Test case litigation register

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TEST CASE LITIGATION REGISTER AS AT 1 March 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

- 4 May 2022 meeting: closing date for applications is 13 April 2022
- 13 July 2022 meeting: closing date for applications is 22 June 2022
- 21 September 2022 meeting: closing date for applications is 31 August 2022
- 30 November 2022 meeting: closing date for applications is 9 November 2022

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: 7/2020-21	
Venue	High Court of Australia
Issue	Whether Article 25(1) of the *Convention between the Government of Australia and the Government of the United Kingdom of Great 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* [2003] ATS 22 (the 'DTA') prevents the Applicant (a UK national) from having the working holiday maker tax rates applied in full to her working holiday maker income? ('the DTA issue')
Why does the issue involve uncertainty and/ or contention?	This matter involves testing of provisions (inserted by the *Income Tax Rates Amendment (Working Holiday Maker Reform) Act 2016*) in respect of contentions that they are inconsistent with obligations in some of Australia's tax treaties. 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 clause in those of Australia's tax treaties that include it.
Impact on other taxpayers and mitigation strategies	The non-discrimination clause also exists in other jurisdictions' tax treaties and as such, the international community will be interested in the outcome of this case. A decision on this provision may have precedential value for other working holiday makers in the same circumstances.
Status	The High Court heard the taxpayer's appeal on 24 June 2021. The judgment stands reserved.
ATO Reference: 15/2020-21	
Venue	High Court of Australia
Issue	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 for the purposes of s 97(1) of the Income Tax Assessment Act 1936 (Cth) (1936 Act)? 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?
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 was granted Special Leave to appeal on 16 April 2021. The matter is set to be heard in November 2021.

DECLINED MATTERS

ATO Reference: 02/2021-22	
Panel Meeting Date	21 September 2021
Issues	1. Whether subsection 126A(3) of the *Superannuation Industry (Supervision) Act 1993* ('SIS Act') required the Tribunal to reach a state of satisfaction as to whether the Respondent was or was not a fit and proper person to be a trustee 2. Whether paragraph 126A(1)(b) of the SIS Act requires the Tribunal to reach a state of satisfaction as to whether the nature, number and/or seriousness of the contraventions of the SIS Act by the Respondent constituted grounds for disqualifying the Respondent 3. Whether the issue of a notice of non-compliance under subsection 40(1) of the SIS Act is a determinative consideration in exercising the residual discretion conferred by subsections 126A(1) and (3) of the SIS Act? 4. Whether, in the circumstances of the Tribunal's findings based on the evidence, the Tribunal's decision to set aside the Commissioner's decision to disqualify the Respondent was legally unreasonable.
Panel Reasons	The Panel observed that, while the Commissioner's Notice of Appeal is framed as a series of legal propositions, the substance of the appeal appeared to hinge on the proper application of the Tribunal's factual findings to the law rather than contention around the proper construction of the provisions. Accordingly, the Panel considered that the matter was likely to turn on its facts. The Panel also turned its mind to whether there was a public interest in providing funding, in light of the Tribunal's factual findings of multiple serious contraventions. The Panel considered that this weighed against a public interest in providing public funds to support the appeal. Accordingly, the Panel recommended that the funding application be declined. The Acting Chair accepted the recommendation and declined funding.

ATO Reference: 01/2021-22	
Panel Meeting Date	21 September 2021

Issue	Whether, for the purposes of calculating the tax free component of a Genuine Redundancy Payment (GRP) under subsection 83-170(3) of ITAA97, the years of service should be taken to include the period attributable to a previous employer where the taxpayer's employment was transferred under a commercial transitional arrangement.
Panel Reasons	The Panel noted that the critical question in the dispute was the meaning of 'years of service' for the purposes of the calculation in section 83-170 of ITAA97. It was considered that, while the statutory definition was not exhaustive, it was relatively straightforward in context. The Panel also considered that the matter was likely to turn on its own facts as the question of whether service across multiple employers should be combined is likely to turn on the approach of the employer at the time the section 83-170 calculation is completed. It was noted that the matter related to a private ruling issued by the Commissioner and, accordingly, the AAT's review would be confined to the facts as set out in the ruling application. Accordingly, the matter would not be a suitable vehicle to test the provision. The Panel recommended that funding be declined. The Acting Chair accepted the recommendation and declined funding.

