding.</p> <p>In doing so, the Panel noted that several short-term holiday accommodation platforms had entered the market in recent years and that a number of taxpayers supply short term holiday accommodation services as a form of income. However, it was considered that existing legal principles in relation to accommodation services and capital gains tax were enough to cover the field.</p> <p>The Panel considered that the current matter, as expressed in the application, does not raise a novel question of law that would require a re-examination of the relevant principles.</p> <p>The Panel observed that the matters described in the application were likely to turn on its specific facts and, consequently, was unlikely to lead to legal precedent in an area of legal uncertainty.</p> <p>The Panel recommended funding be declined.</p> <p>The Chair agreed and decided to decline funding.</p>

ATO Reference: 12/2020-21	
Panel Meeting Date	1 December 2020 and 23 February 2021
Issue	1. Whether the Ethereum cryptocurrency (ETH) received during the crowdfunding of the Ethereum Platform is the same asset

	<p>now traded under the ticker ETH (i.e. as a result of the Ethereum-Ethereum Classic Hard Fork).</p> <p>2. Whether the capital gain arising from the applicant disposing of ETH via the Smart Contract Disposal is disregarded pursuant to section 118-10 of the ITAA 1997 as the capital gain is from the disposal of a personal use asset, as defined in s 108-20 of the 1997 Act.</p> <p>3. Whether the capital gain arising from the applicant disposing of ETH for AUD via a digital currency exchange (Cash Disposal) is disregarded pursuant to section 118-10 of the ITAA 1997 as the capital gain is from the disposal of a personal use asset, as defined in section 108-20 of the ITAA 1997.</p>
Panel Reasons	<p>The Panel considered that the declaratory relief sought by the applicant appears to carve-out narrow points in dispute rather than addressing the totality of the matter. Consequently, they observed that any declaratory relief provided by the Court would not resolve the matters in dispute.</p> <p>It was also noted that the central issues in the application for declaratory relief relate to whether the applicant's ETH holding is a personal use asset for capital gains tax (CGT) purposes, rather than whether the hard fork resulted in the creation of a new CGT asset in the applicant's hands.</p> <p>The Panel noted that the first issue refers to complex concepts in relation to cryptocurrencies and blockchain technology. The Panel noted that cryptocurrencies like Ethereum are a relatively new class of asset and, consequently there were potential issues regarding market valuations and the calculation of the cost base for CGT purposes, particularly where there has been a fork.</p> <p>The Panel considered that the law in relation to identifying personal use assets is well-settled and unlikely to result in legal precedent. It was noted that the ATO has already published guidance in relation to whether Bitcoin is a personal use asset and that advice would be analogous to Ethereum.</p> <p>Overall, it was considered that the matter is not an appropriate vehicle for test case funding and that the second and third issues do not raise legal questions of significant uncertainty.</p> <p>The Panel recommended that funding be declined.</p> <p>The Chair accepted the recommendation of the Panel and decided to decline funding.</p>

ATO Reference: 10/2020-21	
Panel Meeting Date	1 December 2020
Issue	<ol style="list-style-type: none"> Whether section 8AAZN of the <i>Taxation Administration Act</i> 1953, on its proper construction, is directed only at administrative or procedural mistakes made in the administration of a running balance account, or whether the terms should be taken to have their ordinary meaning Whether subdivision 67-L of the <i>Income Tax (Transitional Provisions) Act 1997</i> was a relevant consideration in determining whether the powers under section 8AAZN were enlivened Whether the payment to the applicant was made by mistake Whether the Commissioner was authorised by section 8AAZN to recover the payment from the applicant
Panel Reasons	<p>The Panel agreed that there may be some interest in testing the extent of the Commissioner's powers under section 8AAZN. However, notwithstanding the significance of the issue, the Panel noted the comments of the lower court regarding admitted facts.</p> <p>In particular, the Panel noted the observation around the applicant's concession that they were not entitled to the Research and Development refundable offset which is subject of the refund the Commissioner looked to recover. For this reason, the Panel considered the matter could be construed as an attempt to derive a windfall gain and a benefit not intended by the law and recommended funding be declined.</p> <p>The Chair noted the recommendation of the Panel, and on further review of the issue, acknowledged that whilst test case funding requires regard to be had to all factors, and for all factors to be balanced against each other, the findings of the lower Court, noted above, that the applicant is seeking to reap a windfall gain, make this in an inappropriate case for funding.</p> <p>The Chair decided that funding should be declined.</p>
ATO Reference: 09/2020-21	
Panel Meeting Date	1 December 2020
Issue	<ol style="list-style-type: none"> Whether the head company and two subsidiary members must individually show that they meet the eligibility criteria set out in section 5 of the <i>Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020</i> (the CFB Act). Whether each of them:

	<ul style="list-style-type: none"> a. made a payment of the kind specified in paragraph 5(1)(a) (being a payment from which an amount must be withheld or a payment in relation to an alienated personal services payment that it receives in the relevant period); and b. included an amount in the entity's assessable income for the 2018-19 income year in relation to it carrying on a business and the Commissioner had notice thereof on or before 12 March 2020 under subsection 5(5); or c. made a taxable supply in a relevant tax period that applied to it and the Commissioner had notice thereof on or before 12 March 2020 under subsection 5(6).
Panel Reasons	<p>The Panel observed that the taxpayer did not appear to cooperate with the Commissioner throughout the course of the objection. The Panel remarked that there remained questions about the nature of the circumstances when the purported wages were paid, particularly as wages did not appear to have been paid in some time.</p> <p>Accordingly, the Panel considered that the matter would likely turn on its facts and therefore would not be an appropriate vehicle to provide legal precedent.</p> <p>It was also noted by the Panel that concerns had been raised by ATO stakeholders as to whether some aspects of the matter could be taken to involve a scheme intending solely to gain access to Cash Flow Boost payments. However, in view of the limited information available at objection, it was unclear whether a finding in relation to a scheme could be supported.</p> <p>The Panel recommended that funding be declined.</p> <p>The Chair accepted the Panel's recommendation and declined funding.</p>
ATO Reference: 04/2020-21	
Panel Meeting Date	15 September 2020
Issue	<p>The application related to a proposed appeal to the Full Federal Court in relation to the treatment of capital gains made by resident trusts with non-resident beneficiaries. The prior proceedings in the Federal Court was test case funded.</p> <p>The applicants have sought funding in relation to two issues on appeal:</p>

	<ol style="list-style-type: none"> Whether s 855-10 disregards a capital gain in circumstances where a share of the net income of a resident trust referable to a non-resident beneficiary's entitlement includes a capital gain (855-10 issue). Whether the trustee remains taxable under s 98 of the ITAA 1936 via the operation of s 115-220, independent of whether a beneficiary can disregard its s 115-215 gains (115-220 issue).
Panel Reasons	<p>The Panel noted that there was another matter due to be heard in late 2020 by the Full Federal Court that dealt with the issues set out in the funding application. The first instance decision in the other matter was wholly endorsed by the judge in the applicant's proceedings.</p> <p>The Panel considered that the decision in the prior funded proceedings set out a full explanation of the law and represented a clear statement of principle. Further, Panel members agreed that if there was any residual ambiguity around the operation of the law, the other matter (which is further advanced) would likely deliver any desired clarification before the applicant's possible appeal. The Panel unanimously agreed that the applicants' matter would not be an appropriate vehicle for test case and recommended that funding be declined.</p> <p>The Chair accepted the recommendation and declined funding.</p>
ATO Reference: 03/2020-21	
Panel Meeting Date	15 September 2020
Issue	<p>The application relates to proceedings before the Administrative Appeals Tribunal. Funding was sought in relation to two primary issues:</p> <ol style="list-style-type: none"> Whether the Applicant is a statutory office holder of equivalent seniority to a head of a Department of the Public Service of a State for the purposes of regulation 293-145.01(g) of the <i>Income Tax Assessment Regulations 1997 (ITAR)</i> and exempt from tax under Division 293 by operation of Subdivision 293-E of the <i>Income Tax Assessment Act 1997 (ITAA 1997)</i>. Alternatively, whether the Commonwealth taxation power does not extend to imposing Division 293 tax upon a person in the Applicant's position and should be read down so as not to apply to such an officer.
Panel Reasons	<p>The Panel noted that there had been a number of past cases raising similar questions regarding various statutory appointments and the regime contemplated by Subdivision 293-E of the ITAA 1997.</p>

