TEST CASE LITIGATION REGISTER

AS AT 21 June 2023

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

- 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
- 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: 12/2022-23	
Venue	Administrative Appeals Tribunal
Issue	The issue in dispute concerns the deductibility of occupancy expenses under section 8-1 of the *Income Tax Assessment Act 1997*; specifically: whether an employee working from home with no other employer provided alternative place of work should receive deductions for occupancy expenses.
Why does the issue involve uncertainty and/ or contention?	There is some uncertainty in relation to the application of settled pre-COVID work-related expense legilsation in a post-COVID environment. *TR 93/30* provides that occupancy expenses are generally private in nature and not deductible unless part of the home was used for income producing activities and that part of the home has the character of a place of business. *TR 93/30* goes on to provide that whether an area of the home has the character of a place of business is a question of fact which depends on the circumstances of each case. As a result of the Chief Health Officer's directions and employer's directions during the pandemic, there is some level of contention as to how these deductibility principles should apply.
Impact on other taxpayers and mitigation strategies	The case will have a significant impact on how the principles behind the deductibility of occupancy expenses are applied and weighted in contemporary employment arrangements. Many employers are shifting, or have shifted, towards hybrid working arrangements with employees specifically engaged to work from home (entirely or partially) during the week. It is incumbent to apply the law and subsequent rules in a way that gives the public confidence that they can claim according to their entitlements and to ensure claiming is consistently managed.
Status	The taxpayer has accepted their funding offer and the matter is currently in the Administrative Appeals Tribunal.
ATO Reference: 01/2022-23	
Venue	Administrative Appeals Tribunal
Issue	Whether the supply of the Applicant's product (**Product**) is GST-free under section 38-2 of the *A New Tax System (Goods and Services) Act 1999* (Cth) (**GST Act**).

Why does the issue involve uncertainty and/ or contention?	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. 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. There is uncertainty as to whether such a supply is: a. 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 3rd 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 b. 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.
Impact on other taxpayers and mitigation strategies	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.
Status	Decision is reserved.

DECLINED MATTERS

ATO Reference: 14/2022-23	
Panel Meeting Date	3 May 2023
Issue	The matter relates to current Administrative Appeals Tribunal (AAT) proceedings with the issue in dispute concerning the interpretation and application of section 8-1 of the *Income Tax Assessment Act 1997* and the associated Taxation Ruling 93/30 to the Applicant's home office expenses in the income years ending 30 June 2020 and 30 June 2021.

Panel Reasons	The Panel identified that the facts of the case have not been well articulated and therefore lack clarity. The Applicant has not identified any issue of law that requires clarification, instead relying upon settled principles. Thus, the case would simply turn on applying the law to the facts. The Panel observed that there are substantiation issues surrounding the occupancy and travel expenses claimed by the Applicant, noting also that the occupancy expenses are minimal. Based on the circumstances of the matter, the main issue identified by the Panel was that the Applicant has not substantiated their expenses under Division 900 of the *Income Tax Assessment Act* 1997. Had the taxpayer been able to comply with the substantiation of overseas travel requirements and provide evidence that they had not been reimbursed by their employer, then most of the travel expenses may be deductible. For the above reasons, the Panel recommended funding be declined. The Chair of the Panel agreed with the recommendation and declined test case funding for this matter.
ATO Reference: 13/2022-23	
Panel Meeting Date	3 May 2023
Issues	1. In regards to section 160-30 of the *Income Tax Assessment Act* (ITAA) 1997, the definition of trustee in section 6 of the ITAA 1936 and at law, section 254 of the ITAA 1936, whether or not an individual appointed as a trustee of a sequestrated estate pursuant to the Bankruptcy Act 1966 is an “agent” or “trustee” for the purposes of section 254 of the ITAA 1936 and hence answerable as taxpayer for the doing of all such things as required to be done by virtue of the ITAA 1936 in respect of income, or any profits or gains of a capital nature, derived by him or her in that capacity or derived by the principle by virtue of his/her agency. 2. Whether or not a trustee in bankruptcy is considered an agent or trustee for the purposes of the general law which may also impart upon clarifying the duties and obligations that such a person may have in that role more broadly.
Panel Reasons	The Panel considered the main question in the application to be ‘whether a trustee in bankruptcy is a trustee for the purposes of s254(1)(a) of the *Income Taxation Assessment Act 1936*, with every other issue raised being ancillary to this. It was noted that this is a settled area of law with longstanding case law and thus presenting no confusion or conjecture. In the circumstances, the Panel agreed that the taxpayer is a trustee and not an agent.

