- money stolen by an employee from his employer (the money was held on constructive trust) (*Zobory*).

It is important to note that the provisions of Div 6, which operate to determine the circumstances in which the trustee or a beneficiary is taxed, only apply if there is income of a trust estate. That requires that the trustee must stand in relation to a proprietary right by virtue of which income of the trust arises (*Leighton*). In *Leighton*, the Full Federal Court held that the taxpayer (a non-resident individual) was not a trustee in respect of income derived on an accruals basis by two non-resident companies that carried on share trading activities; the proceeds of sales of shares which came to be held by the taxpayer did not represent the income of either of the companies but rather represented the realisation of the income that they had already derived.

Although a liquidator of a company is within the statutory definition of trustee a liquidator is not a trustee of a trust estate in any ordinary sense (*Australian Building Systems*).

For details of the withholding requirements relating to trust investments where no TFN or ABN is quoted, see ¶26-200.

[FTR ¶50-517, ¶50-519]

¶6-015 Resettlement of a trust

There was previously considerable doubt as to whether and, if so, in what circumstances one trust estate could come to an end and a new trust estate commence. This particular issue often arose in the context of an amendment to a trust instrument and the question was whether the amendment would cause a ''resettlement''. Of course, if a new trust arose this could have significant income tax and CGT consequences. It may cause, for example:

- the trust property to be realised at trustee level (with potential trading stock, depreciation and CGT implications)
- carried forward tax benefits to be lost
- beneficiaries to dispose of their interests in the original trust and to acquire interests in the new trust.

In *Commercial Nominees*, the High Court (affirming a decision of the Full Federal Court) held that no new trust was created where significant changes were made to a superannuation fund trust deed, primarily because there was a continuing trust estate (ie the property of the fund). The High Court observed that the fund, both before and after the changes, was administered as a single fund, and treated that way by the regulatory authority.

More recently, the question of the continuity of a trust was considered by the Full Federal Court in *Clark*. The trust in that case was a unit trust and no amendment of the trust deed was involved. However, the Commissioner contended that there were several transactions which caused a break in the continuity of the trust. A majority of the court took the view that the indicia of continuity applied by the High Court in *Commercial Nominees* (namely, the constitution of the trust, the trust property and membership) applied generally and not only in the context of a superannuation fund. The majority considered that, when the High Court in *Commercial Nominees* spoke of trust property and membership as providing two of the indicia for the continued existence of the eligible entity or trust estate, the court was not suggesting that there had to be a strict or even partial identity of property for the first and objects for the second. It was speaking more generally: that there had to be a continuum of property and membership, which could be identified at any time, even if different from time to time; and without severance of one or both leading to the termination of the trust in question. In the present case, the Commissioner never contended, nor on the evidence could he, that there was a severance in the continuum of trust property and objects of the particular trust. Their identity

changed from time to time, but not their continuum. An application by the Commissioner for special leave to appeal to the High Court from the decision of the Full Federal Court was refused.

Commissioner's views

The Commissioner's current views in relation to the amendment of trust deeds are set out in TD 2012/21. According to that determination, the Commissioner accepts that, as a general proposition, the approach adopted by the Full Federal Court in *Commercial Nominees* is authority for the proposition that assuming there is some continuity of property and membership of the trust, an amendment to the trust that is made in proper exercise of a power of amendment contained under the deed will not have the result of terminating the trust, irrespective of the extent of the amendments so made so long as the amendments are properly supported by the power of amendment.

The Commissioner accepts as an accurate statement of the current law that continuity of trust is a function of whether the trust continues in existence under trust law in contradistinction to having terminated. Amendments validly made pursuant to a power of amendment that will not lead to the creation of a new trust include amendments adding to, or deleting, beneficiaries, the extension of the vesting day, amendments to the definition of income and amendments to permit the ''streaming'' of different classes of income. The position is the same with court sanctioned amendments or variations. Once the vesting date has passed, it will not be able to be extended by amendment to the trust deed, even if this could have been validly done before the vesting day arrived (*Draft* TR 2017/D10).

However, the determination states that even in instances where a pre-existing trust does not terminate, it may be the case that assets held originally as part of the trust property commence to be held under a separate charter of obligations as a result of a change to the terms of the trust — whether by exercise of a power under the deed (including a power to amend) or court approved variation — such as to lead to the conclusion that those assets are now held on terms of a distinct (ie different) trust. Thus, depending on the facts, the Commissioner considers that the effect of a particular amendment might be such as to lead to the conclusion that a particular asset has been settled on terms of a different trust by reason of being made subject to a charter of rights and obligations separate from those pertaining to the remaining assets of the trust.

Vesting day issues

As pointed out above, the Commissioner accepts that if a trust deed is validly amended so as to extend the vesting day of the trust, there will not be the creation of a new trust. There are, however, potential CGT and income tax issues where the vesting day of a trust passes which will mean that all of the interests in the trust as to income and capital become vested in interest and possession. The Commissioner has issued a draft ruling that deals with these issues (*Draft* TR 2017/D10).