	<p>In view of the existing case law, the Panel remarked that a decision of the AAT in the applicant's matter would be unlikely to provide further law clarification. Additionally, the Panel considered that the current matter turned largely on its facts, particularly specifics of the applicant's appointment and its nature.</p> <p>The Panel noted that the materials provided dealt primarily with the 'statutory office holder' issue but did not include any substantive commentary in relation to the constitutional powers issue raised in the application.</p> <p>The Panel recommended that funding be declined. The Chair accepted the recommendation and declined funding.</p>
ATO Reference: 27/2019-20	
Panel Meeting Date	14 July 2020
Issue	<ol style="list-style-type: none"> 1. Whether the applicant was an Australian resident for the 2009 to 2014 income years (relevant years), pursuant to the "ordinary concepts" test? 2. Whether the applicant was an Australian resident during the relevant income years, pursuant to the "domicile" test? 3. If the applicant was a dual resident of Australia and Thailand during the relevant income years, whether the double tax agreement (DTA) between Australia and Thailand applies to treat Mr Pike as solely a resident of Thailand (and not Australia), for the relevant years.
Panel Reasons	<p>The Panel noted that the questions raised in relation to the Australian residency tests are factual in nature and do not identify an uncertainty in the operation of the law.</p> <p>Similarly, it was considered that the DTA issue does not identify a controversy over the tiebreaker test, but rather questions in relation to whether the Court applied the test correctly.</p> <p>The Panel observed that the matter does not have significance for a substantial section of the public, or commercial implications for an industry.</p> <p>For these reasons, the Panel acknowledged the matter does not satisfy funding criterion and expectations and recommended that funding be declined.</p> <p>The Chair agreed with the recommendation and declined funding.</p>
ATO Reference: 21/2019-20	
Panel Meeting Date	5 May 2020

Issue	<ol style="list-style-type: none"> 1. Whether the applicant made a gain on repayment of the Bonds as a result of the application of Subdivision 960-D of the <i>Income Tax Assessment Act 1997</i> 2. Whether the gains from the bonds are income according to ordinary concepts under section 6-5 of ITAA97; 3. If the gains are capital in nature, are they 'currency exchange gains' assessable as income under former section 82Y of former Division 3B of Part III of the Income Tax Assessment Act 1936 ("section 82Y", which has since been repealed) 4. Whether the Commissioner is bound by a Private Binding Ruling issued to the applicant to the extent that it stated that section 82Y did not apply.
Panel Reasons	<p>The Panel noted that the application raises a number of issues which are highly complex and that litigation in relation to the threshold issue may result in legal precedent. However, the Panel unanimously agreed that the factual circumstances affect relatively few taxpayers and a Court decision would have limited impact on the broader community.</p> <p>Considering the related issues, the Panel collectively agreed that the issues are factually confined and do not warrant funding. Relatedly, the Panel also observed that some of the identified issues referred to repealed provisions and, consequently, the number of taxpayers in similar circumstances would decline in coming years.</p> <p>In view of this, the Panel considered that the matter was not an appropriate vehicle for test case funding.</p> <p>The Panel recommended the funding be declined. The Chair accepted the recommendation and declined funding.</p>
ATO Reference: 16/2019-20	
Panel Meeting Date	4 March 2020 (Out of session)
Issue	<p>Whether:</p> <ol style="list-style-type: none"> 1. the applicant's development works are a 'supply' for the purposes of section 9-10 of the <i>A New Tax System (Goods and Services Tax) Act 1999</i> ("GST Act"), in whole or in part; 2. the applicant's development works are a 'taxable supply' for the purposes of section 9-5 of the GST Act, in whole or in part; 3. the applicant's development work comprises non-monetary consideration for the supply of land pursuant to sections 9-15 and 75-10 of the GST act, in part or completely.
Panel Reasons	The Panel acknowledged that the matter involves contention around a distinct legal issue. However, the Panel unanimously took