	The Panel acknowledged the applicant's claims regarding industry wide concerns with the ATO view of the tax obligations on bankruptcy trustees, however it was noted that the issue has not been raised with the ATO widely by other taxpayers and industry bodies. The Panel concluded that there is already established ATO guidance on the issues raised in the application which have been provided to the Trustee and thus test case funding is not an appropriate avenue to fund the matter. For these reasons, the panel recommended that funding should not be approved. The chair accepted the recommendation and declined funding.
ATO Reference: 11/2022-23	
Panel Meeting Date	22 February 2023
Issue	Whether an asset whose main use is to carry on a business of renting/leasing property and subject to the small business relief under division 152 ITAA97, is excluded as an active asset by the operation of subsection 152-40(4)(e) ITAA97 because the business income derived comprises of rental income.
Panel Reasons	In considering the issue, the Panel noted the main use of the property was to derive rental income. Acknowledging this use, the Panel concurred that the legislation relating to the exclusion of an asset that is primarily used to derive rental income from the small business capital gains tax concessions is clear. Panel members unanimously agreed there is no uncertainty as to how the law operates in these circumstances and an established view on this point exists in *JakJoy Pty Ltd v Commissioner of Taxation* [2013] AATA 526. For these reasons, the Panel took the view that there are no issues requiring law clarification and there is unlikely to be any broad effect on the community such that it is necessary to litigate the issue. Accordingly, the Panel recommended that funding be declined. The Chair of the Panel agreed with the recommendation and declined test case funding for this matter.
ATO Reference: 10/2022-23	
Panel Meeting Date	22 February 2023
Issues	1. The definition of 'payment' for the purposes of Division 7A of the *Income Tax Assessment Act 1936* (Cth) (ITAA). 2. Whether the words 'credit an amount to, or on behalf of, or for the benefit of' in s109C(3)(b) of the ITAA were intended to

	capture a 'crediting' (the receipt of one asset – such as the assignment of a loan receivable) as a replacement for another asset – (the Division 7A loan receivable). 3. The application of section 45B of the ITAA and the relevant circumstances to be given regard to determine whether the capital reduction was carried out for the purpose of obtaining a tax benefit. 4. The application of Part IVA of the ITAA and what may be considered a reasonable alternative to the transactions alleged to form the scheme.
Panel Reasons	In considering the issues, the Panel noted that the matter relies on a set of facts that are particular to the taxpayer and in applying these facts to the relevant provisions, a decision on the issues would have limited application. The Panel also acknowledged that the matter involves issues relating to Part IVA of the *Income Tax Assessment Act 1936* (Cth) and that the specific funding expectation precluding matters from funding includes those involving a tax avoidance scheme. For these reasons, the panel recommended that funding be declined The Chair of the Panel agreed with the recommendation and decided to decline test case funding for this matter.
ATO Reference: 09/2022-23	
Panel Meeting Date	22 February 2023
Issues	1. The ordinary meaning of 'employee' in section 12(1) of the or the extended definition under section 12(3). 2. Whether the worker had a right of delegation under his written contract; and 3. Whether the contract was "wholly or principally for" the worker's labour or whether the worker's labour was directed towards himself in producing the result that he was contracted to produce.
Panel Reasons	The Panel discussed the recent High Court decisions in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 and ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2.* When discussing these decisions, the Panel noted that the High Court established the meaning of 'employee' and agreed that the decisions provided clarification on the issues highlighted in the funding application. As such, the Panel agreed there is no general uncertainty or contention about the legal test. Accordingly, the Panel agreed that the matter is an application of established principles to the facts and recommended funding be

