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# TEST CASE LITIGATION REGISTER

## AS AT 18 APRIL 2019

### **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**

- 16 July 2019 meeting: closing date for applications is 25 June 2019
- 24 September 2019 meeting: closing date for applications is 3 September 2019
- 3 December 2019 meeting: closing date for applications is 12 November 2019

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

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

**APPROVED MATTERS IN PROGRESS**

<b>Name: <i>Harding v Commissioner of Taxation [2019] FCAFC 29</i></b>	
<b>Venue</b>	High Court of Australia
<b>Issue</b>	<ol style="list-style-type: none"> <li>1. Whether the taxpayer was someone who resided in Australia under the ordinary resides test for the 2011 income year ('the relevant period'); and</li> <li>2. Whether the taxpayer had a permanent place of abode outside Australia in the relevant period.</li> </ol>
<b>Why does the issue involve uncertainty and/ or contention?</b>	This matter represents an opportunity for the Court to provide clarity in the current environment as existing Federal and High Court authorities are between 35 to 90 years old.
<b>Impact on other taxpayers and mitigation strategies</b>	<p>Since 2009, there have been approximately thirty AAT decisions on residency. There are currently more than a dozen litigation matters on foot before the AAT or the Federal Court in Australia, where the residency of an individual is an issue.</p> <p>The question of residency is becoming increasingly complex. A court decision on the issues will provide greater certainty to taxpayers particularly because of the global, transient nature of the modern workforce.</p>
<b>Status</b>	A Special Leave Application was filed on 22 March 2019.

<b>Name: <i>Commissioner of Taxation v Sharpcan Pty Ltd M163 of 2018</i></b>	
<b>Venue</b>	High Court of Australia
<b>Issue</b>	Whether the amount incurred by the Trustee of the Trust for the allocation to it of 18 gaming machine entitlements (GMEs) under Part 4A of the <i>Gaming Regulations Act 2003</i> was capital or of a capital nature, and therefore not deductible, under section 8-1 of the <i>Income Tax Assessment Act 1997</i> (Cth) (ITAA 1997). If capital, whether the amount could be deducted over 5 years under section 40-880 of the ITAA 1997.
<b>Why does the issue involve uncertainty</b>	The case raises important questions about the basic principles to be applied in characterising an outgoing as an affair of revenue or capital. As to section 40-880, the case is the first time in which

<b>and/ or contention?</b>	significant features of that section have been considered judicially.
<b>Impact on other taxpayers and mitigation strategies</b>	The case will directly impact the tax treatment of Gaming Machine Entitlements for all taxpayers operating in the Victorian gaming machine industry, but also may set a precedent with far broader impact given the fundamental role played by section 8-1 in the tax law.
<b>Status</b>	The Commissioner's Special Leave Application was granted on 20 March 2019. A hearing date has not been provided yet.

<b>ATO Reference: 012/2018-19</b>	
<b>Venue</b>	Federal Court of Australia
<b>Issue</b>	<p>Whether for the purposes of the "Active Asset Test" in Subdivision 152-A, and on a proper construction of subsection 152-40(1) of the <i>Income Tax Assessment Act 1997</i> (Cth) (ITAA 1997):</p> <ol style="list-style-type: none"> <li>a. It is sufficient for the characterisation of the land as an "Active Asset" to show that the land, owned by the taxpayer, was used for the purposes of a business carried on by an entity connected with the taxpayer in a manner that was no more than non-trivial and not significant?;</li> <li>b. The words "<i>is used, or held ready for use, in the course of carrying on a business</i>" in paragraph 152-40(1)(a) of the ITAA 1997 refer to a use that is integral to the business which is carried on</li> </ol>
<b>Why does the issue involve uncertainty and/ or contention?</b>	<p>The "Active Asset Test" acts as one of the basic conditions for access to the small business CGT concessions. Although there have been extensions to these concessions for taxpayers, the requirement that the asset was "active" and used in the course of carrying on the business has remained consistent.</p> <p>The matter provides an opportunity for the Commissioner to seek clarity on the extent of this connection between the use of the land and the actual operations of the business to render the asset as an Active Asset. The decision by the Tribunal stands uneasily (and is arguably inconsistent) with the recent decision of the Tribunal in <i>Rus v Commissioner of Taxation</i> [2018] AATA 185.</p>
<b>Impact on other taxpayers and</b>	The decision impacts on a broad section of the community. Specifically the case will directly impact the tax treatment of capital