	<p>the view that the issue is confined to particular property developments in the ACT and that it would not have significance for a substantial section of the public or for an industry. For this reason, the Panel agreed the matter is not suitable for test case funding.</p> <p>For the above reasons the Panel recommended that funding be declined.</p> <p>The Acting Chair of the Panel agreed with the recommendation of the Panel and decided to decline test case funding for this matter.</p>
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FINALISED APPROVED MATTERS

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"> a. 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 b. the entity was registered for GST on a quarterly basis effective from 20 January 2020, and c. the entity made its first taxable supplies in January 2020?
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. The last day for the parties to appeal is 7 April 2021.

Name: Commissioner of Taxation v Douglas [2020] FCAFC 220	
Venue	Federal Court of Australia (Full Court)
Issue	<p>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 (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"> 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); 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. 3. Whether the invalidity benefits paid to Douglas were a superannuation income stream as defined in subregulation 995-

	<p>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.</p> <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>
<p>Decision or Outcome</p>	<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 <i>the 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</p>

	<p>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>
Why does the issue involve uncertainty and/ or contention?	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.
Status	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.

Name: Commissioner of Taxation v Lane [2020] FCAFC 184	
Venue	Federal Court of Australia (Full Court)
Issue	<p>In relation to the bankruptcy of a trustee:</p> <ol style="list-style-type: none"> 1. Is the right of indemnity ("the right") property of the trust to the exclusion of non-trust creditors or is the right the property of the bankrupt (personally) and then available to non-trust creditors? 2. How should the statutory priority afforded to the Commissioner of Taxation, pursuant to section 109(1)(e) of the <i>Bankruptcy Act 1966</i> (Cth), for Superannuation Guarantee Charge amounts owing, be applied; namely, should the priority be applied to the trust assets alone or to the assets of the trustee, or both?
Decision or Outcome	<p>The Court (Allsop CJ, Perram and Farrell JJ) found that the priority payment regime in sections 108 and 109 of the <i>Bankruptcy Act 1966</i> did apply to the proceeds of sale of trust assets, and that the trust creditors were required to bring into hotchpot the amount received from the proceeds of sale. It was further held that the proceeds of a recovery of a preference payment received by the Commissioner from a bankrupt trustee were required to be used by the trustee in bankruptcy for the purpose of discharging trust debts only.</p> <p>The Court held that the order of priority of payment was as follows:</p> <ol style="list-style-type: none"> 1. Priority trust creditors would receive a distribution from the Trust estate (including Superannuation Guarantee Charge, limited by the statutory cap)