	declined. The chair agreed with the recommendation and declined funding.
ATO Reference: 08/2022-23	
Panel Meeting Date	22 February 2023
Issues	1. Can the Commissioner treat the loan as contingent due to the inclusion of an explicit term that it need not be repaid if the services to which it relates are not delivered and/or 2. Can the loan be treated as not being genuine in circumstances where the Commissioner is not alleging sham?
Panel Reasons	The Panel discussed the legal test for determining whether expenditure had been incurred from the Federal Court decision in *Commissioner of Taxation v Desalination Technology Pty Ltd* [2015] FCAFC. The Panel agreed that the decision established clear principles in respect of claiming research and development expenditure in the Applicant's circumstances. As such, the Panel agreed that the application for review may not achieve any further guidance on the issues. Additionally, the Panel noted the issues in this matter are narrow and any Tribunal decision may turn on the particular facts. In these circumstances, a resulting decision would have limited application. For the above reasons, the Panel recommended funding be declined. The chair accepted the recommendation and declined funding.
ATO Reference: 07/2022-23	
Panel Meeting Date	22 February 2023
Issues	Is the interest expense deductible under section 8-1 of *the Income Tax Assessment Act 1997* (ITAA 1997)?
Panel Reasons	The Panel observed that the facts appeared at odds with a typical unit trust structure and the distributions were not commensurate to the funding applicant's holdings which appeared to be a hybrid trust. The Panel also noted the funding applicant was claiming interest deductions when they were not deriving income and that to expend in the hope of deriving income is not sufficient. It was noted that the trust structure in this matter is not novel. This arrangement has been well ventilated, with legal precedent already established. As such, any decision in these proceedings would provide little precedential value.

	The Panel noted the principle in *Fletcher v Commissioner of Taxation (1991)* 173 CLR 1 had been applied in the objection decision to limit the interest deductions to the amount of income received. For these reasons, the Panel recommended funding be declined. The Chair of the Panel agreed with the recommendation and decided to decline test case funding for this matter.
ATO Reference: 06/2022-23	
Panel Meeting Date	30 November 2022
Issues	1. What constitutes a 'foreign transaction' in section 14 of the *Income Tax Assessment (1936 Act) Regulation 2015* (Cth), which is not a defined term. 2. What is required for income to come 'from' the foreign transaction identified. 3. What is required to satisfy that a foreign transaction has been 'identified'.
Panel Reasons	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. 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. 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. 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 completed on a computer in Australia. Instead, the applicant's submissions are about the lack of guidance provided by the Commissioner.

	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. 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. For these reasons, the panel recommended that funding should not be approved. The chair accepted the recommendation and declined funding.
ATO Reference: 04/2022-23	
Panel Meeting Date	29 September 2022
Issues	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: a. notice of objection decision; and b. reason for decision. 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: a. where that additional material was not before the Commissioner; or b. where that additional material was before the Commissioner but not mentioned in the private ruling or the objection decision; and/or c. where that material was mentioned under "we looked at this information" in relation to issue a. 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 the same time attached to the same document but not listed amongst the attachment by the Commissioner. 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.
Panel Reasons	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. 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. For these reasons, the panel recommended that funding should not be approved. The chair accepted the recommendation and declined funding.
ATO Reference: 05/2022-23	
Panel Meeting Date	29 September 2022
Issues	1. What constitutes payment or constructive payment under section 11-5 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (**TAA**)? 2. Whether a journal entry constitutes payment or constructive payment under section 11-5 of Schedule 1 to the TAA? 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? 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?
Panel Reasons	The panel noted that the matter turns on its own facts and would not be suitable for funding. 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. 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 appears to be contrived arrangements to rewrite accounting history which may result in a benefit that is contrary to the law.