<b>mitigation strategies</b>	<p>gains for small businesses and their eligibility to access the concessions (particularly in relation to satisfying the Active Asset test).</p> <p>The decision of the Tribunal erodes the role of the active asset test as a gateway to the small business CGT concessions and will result in greater access to the concessions than was intended with consequent impact on revenue</p>
<b>Status</b>	The Commissioner's notice of appeal from the decision of the AAT was filed on 15 March 2019.
<b>ATO Reference: 008/2017-18</b>	
<b>Venue</b>	Federal Court of Australia
<b>Issue</b>	Whether the taxpayer, the holder of a working holiday maker visa, is subject to tax that is other or more burdensome than the tax to which Australian nationals, in the same circumstances, are or may be subjected, in breach of Australia's non-discrimination clause in its tax treaty with the United Kingdom.
<b>Why does the issue involve uncertainty and/ or contention?</b>	<p>This matter involves testing of new provisions (inserted by the <i>Income Tax Rates Amendment (Working Holiday Maker Reform) Act 2016</i>) in respect of contentions that they are inconsistent with Australia's tax treaty obligations.</p> <p>The case has the potential to establish principles of law that go beyond the working holiday maker provisions, particularly in relation to the operation of the non-discrimination clauses in Australia's tax treaties.</p>
<b>Impact on other taxpayers and mitigation strategies</b>	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.
<b>Status</b>	The matter was heard on 3 and 4 December 2018 and the decision has been reserved.
<b>ATO Reference: 004/2017-18</b>	
<b>Venue</b>	Federal Court of Australia
<b>Issue</b>	Whether the taxpayers are liable to make payments to jockeys pursuant to paragraph 12(8)(a) of the <i>Superannuation Guarantee (Administration) Act 1992</i> (Cth) (SGAA) and as such,

	are considered to be the employers of those jockeys for superannuation guarantee purposes.
<b>Why does the issue involve uncertainty and/or contention?</b>	It is not clear from the remuneration practices in place in the industry as to who is the employer of the persons covered by paragraph 12(8)(a) of the SGAA.
<b>Impact on other taxpayers and mitigation strategies</b>	It is anticipated that this issue is limited to the particular industry.
<b>Status</b>	The decision in the remaining matter is still reserved.
<b>ATO Reference: 002/2017-18</b>	
<b>Venue</b>	Administrative Appeals Tribunal
<b>Issue</b>	<p>The dispute concerns:</p> <ol style="list-style-type: none"> <li>1. Whether an invalidity pension that commenced being paid prior to 20 September 2007, under the rules of a Commonwealth Government military superannuation scheme, is: <ol style="list-style-type: none"> <li>a. a superannuation income stream as defined in section 307-70 of the <i>Income Tax Assessment Act 1997</i> (Cth) (ITAA 1997) and sub-regulation 995-1.01(1) of the <i>Income Tax Assessment Regulations 1997</i> (Cth) (ITAR 1997) such that the pension payments are superannuation income stream benefits, or</li> <li>b. not a superannuation income stream meaning that the payments are superannuation lump sums as defined in section 307-65 of the ITAA 1997.</li> </ol> </li> <li>2. Whether an invalidity pension that commenced being paid after 19 September 2007, under the rules of a Commonwealth Government military superannuation scheme, is: <ol style="list-style-type: none"> <li>a. a superannuation income stream as defined in section 307-70 of the ITAA 1997 and sub-regulation 995-1.01(1) of the ITAR 1997 such that the pension payments are superannuation income stream benefits; or</li> <li>b. not a superannuation income stream meaning that the payments are superannuation lump sums as defined in section 307-65 of the ITAA 1997.</li> </ol> </li> </ol>
<b>Why does the issue involve uncertainty</b>	There is 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

<b>and/or contention?</b>	1997 and ITAR 1997 following amendments that were made with effect from 1 July 2007.
<b>Impact on other taxpayers and mitigation strategies</b>	A Tribunal decision on these issues will provide guidance to other ex-ADF members in similar situations as to how their invalidity pensions payable from a Commonwealth military superannuation scheme should be properly taxed. There have been a number of requests for Private Rulings on this issue. In the event the invalidity pensions are not found to be superannuation income streams the pension payments will be taxable as superannuation lump sums.
<b>Status</b>	Issues 1 and 2 involve different taxpayers.  The matters were heard on 14 December 2018 and adjourned to allow further submissions surrounding the effect of newly enacted regulations on the matters before the Tribunal.