ATO Reference: 23/2020-21	
Panel Meeting Date	13 July 2021
Issue	Whether subsection 355-710(3) of the Income Tax Assessment Act 1997 (ITAA 1997) operates to disregard the ordinary statutory limitation on amending taxation assessments (section 170 ITAA 1936).
Panel Reasons	The Panel noted that application raised a question of law that may be of general interest, but considered that the question will only arise in quite narrow circumstances. The Panel considered that only a small subset of the entities identified in the application may find themselves in those circumstances and that the matter is therefore unlikely to have a broad enough impact to warrant test case funding.

	Accordingly, the Panel recommended that funding be declined. The Chair accepted the recommendation and declined funding.

ATO Reference: 22/2020-21	
Panel Meeting Date	13 July 2021
Issue	Whether the requirements of Rule 12(2)(b)(item 3) of the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 will be satisfied where the applicant is a unit trust whose units are held by interposed discretionary trusts rather than an individual.
Panel Reasons	The Panel discussed the trust arrangement set out in the funding application and noted that it appeared to be far removed from the plain wording of the provision. The Panel considered that there was insufficient contention about the proper interpretation of the provision to warrant funding. The Panel also noted that there is an issue on the facts in relation to multiple JobKeeper nominations for the eligible business participant which may circumvent the Tribunal's determination of the proposed issue. Accordingly, the matter would not be an appropriate vehicle for test case funding. The Panel acknowledged the winding down of the JobKeeper program and noted that there would be no enduring public benefit in providing funding to test the provision. The Panel recommended that funding be declined. The Chair accepted the recommendation and declined funding.

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	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. 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.
ATO Reference: 18/2020-21	
Panel Meeting Date	23 February 2021
Issue	1. 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. 2. Whether the applicant is liable to repay an overpayment under section 9 of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*.
Panel Reasons	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. 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. 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. 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.
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 *Income Tax Assessment Act 1997*.
Panel Reasons	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 considering whether the substance of the matter would be suitable for funding.

	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. 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. 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. The Panel recommended funding be declined. The Chair agreed and decided to decline funding.

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 now traded under the ticker ETH (i.e. as a result of the Ethereum-Ethereum Classic Hard Fork). 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. 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.
Panel Reasons	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.

	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. 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. 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. 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. The Panel recommended that funding be declined. The Chair accepted the recommendation of the Panel and decided to decline funding.

ATO Reference: 10/2020-21	
Panel Meeting Date	1 December 2020
Issue	1. Whether section 8AAZN of the *Taxation Administration Act* 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 2. Whether subdivision 67-L of the *Income Tax (Transitional Provisions) Act 1997* was a relevant consideration in determining whether the powers under section 8AAZN were enlivened 3. Whether the payment to the applicant was made by mistake 4. Whether the Commissioner was authorised by section 8AAZN to recover the payment from the applicant
Panel Reasons	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. 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. 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. The Chair decided that funding should be declined.
ATO Reference: 09/2020-21	
Panel Meeting Date	1 December 2020
Issue	1. Whether the head company and two subsidiary members must individually show that they meet the eligibility criteria set out in section 5 of the *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020* (the **CFB Act**). 2. Whether each of them:

	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	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. 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. 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. The Panel recommended that funding be declined. The Chair accepted the Panel's recommendation and declined funding.