	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. For these reasons, the panel recommended that funding should not be approved. The chair accepted the recommendation and declined funding.
ATO Reference: 02/2022-23	
Panel Meeting Date	13 July 2022
Issues	1. Whether the Commissioner has discretion to remit penalties imposed pursuant to the *Superannuation Guarantee (Administration) Act 1992* (SGAA) below 100% of the superannuation guarantee charge (SGC) 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 3. Whether the Commissioner's audit should have been formally put on hold 4. Whether the COVID-19 pandemic materially reduced the capacity of the taxpayer to lodge SG statements and make disclosures 5. Whether the discretion to remit SGC was narrowly applied 6. Whether the principles in the Taxpayer's Charter were applied.
Panel Reasons	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. 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. 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 and agreed that the issue did not require further judicial clarification.

	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. The Chair accepted the recommendation and **declined** funding.
ATO Reference: 17/2021-22	
Panel Meeting Date	4 May 2022
Issues	In a dispute already determined by the Federal Court, the issue was the interaction between: a. the Commissioner of Taxation's obligation under s 166 of the *Income Tax Assessment Act 1936* (Cth) (***ITAA***) 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 b. the Commissioner's implied undertaking, commonly referred to as a *Harman* undertaking in reference to the decision in *Harman v Secretary of State for the Home Department* [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.
Panel Reasons	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. The panel noted that the issues had previously been determined in the cases of *Deputy Commissioner of Taxation v Rennie Produce (Aust) Pty Ltd (in liq)* [2018] FCAFC 38 and *Deputy Commissioner of Taxation v Shi* [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.

	Accordingly, the panel recommended that the funding application be **declined**. The chair accepted the recommendation and **declined** funding. 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.
ATO Reference: 18/2021-22	
Panel Meeting Date	4 May 2022
Issues	Whether a home can be treated as a place of work by means of the following, that: a. there is a direct link between income and expense for the maintenance of dogs/live animals from home. b. 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. c. 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. d. 2 live dogs, being SA Government assets and stored at the applicant's home, be considered as a place of work. e. 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. f. section 900-115(3) should have been applied to this matter rather than section 900-195 of the *Income Tax Assessment Act 1997* (Cth).
Panel Reasons	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. 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. Accordingly, the panel unanimously recommended funding application be **declined**. The chair accepted the recommendation and **declined** funding.
ATO Reference: 13/2021-22	

Panel Meeting Date	23 February 2022
Issues	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 *Taxation Administration Act 1953* (Cth).
Panel Reasons	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 *Administrative Appeals Tribunal Act 1975* (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. 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. 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. Accordingly, the Panel recommended that funding be **declined**. The Chair accepted the advice of the Panel and **declined** funding.
ATO Reference: 14/2021-22	
Panel Meeting Date	23 February 2022
Issues	Whether the position of Chief Executive Officer (CEO) of a company is a declared individual under paragraph 293-145.01(g) of the *Income Tax Assessment Regulations 1997* (**ITAR 1997**).
Panel Reasons	During opening discussions, the Panel noted that is it 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. The Panel noted that there is a lack of sufficient uncertainty or contention about how the law operates because the law is already