### DECLINED MATTERS

<b>ATO reference: 011/2018-19</b>	
<b>Panel Meeting Date</b>	26 February 2019
<b>Issue</b>	<ol style="list-style-type: none"> <li>1. Is the payment that the taxpayer received under a deed of release, discharge and indemnity assessment an eligible termination payment (ETP) under s 27A (1) of the <i>Income Tax Assessment Act 1936</i> (Cth) (ITAA 1936)?</li> <li>2. Is the payment received under a deed of release, discharge and indemnity exempt from tax under subsection 160ZB(1) of the ITAA 1936 and s 118-37 of the <i>Income Tax Assessment Act 1997</i> (Cth) (ITAA 1997)?</li> <li>3. If the conclusion that the amount in question is ordinary income is incorrect, is the payment in question is subject to capital gains tax as it represents capital proceeds for CGT event C2?</li> </ol>
<b>Panel reasons</b>	<p>The Panel was of the view that the uncertainty could exist in the terms of the settlement deed but not around how the law applies in the taxpayer's circumstances. The Panel also believed that there was no point of contention or uncertainty about the law and it was unlikely to affect a substantial segment of the public.</p> <p>The Panel recommended that the application for test case funding be declined.</p>

<b>ATO reference: 010/2018-19</b>	
<b>Panel Meeting Date</b>	26 February 2019
<b>Issue</b>	<ol style="list-style-type: none"> <li>1. In applying the test in s 87-18(4) of the <i>Income Tax Assessment Act 1997</i> (Cth) (ITAA 97) was the Tribunal required to ask whether it was the custom and practice that the work done “of the kind” done by the Applicant was performed by an entity other than an employee, and proceed to apply s 87-18 of the ITAA 97 on that basis;</li> <li>2. In applying the test in s 87-20(2) of the ITAA 97, did the Tribunal construe the test wider than the proper reading of the words of the legislation allowed; and</li> <li>3. In doing over again the objection decision as to administrative penalties, did the Tribunal inadvertently or otherwise fail to properly identify that the culpability it found in the fact appropriately pertained, on the spectrum of penalties, was not open to a finding of recklessness but a failure of reasonable care.</li> </ol>
<b>Panel reasons</b>	<p>The Panel believed that this matter will not produce any additional clarity around the operation of the PSI rules as ample authorities governing the outcomes of PSI exist.</p> <p>The Panel recommended that the application for test case funding be declined.</p>
<b>ATO reference: 009/2018-19</b>	
<b>Panel Meeting Date</b>	26 February 2019
<b>Issue</b>	<ol style="list-style-type: none"> <li>1. In the application of the “custom or practice” test in s 87-18(4) of the <i>Income Tax Assessment Act 1997</i> (Cth) (ITAA 97), did the Tribunal err in failing to give consideration that the burden ought to have been shifted to the Commissioner as “custom and practice” is not a matter within the peculiar knowledge of the Applicant?</li> <li>2. In the “doing over again” of the objection decision pertaining to penalty, did the Tribunal err in applying the wrong test as to recklessness, where the Tribunal was required to determine where on the scale as between – reasonable care – failure of reasonable care – recklessness – intentional disregard the purported “misleading statement” was, and the Tribunal failed, in “doing over again” to make this finding?</li> </ol>