	<ol style="list-style-type: none"> 2. All trust creditors would receive a distribution from the Trust estate (funds permitting) 3. All priority creditors, with creditors in each s 109 cascading priority were to be treated separately, and would receive a distribution from the personal bankrupt estate, and those creditors from step one who had not had their debts fully discharged would be required to bring into hotchpot should there be any other creditors of equal priority to them 4. All other creditors would receive a distribution from the personal bankrupt estate (funds permitting) with those creditors in Step 2 being required to bring into hotchpot the distribution received from the trust estate
Why does the issue involve uncertainty and/ or contention?	<p>This matter will have particular relevance to insolvency practitioners as they seek to correctly apply the law and ensure the proper functioning of the broader insolvency regime.</p> <p>However, it may also impact on employees of businesses that operate through a trust structure in the event that the business becomes insolvent.</p> <p>If the priority regime does not apply, those employees may not be able to recover the full amount of unpaid superannuation contributions in the event that their employer becomes insolvent.</p>
Status	The Full Court handed down its decision on 6 November 2020.
Name: Eichmann v Commissioner of Taxation [2020] FCAFC 155	
Venue	Federal Court of Australia (Full Court)
Issue	Whether, for the purposes of the “active asset test” in Subdivision 152-A, the words “is used, or held ready for use, in the course of carrying on a business” in paragraph 152-40(1)(a) of the ITAA 1997 requires the taxpayer to demonstrate a use that is a ‘direct functional relevance’ or that is ‘a constituent part or component of the day to day business activities’ to the carrying on of the normal day-to-day activities of the business which are directed to the gaining or production of assessable income in a way that is ‘integral’ to the carrying on of the business.
Decision or Outcome	The Court (McKerracher, Steward and Stewart JJ) handed down a unanimous decision and on 18 September 2020. Their Honours held that, in the context of the taxpayer’s business company’s construction business, the vacant land that was mainly used for storage was an active asset as it satisfied the requirements of paragraph 152-40(1)(a) of ITAA 1997.
Why does the issue involve uncertainty and/ or contention?	The “active asset test” is one of the basic conditions for access to the small business CGT concessions. Although there have been changes to these concessions over time, the requirement that the asset was

	<p>“active” and used in the course of carrying on the business has remained consistent.</p> <p>The matter provides an opportunity for the Commissioner to seek clarity on the extent of this connection between the use of the land and the actual operations of the business to render the asset as an active asset.</p>
Status	The Court handed down its decision on 18 September 2020. A Decision Impact Statement will be issued by the ATO in due course.
Name: N & M Martin Holdings Pty Ltd v Commissioner of Taxation [2020] FCA 1186	
Venue	Federal Court of Australia
Issue	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.
Decision or Outcome	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.
Why does the issue involve uncertainty and/ or contention?	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.
Status	The Court handed down its decision on 18 August 2020. The taxpayer has filed an appeal to the Full Federal Court in respect of the 855-10 issue.
Name: Commissioner of Taxation v Addy [2020] FCAFC 135	
Venue	Federal Court of Australia (Full Court)
Issue	Whether the taxpayer, firstly is a resident for tax purposes in Australia. Secondly whether the non-discrimination article in Australia’s tax treaty with the United Kingdom (the DTA) is infringed as the taxpayer, as the holder of a working holiday maker visa paying income tax at working holiday maker rates, is subject to tax that is other or more burdensome than the tax to which Australian nationals, in the same circumstances, are or may be subjected.
Decision or Outcome	In relation to residency, the Court (Derrington, Davies and Steward JJ) unanimously held that the taxpayer was a resident of Australia for tax purposes. This was because she had been in Australia for more than 183 days and the Commissioner did not form a state of satisfaction that she had a usual place of abode overseas and that she did not

	<p>have an intention of residing in Australia. The Court indicated that had the Commissioner formed the relevant state of satisfaction that she would have been found to have been a non-resident.</p> <p>In relation to infringement of the non-discrimination article, the majority (Derrington and Steward JJ) held that the working holiday maker tax rates did not infringe the non-discrimination article of the DTA. This was because the provisions applied on the basis of the type of visa held by the taxpayer (417 working holiday visa) and so did not solely discriminate based on nationality. They found that Ms Addy chose to come to Australia on the working holiday maker visa, and as such subject herself to the working holiday maker tax rates. Instead she could have applied for another visa and have other tax rates apply to her.</p>
Why does the issue involve uncertainty and/ or contention?	<p>This matter involved testing of new provisions imposing the working holiday maker tax rates (inserted by the <i>Income Tax Rates Amendment (Working Holiday Maker Reform) Act 2016</i>) in respect of contentions that they infringe the non-discrimination article in Australia's tax treaties.</p> <p>The case has 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 article in Australia's tax treaties.</p>
Status	<p>The Full Court handed down its decision on 6 August 2020. The taxpayer has filed for special leave in the High Court and leave has been granted.</p>

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.

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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