	clearly determined. It was considered that this matter was more a question of fact rather than a question of law. The Panel conceded that whilst the matter may add to established case law, it would not provide a precedent for future cases. Accordingly, the Panel recommended that funding be declined. The Chair accepted the recommendation and declined funding.
ATO Reference: 15/2021-22	
Panel Meeting Date	23 February 2022
Issues	1. Whether the definition of a "Pension" in the *Superannuation Industry (Supervision) Act 1993* (**SISA**) relating to pre-20 September 2007 recipients of a "disability superannuation benefit", does not comply with the rules of the sub-regulations of the *Superannuation Industry (Supervision) Regulations 1994* (**SISR**), pertaining to a pension according to the respective SISR Reg:1.06; specifically, Sub-Reg:1.06(1A). 2. Whether Commonwealth and Military superannuation entitlements are unfunded public sector "defined benefit interests", as provisioned by the Commonwealth Superannuation Corporation (CSC).
Panel Reasons	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 *Douglas* and *Burns.* 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. The Panel was unanimous in the recommendation that funding should be declined**.** The Chair accepted the recommendation and declined funding.
ATO Reference: 007/2021-22	
Panel Meeting Date	22 November 2021
Issues	1. Whether an applicant's burden of proof under subsection 14ZZK(b) of the *Taxation Administration Act 1953* (Cth) will be satisfied: a. by adducing evidence suggesting that all or part of the Commissioner's methodology in making an assessment may have been flawed.

	b. by adducing evidence that the Commissioner may have been mistaken as to relevant facts when making an assessment.
Panel Reasons	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. 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. 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. 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. Accordingly, the Panel recommended that funding be declined. The Chair accepted the recommendation and declined funding.
ATO Reference: 10/2021-22	
Panel Meeting Date	22 November 2021
Issues	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 *Taxation Administration Act 1953* (Cth), namely: 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. 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. 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.

Panel Reasons	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. 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. 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. Accordingly, the Panel recommended that funding be declined. The Chair accepted the recommendation and declined funding.
ATO Reference: 009/2021-22	
Panel Meeting Date	22 November 2021
Issues	1. Was a Lump Sum Payment in Arrears (**LSPIA**) paid to taxpayers under each Deed of Acknowledgement and Assignment, ordinary income within the meaning of section 6-5 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**)? 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? 3. If CGT event A1 did happen in respect of each Deed of Acknowledgment and Assignment, then: a. did the taxpayers make a capital gain and, if so, what was the quantum of the capital gain; and b. was the capital gain made by the taxpayers a 'discount capital gain' within the meaning of Division 115 of the ITAA 1997?
Panel Reasons	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.

	The Panel also agreed that there is no plausible argument that the amount in question constitutes capital as opposed to revenue income. Accordingly, the Panel recommended that funding be declined. The Chair accepted the recommendation and declined funding.

FINALISED APPROVED MATTERS

Name: *Commissioner of Taxation v Wood* [2023] FCA 574	
Venue	Federal Court of Australia
Issues	Whether the Applicant is entitled to claim a general deduction under section 8-1 of the *Income Tax Assessment Act 1997* (ITAA97) for a payment made to settle litigation. In particular: 1. Whether the expenses were incurred in gaining or producing the Applicant's assessable income under section 8-1(1)(a); 2. Whether the expenses were an outgoing of capital or of a capital nature or of a private or domestic nature, and accordingly not deductible under 8-1(2).
Decision or Outcome	The Court found in favour of the Respondent, reaffirming the Tribunal's decision that settlement sum was an allowable deduction under section 8-1(1)(a) of the ITAA97. The reasons provided by the Court for the decision were: 1. The occasion of the liability that was discharged was the work done by the respondent as employee. It did not matter that the liability itself was created by the Settlement Deed (after employment had ceased) because the claim that was compromised by that deed arose directly out of the respondent's employment. 2. The respondent's conduct in his employment was at once the source of income and the cause of the risk of liability. 3. The respondent's agreement to pay, and then payment, to bring allegations about his conduct in his employment to an end is similarly characterised – it is a loss or outgoing that reduces his income from his employment. Further the Court held that the Settlement Sum was not an outgoing of capital or of a capital nature because: 1. It was to be characterised as bringing to an end the litigation risk arising from the respondent's conduct in his employment years previously, rather than as in the protection of his reputation in the future.