<b>Panel reasons</b>	<p>The Panel was of the view that ample authorities governing the outcomes of PSI exist and there is no uncertainty around how the PSI rules operate. The Panel also noted that the matter concerns questions of fact and there were no legal issues to be clarified.</p> <p>The Panel recommended that the application for test case funding be declined.</p>
<b>ATO reference: 008/2018-19</b>	
<b>Panel Meeting Date</b>	26 February 2019
<b>Issue</b>	<ol style="list-style-type: none"> <li>1. Was the Foreign Income Tax Offset (FITO) claimable by the Applicant under s 770- 10(1) of the <i>Income Tax Assessment Act 1997</i> (Cth) (ITAA 1997) in the 2011 Income Year a sum of \$3,889,148, being the full amount of tax paid in the USA or, alternatively, some amount greater than \$1,944,574, being the amount allowed by the Commissioner in the amended assessment in respect of that year?</li> <li>2. Was the FITO claimable by the Applicant under s 770- 10(1) of the ITAA 1997 in the 2012 Income Year a sum of \$1,119,866, being the full amount of tax paid in the USA or, alternatively, some amount greater than \$484,832, being the amount allowed by the Commissioner in the amended assessment in respect of that year?</li> </ol>
<b>Panel reasons</b>	<p>The Panel was satisfied the issues no longer remain in contention and the reasoning was sufficiently clear in the judgement to address the areas of uncertainty.</p> <p>The Panel believed that there does not appear to be sufficient doubt present in respect of the decision which would warrant further justification at a higher level.</p> <p>The Panel recommended that the application for test case funding be declined.</p>
<b>ATO reference: 007/2018-19</b>	
<b>Panel Meeting Date</b>	10 January 2019
<b>Issue</b>	<ol style="list-style-type: none"> <li>1. Whether the relevant 'project', for the purposes of Subdivision 40-I of the <i>Income Tax Assessment Act 1997</i> (Cth) (ITAA 1997), is the 'construction and operation of the new parallel runway (NPR)'; and</li> <li>2. Whether this project 'start to operate', for the purposes of section 40-855 of the ITAA 1997, by the time aircraft start</li> </ol>

	landing on the NPR.
<b>Panel reasons</b>	The Panel was of the view that there may be little or no law clarification in answering this question. The Panel recommended that funding be declined as a significant part of the case (scope of this project) was mostly a factual question, and the area of potential uncertainty in the law (scope and meaning of “starts to operate”) was not of sufficient public interest.
<b>ATO reference: 005/2018-19</b>	
<b>Panel Meeting Date</b>	25 September 2018
<b>Issue</b>	Whether a Reader’s Course fee is deductible under: <ol style="list-style-type: none"> <li>1. section 8-1 of the <i>Income Tax Assessment Act 1997</i> (Cth) (ITAA 1997); or</li> <li>2. section 40-880 of ITAA 1997.</li> </ol>
<b>Panel reasons</b>	<p>The Panel appreciated the points raised in the funding application. However, the Panel believed that there was no real distinction about the issues that would take the matter beyond already settled principles.</p> <p>The Panel noted that the distinction between barristers and lawyers has been around for a long time and there does not appear to be any recent changes to the law that would require the law to be administered differently now. Instead, the Panel viewed the matter as an application of particular facts to settled principles.</p>
<b>ATO reference: 004/2018-19</b>	
<b>Panel Meeting Date</b>	25 September 2018
<b>Issue</b>	<ol style="list-style-type: none"> <li>1. Whether the taxpayer undertook ‘refining’ for the purposes of section 38-385 of the <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth) (GST Act); and</li> <li>2. Whether the precious metals were sold as a GST-free supply.</li> </ol>
<b>Panel reasons</b>	The Panel was of the view that the concept of possible future litigation is too vague as there is an absence of a crystallised dispute present in the matter. The Panel recommended that funding be declined as the language of the statute is unambiguous and the matter appears to offer little or no law clarification.
<b>ATO reference: 002/2018-19 and 003/2018-19</b>	

<b>Panel Meeting Date</b>	25 September 2018
<b>Issue</b>	<p>Whether under Subdivision 115-A of the <i>Income Tax Assessment Act 1997</i> (Cth):</p> <ol style="list-style-type: none"> <li>1. capital gains derived by each of the trusts on their disposal of shares in a company in the 2008 income year were discount capital gains, and</li> <li>2. the shares could be treated as having been acquired at least 12 months before they were sold.</li> </ol>
<b>Panel reasons</b>	<p>The Panel was of the view that the provisions dealing with the issues were prescriptive and had little scope for law clarification. The Panel also noted the matter is unlikely to have a wider impact on the community at large. Accordingly, the outcome of the matter may only affect a limited number of taxpayers and have little or no precedential value.</p> <p>As such, the Panel concluded that there was no compelling public interest to fund the application.</p>