FINALISED APPROVED MATTERS

Name: Commissioner of Taxation v Ross [2021] FCA 766	
Venue	Federal Court of Australia
Issue	The case concerns section 167 *Income Tax Assessment Act 1936* (*ITAA 1936)* default assessments made using the asset betterment method, the correct *onus* of proof arising under s14ZZK of the *Taxation Administration Act 1953* (TAA) and the *standard* of proof

	required to discharge that onus. In particular, whether an applicant's burden of proof under subsection 14ZZK(b) of the *Taxation Administration Act 1953* is satisfied: 1. by adducing evidence suggesting that all or part of the Commissioner's methodology in making an assessment *may have been* flawed; and 2. by adducing evidence that the Commissioner *may have been* mistaken as to relevant facts when making an assessment.
Decision or Outcome	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 *ITAA 1936* 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.
Why does the issue involve uncertainty and/ or contention?	The AAT had set aisde 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 *Commissioner of Taxation v Dalco* (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.
Status	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 proceudral fairness as a consequence of prolonged delay between the taking of evidence and the delivery of reasons. The Court orderded that the applications for review be remitted to the Tribunal without the hearing of further evidence.

Name: Commissioner of Taxation v Apted [2021] FCAFC 45	
Venue	Federal Court of Australia, Full Court.
Issue	1. Did the applicant have an Australian Business Number (ABN) on 12 March 2020 for the purposes of s 11(6) of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2000*) ('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 "later time" discretion ('the 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?
Decision or Outcome	The Full Court handed down its decision on 24 March 2021 (Per Logan and Thawley JJ, Allsop CJ agreeing). 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?' 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 *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*, 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. 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. 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.
Why does the issue involve uncertainty and/ or contention?	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.
Status	The decision was handed down on 24 March 2021. The Commissioner did not seek special leave to appeal the decision to the High Court.

	The ATO issued a Decision Impact Statement in relation to this decision on 29 April 2021.

Name: Slatter Building Group Pty Ltd v Commissioner of Taxation [2021] AATA 456	
Venue	Administrative Appeals Tribunal
Issue	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 *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020*) where: 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	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. 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. The Tribunal commented in *obiter* 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.
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: Commissioner of Taxation v Douglas [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: *Burns and Commissioner of Taxation* [2020] AATA 671 (Burns); *GDGR and Commissioner of Taxation* [2020] AATA 766 (Walker – GDGR is a pseudonym for Walker); and *Douglas and Commissioner of Taxation* [2020] AATA 494 (Douglas). 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). 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. Three primary issues were identified for resolution (resolution of the other issues turned on the resolution of these issues): 1. Whether subregulation 995-1.01(2) of the Income Tax Assessment Regulations 1997 (ITAR), as it was prior to the *Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2018* (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 995-1.01(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. 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.
Decision or Outcome	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. 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. In relation to issue 2, the Court held that the invalidity benefits satisfied the definition of pension in section 10 of *the Superannuation Industry (Supervision) Act 1993* (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 *Superannuation Industry (Supervision) Regulations 1994* (SISR) because they do not ensure the invalidity benefits are payable for the lifetime of the recipient. 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. 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. 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. The Court further held that the invalidity benefits paid to Douglas were not a pension that commenced before 20 September 2007. 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.

	Hence, the invalidity benefits paid to Douglas are superannuation lump sums.
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	In relation to the bankruptcy of a trustee: 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 *Bankruptcy Act 1966* (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	The Court (Allsop CJ, Perram and Farrell JJ) found that the priority payment regime in sections 108 and 109 of the *Bankruptcy Act 1966* 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. The Court held that the order of priority of payment was as follows: 1. Priority trust creditors would receive a distribution from the Trust estate (including Superannuation Guarantee Charge, limited by the statutory cap) 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?	This matter will have particular relevance to insolvency practitioners as they seek to correctly apply the law an ensure the proper functioning of the broader insolvency regime. However, it may also impact on employees of businesses that operate through a trust structure in the event that the business becomes insovlent. 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.
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 "active" and used in the course of carrying on the business has remained consistent. 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.
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 *Income Tax Assessment Act 1997* (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 *Peter Greensill Family Co Pty Ltd (as trustee) v FCT* [2020] FCA 559 ('*Greensill*') was plainly wrong. Following *Greensill*, 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. The taxpayer's appeal was heard between 22 February 2021 and 24 February 2021. The decision stands reserved.

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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