	2. It did not involve the acquisition of any tangible asset, but rather arose out of the very activities the respondent performed in gaining assessable income. The discharge of the liability that arose out of those activities cannot sensibly be characterised as a loss or outgoing of capital or of a capital nature – it was not to protect goodwill or widespread or general reputation, or to secure habitual patronage by clients or customers.
Why does the issue involve uncertainty and/ or contention?	This case introduces some uncertainty around the application of Section 8-1 of the ITAA97 in the context of employee legal expenses. In particular, the decision handed down is of strategic importance. Although in situations where an employment relationship ends the occasion of a loss or outgoing will not usually relate to the former employment, the case has clarified that, depending on the particular facts, there are circumstances where it is possible to establish a nexus between the loss or outgoing and the past employment activity.
Status	The Federal Court handed down its decision on 2 June 2023.
Name: ***Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust [2023] FCAFC 3***	
Venue	Federal Court of Australia, Full Court.
Issue	This matter concerns appeals to the Full Court against 2 first instance decisions of the Federal Court of Australia. 1. In respect of the first appeal, the issues raised are: a. Whether a present entitlement of a beneficiary to a share of the income of the trust arose out of a reimbursement agreement within the meaning of section 100A of the *Income Tax Assessment Act 1936* (Cth) (ITAA 1936). 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). c. Whether the Commissioner's posited reimbursement agreement was entered into for the requisite tax reduction purpose within the meaning of subsection 100A(8). 2. In respect of the second appeal, the issues raised are: a. Whether there was a scheme to which Part IVA applied. 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. c. Whether, in applying section 177CB to the 2013 income year, the Commissioner's posited counterfactual has

	comparable substance and achieves comparable results and consequences (other than tax consequences). d. Whether one, or both schemes was carried out for the sole or dominant purpose of obtaining a tax benefit.
Decision or Outcome	In relation to the first appeal, the Court found that section 100A did not apply to the 2013 income year, as there was no reimbursement agreement within the meaning of that section, at the time the present entitlement arose. Therefore, the Court observed that it was unnecessary for it to consider issues of tax reduction purpose and 'ordinary commercial or family dealing'. In relation to the second appeal, the Court held that Part IVA applied in the 2013 income year but not the 2012 income year. The Court found that: • The 2012 related scheme and 2013 related scheme were each a 'scheme' as defined in s 177A; • The taxpayer received a tax benefit in each of the 2012 and 2013 income years. In respect of the 2013 income year, this conclusion was strengthened by the application of subsection 177CB(4). The Court concluded that a party entered into or carried out the 2013 related scheme for the dominant purpose of enabling the taxpayer to obtain a tax benefit. However, it found there was no such purpose in respect of the 2012 related scheme. Additionally, the Court observed that following the 2013 amendments to Part IVA and introduction of section 177CB, it may not have regard to a higher tax cost of implementing an alternative postulate, in determining what might reasonably have occurred in the absence of the scheme.
Why does the issue involve uncertainty and/ or contention?	This matter concerned the operation of section 100A and new section 177CB of the ITAA 1936. 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 (PAG) in TR 2022/D1 on what agreements would be subject to section 100A. Additionally, section 177CB had not previously been applied in any court or tribunal decisions. This case provided a precedent on the application of section 177CB to post-2012 Part IVA arrangements. It was thought that it may provide a precedent on whether or to what extent these provisions impact on the application of *RCI Pty Limited v*