### ***FINALISED APPROVED MATTERS***

<b>Name: <i>Harding v Commissioner of Taxation [2019] FCAFC 29</i></b>	
<b>Venue</b>	Full Federal Court of Australia
<b>Issue</b>	<ol style="list-style-type: none"> <li>3. Whether the taxpayer was someone who resided in Australia under the ordinary resides test for the 2011 income year ('the relevant period'); and</li> <li>4. Whether the taxpayer had a permanent place of abode outside Australia in the relevant period.</li> </ol>
<b>Decision or outcome</b>	<p>The Full Federal Court found that Mr Harding was not a resident of Australia under either the ordinary resides or domicile test.</p> <p>Davies and Steward JJ, with whom Logan J agreed, allowed the taxpayer's appeal and rejected the Commissioner's notice of contention. They considered that the word 'place' should be read as including a reference to a country or state.</p> <p>Their Honours held that for a person's 'permanent place of abode' to be outside Australia in the statutory context of the residency definition requires the person to have abandoned their Australian residence and to have commenced living permanently in a</p>

	<p>particular country.</p> <p>Their Honours found that Mr Harding had a permanent place of abode in Bahrain in the relevant period. They further found that the quality and nature of Mr Harding's objective connections to Australia either supported a finding that Mr Harding did not reside in Australia or were insufficient to overcome the significance of Mr Harding's intent to leave Australia indefinitely.</p>
<b>Why does the issue involve uncertainty and/ or contention?</b>	<p>Since 2009, there have been approximately thirty AAT decisions on residency. There are currently more than a dozen litigation matters on foot before the AAT or the Federal Court in Australia, where the residency of an individual is an issue.</p> <p>The question of residency is becoming increasingly complex. A court decision on the issues will provide greater certainty to taxpayers particularly because of the global, transient nature of the modern workforce.</p>
<b>Status</b>	<p>The decision was handed down on 22 February 2019.</p> <p>A Special Leave Application was filed on 22 March 2019.</p>
<b>Name: <i>Commissioner of Taxation vs Tomaras &amp; Anor [2018] HCA 62</i></b>	
<b>Venue</b>	High Court of Australia
<b>Issue</b>	Whether section 90AE of the Family Law Act 1975 (Cth) (FLA) enables the Family Court of Australia and the Federal Circuit Court to make an order substituting one party to a marriage for the other party in relation to a taxation debt.
<b>Decision or outcome</b>	<p>The High Court found that under Part VIII AA of the FLA, a Court has jurisdiction over debts owed to the Commonwealth and a Court has power under s90AE to order the Commissioner to substitute the Husband for the Wife in relation to a debt owed to the Commonwealth arising under a taxation law. They found that the presumption under <i>Bropho</i> that an Act does not bind the Crown was rebutted with respect to Part VIII AA of the FLA.</p> <p>However, the High Court also observed there will seldom, if ever, be occasion to exercise that power and adversely affect the Commissioner or other creditors given the express legislative requirements that a substitution order only be made where it is just and equitable to do so, and not if it is foreseeable that the order would result in the debt not being paid in full.</p>
<b>Why does the issue involve uncertainty and/or contention?</b>	This case concerned the proper scope of operation of section 90AE and specifically whether the section empowers the court to make orders as part of a property settlement requiring the Commissioner to substitute for one person who has a tax liability owed to the

	Commonwealth another person.
<b>Status</b>	The decision was handed down on 13 December 2018.
<b>Name: <i>Burton v Commissioner of Taxation [2018] FCA 1857</i></b>	
<b>Venue</b>	Federal Court of Australia
<b>Issue</b>	Whether, in each of the 2010-11 and 2011-12 income years, the taxpayer is only entitled under subsection 770-10(1) of the ITAA 1997 to claim, as a Foreign Income Tax Offset (FITO), the amount of foreign income tax paid in respect of an amount that was included in their assessable income.
<b>Decision or outcome</b>	<p>The Court delivered a judgement in favour of the Commissioner and dismissed the appeal with no order as to costs (previously agreed between the parties).</p> <p>The Commissioner argued that an amount not included in the assessable income, namely 50% of a capital gain because of the CGT discount, cannot, by definition, be doubly taxed. Justice McKerracher agreed with the Commissioner's approach that the question was not how the CGT is calculated, but on what assessable income it is calculated.</p> <p>Accordingly, McKerracher J held that an amount cannot be said to have been doubly taxed where it is not an amount included in assessable income.</p> <p>Justice McKerracher was not persuaded by the taxpayer's alternative argument and held that the construction of s770-10(1) adopted by the Court is not inconsistent with Article 22(2) of the Australia-US Convention and the 'general principles' it espouses.</p>
<b>Why does the issue involve uncertainty and/or contention?</b>	<p>The ATO view on the application of FITO provisions is set out in ATO ID 2010/175 <i>Foreign income tax offset: entitlement where foreign capital gain is only partly assessable in Australia</i>. The outcome of the litigation is expected to provide case law authority on the operation of the FITO provisions. In particular that FITO is limited to the amount of foreign income tax paid 'in respect of an amount that is all or part of an amount' which is included in a taxpayer's assessable income (the Commissioner's 'apportionment approach').</p> <p>There are no existing precedents and this area of law is unclear as it has not been tested.</p> <p>The decision now has positive implications for the 'apportionment</p>

	approach' and the interpretation of s770-10(1) in ATO ID 2010/175.
<b>Status</b>	The decision was handed down on 27 November 2018. The taxpayer appealed the decision from the Federal Court of Australia and the Appeal was dismissed by the Full Federal Court. The Appeal is not test case funded.
<b>Name: <i>Comptroller General of Customs v Domenic Zappia [2018] HCA 54</i></b>	
<b>Venue</b>	High Court of Australia
<b>Issue</b>	Whether an employee of a licensed warehouse is capable of having, or being entrusted with, the possession, custody or control of dutiable goods under subsection 35A(1) of the <i>Customs Act 1901</i> (Cth) (Customs Act).
<b>Decision or outcome</b>	The High Court unanimously allowed the Comptroller's appeal in respect of the decision of the Full Court of the Federal Court of Australia. The High Court set aside the orders of the Full Court and elected not to remit the matter back to the Tribunal.  The High Court held that an employee of a warehouse licence holder is capable of being a person who "has, or has been entrusted with, the possession, custody or control" of the relevant goods.  Furthermore, the facts found by the Tribunal were sufficient to establish that the respondent was a person who had the possession, custody or control of the stolen goods and had failed to keep those goods safely.
<b>Why does the issue involve uncertainty and/or contention?</b>	The Full Court had determined that an entire class of persons, being employees, were excluded from the ambit of subsection 35A(1) of the Customs Act. This interpretation was inconsistent with the manner in which the provision had been previously administered.
<b>Status</b>	The decision was handed down on 14 November 2018.

<b>Name: <i>Commissioner of Taxation v Sharpcan Pty Ltd [2018] FCAFC 163</i></b>	
<b>Venue</b>	Federal Court of Australia
<b>Issue</b>	Whether the amount incurred by the Trustee of the Trust for the allocation to it of 18 gaming machine entitlements (GMEs) under

	Part 4A of the <i>Gaming Regulations Act 2003</i> was capital or of a capital nature, and therefore not deductible, under section 8-1 of the <i>Income Tax Assessment Act 1997</i> (Cth) (ITAA 1997).
<b>Decision or outcome</b>	<p>The Federal Court dismissed the Commissioner's appeal (2:1), finding the Trustee's GME fees were allowable as a general deduction under section 8-1 of the ITAA 1997 in the income year incurred because they were not capital or of a capital nature.</p> <p>The majority highlighted the importance of the individual circumstances confronting a particular business as these may result in an outgoing being of a capital nature in one instance, but revenue in another. The majority considered that it was inappropriate to characterise by analogy. A crucial factor was that the Trustee's occasion for incurring the outgoing necessarily to preserve the existing going concern of its integrated hotel business, in compliance with the regulatory changes affecting its gaming activities which contributed to the derivation of revenue in all aspects of the hotel business.</p> <p>Justice Thawley dissented. His Honour held that the GME expenditure was a one-off expenditure for the acquisition of an enduring asset, lasting ten years. His Honour also held that the GME formed part of the business structure and was essential to enabling the conduct of gaming activities.</p> <p>As such, the expenditure was capital or of a capital nature, precluding a deduction under section 8-1 of the ITAA 1997.</p>
<b>Why did the issue involve uncertainty and/or contention?</b>	It involves an evaluative judgement as to whether the outgoing is properly characterised as being on capital or revenue account.
<b>Status</b>	<p>The decision was handed down on 27 September 2018.</p> <p>The Commissioner's special leave application has been granted on 20 March 2019.</p>

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

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

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