	Commissioner of Taxation (RCI) [2011] FCAFC 104 to Part IVA schemes. Unlike in RCI however, the taxpayer did not seek to contend that nothing would have happened in the 2013 income year absent the scheme.
Status	The Full Federal Court handed down its decision on 24 January 2023, affirming in part the appeal in QUD 37 of 2022, and dismissing the appeal in QUD 36 of 2022. The Commissioner issued a Decision Impact Statement on 24 April 2023.
Name: *Commissioner of Taxation v Landcom [2022] FCAFC 204*	
Venue	Federal Court of Australia, Full Court.
Issue	Whether, where there has been a single sale of multiple freehold interests, the margin scheme provisions in Division 75 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GST Act) apply separately to each freehold interest or collectively to the whole area of land sold.
Decision or Outcome	The Full Federal Court agreed with the conclusions of the Primary Judge Thawley J, that under Division 75, the margin is to be calculated by reference to the particular freehold interest sold, irrespective of whether or not that particular freehold interest was sold under contract for the sale of other freehold interests. The Commissioner appealed that conclusion arguing that Thawley J's construction of Division 75 was incorrect because, in applying the GST Act, it is first necessary to identify the "supply" before ascertaining how to calculate the GST payable on that supply. The Full Federal Court rejected this argument, contending that: ▪ The Commissioner's contention focused on the word "supply" whereas the concept employed in s75-5(1) is a "taxable supply of real property"; ▪ The gateway to Division 75 is a taxable supply of real property. Once a taxable supply of real property has been identified, there is no further need to embark on an inquiry as to whether the supply is a component of another supply; ▪ The terms of s 75-10 direct attention to the individual freehold interest, noting in particular the language in s 75-10(2) "*the* interest, unit or lease *in question*"; This interpretation is consistent with other provisions in Div 75, such as s 75-16 and s 75-22, which are drafted by reference to the supply of the particular freehold interest. It would be a distortion of the language of the provisions as a whole to read the singular as encompassing the plural.

Why does the issue involve uncertainty and/ or contention?	Prior to the decision, there were 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 decision resolves the uncertainty over the quantum of GST liabilities and profit margin on these transactions.
Status	The Full Federal Court handed down its decision on 22 December 2022 and unanimously decided in favour of the taxpayer.
Name: *Bosanac v Commissioner of Taxation* [2022] HCA 34	
Venue	High Court of Australia
Issue	Is the presumption of advancement still good law? Should the presumption of advancement be abolished on the basis that it is 'discriminatory and anachronistic'? 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?
Decision or Outcome	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. 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.
Why does the issue involve uncertainty and/ or contention?	This matter concerned the operation of section 100A and new section 177CB of the ITAA 1936. 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 (PAG) in TR 2022/D1 on what agreements would be subject to section 100A.

	Additionally, section 177CB had not previously been applied in any court or tribunal decisions. This case provided a precedent on the application of section 177CB to post-2012 Part IVA arrangements. It was thought that it may provide a precedent on whether or to what extent these provisions impact on the application of *RCI Pty Limited v Commissioner of Taxation* (RCI) [2011] FCAFC 104 to Part IVA schemes. Unlike in RCI however, the taxpayer did not seek to contend that nothing would have happened in the 2013 income year absent the scheme.
Status	The High Court handed down its decision on 12 October 2022 and unanimously allowed the taxpayer's appeal.
Name: *Commissioner of Taxation v Carter & Ors* [2022] HCA 10	
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? 4. What was the nature of the beneficiary's interest in the income of the trust estate prior to their disclaimer?
Decision or Outcome	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.
Why does the issue involve uncertainty and/ or contention?	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.
Status	The High Court handed down its decision on 6 April 2022 and unanimously allowed the Commissioner's appeal. The Commissioner issued a Decision Impact Statement on 10 June 2022.
Name: *Addy v Commissioner of Taxation* [2021] HCA 34	
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 (**DTA**) prevents the taxpayer (a UK national) from having the working holiday maker tax rates applied in full to her working holiday maker income?
Decision or Outcome	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." 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.
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 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.

Status	The High Court handed down its decision on 3 November 2021 and unanimously allowed the taxpayer's appeal. The Commissioner issued a decision impact statement on 17 December 2021.
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 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 *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: *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 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.
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.
Last updated: 21 June 2023