Trust Returns

¶6-020 Trust return

An annual return (often referred to as Form T) must be lodged for a trust, irrespective of the amount of income derived by the trust (¶44-060). Corporate unit trusts and public trading trusts should use the company return form: ¶3-045. The trust return is to be lodged by any one of the trustees who is a resident of Australia. If there is no trustee resident in Australia, the return must be lodged by the trust's public officer (¶6-050) or, where no public officer is appointed, by the trust's agent in Australia. Trust returns are usually required to be lodged by 31 October after the end of the income year to which the return relates (¶24-060).

http://www.pbookshop.com

beneficiary cannot immediately receive because of some legal incapacity such as infancy or insanity (s 96). (Corporate unit trusts and public trading trusts are a special case; ¶6-310.)

Where the Commissioner is uncertain as to which taxpayer is liable to tax, alternative assessments may be issued in respect of the same income (¶25-100), eg one to the trustee and one to another person, provided there is no double recovery of tax (*Trustee of the Balmain Trust*).

Subject to certain qualifications relating to foreign source income, trust income is taxed in the year it is *derived by the trust*, and it is taxed either to the trustee or to the beneficiaries, or a portion of it is taxed to the trustee and a portion to the beneficiaries. Thus, the beneficiaries may be taxed on their respective shares of the net income of the trust for tax purposes even though the trustee has not physically distributed that income to them by the end of the year in which it is derived. However, it is clear that, if some or the whole of the income derived in one year is taxed to the trustee or to beneficiaries who have not yet received it, it does not again become subject to tax when it is subsequently distributed to the beneficiaries (¶6-130).

The primary provisions relating to the taxation of trust income are contained in Pt III Div 6 (s 95AAA to 102). The primary provisions were modified, from and including the 2010/11 income year, where the trust has a net capital gain, a franked distribution or a franking credit included in its net income for tax purposes (see below).

The net income of a trust for tax purposes is taxed either to the beneficiary or trustee as follows:

- the beneficiary is assessable if the beneficiary is presently entitled to income of the trust, is not under a legal disability and is a resident at the end of the income year (¶6-110)
- the trustee is assessable on behalf of a beneficiary who is presently entitled to income of the trust but is either under a legal disability or is not a resident at the end of the income year (¶6-120), and
- the trustee is assessable on net income of the trust to the extent to which no beneficiary (or the trustee on behalf of a beneficiary) is assessed on it (¶6-230).

Undistributed foreign source income is not taxed in the year it is derived by the trust where either: (a) the beneficiary presently entitled to it is not a resident; or (b) there is no beneficiary presently entitled and, subject to special accruals measures (¶6-075), the trust is a non-resident trust. However, the income is assessable in the income year in which it is distributed to a beneficiary who is a resident at any time during that year. Where foreign source income to which no beneficiary is presently entitled is taxed to the trustee under s 99 or s 99A, because the trust is a resident trust, the distribution of that income to a non-resident beneficiary may entitle the beneficiary to a refund of the tax paid by the trustee (¶6-150).

The broad effect of the modification of the primary provisions in relation to capital gains and franked dividends is that capital gains and franked distributions are taken out of the operation of Pt III Div 6 by Div 6E and are dealt with by provisions in ITAA97 Subdiv 115-C (capital gains) and Subdiv 207-B (franked distributions). Provided the trust deed confers the necessary power, the trustee can ''stream'' capital gains and franked distributions to beneficiaries by making them ''specifically entitled'' (¶6-107).

According to the Commissioner, there has been an increase in the use of New Zealand foreign trusts by Australian residents as a vehicle for cross border tax planning. However, Australia's right to tax the trustees of NZ foreign trusts on Australian source

income under Div 6 is not affected by the treaty. For the purposes of determining residency under the treaty, the relevant person is the trustee and not the trust (TR 2005/14).

[FTR ¶50-501ff]

¶6-070 Multiple trusts

One person may create several trusts, either in the one trust instrument or by means of several separate trust instruments, in favour of the same or different beneficiaries.

With one specific exception, the incomes of separate and distinct trusts are not aggregated even though one person may be trustee of each. But, for this advantage to accrue, there must be a clear intention to create separate and distinct trusts. While it may not be necessary to keep separate bank accounts, to divide the corpus physically and to invest the funds of each trust separately, literal compliance with the terms of the trust instrument is necessary.

The exception arises where a beneficiary under two or more trusts is a minor whose income is taxed under the special rules discussed at ¶2-160. Where the beneficiary's income from one trust does not exceed $416 (so that tax would not normally be payable), but the beneficiary has income under one or more other trusts and the total exceeds that amount, then the trustee must pay tax on the beneficiary's income at the rate applying to minor beneficiaries (¶2-220, ¶2-250) (*Income Tax Rates Act 1986*, s 13(4)).

[FTR ¶50-912]

¶6-075 Accumulating income of non-resident trusts

Various special measures prevent the deferral of Australian tax on trust income accumulated in a non-resident trust for the benefit of an Australian resident beneficiary of the trust (Pt III Div 6AAA). These special measures extend to trusts that do not have the derivation of trust income as an object but instead concentrate on realised capital gains at the end of a period of time.

Accruals basis of taxation. The attributable income of an Australian controlled non-resident trust is required to be assessed on an accruals basis to a resident who has directly or indirectly transferred value to the trust where the transfer was made, in the case of a discretionary trust, at any time and, in the case of a non-discretionary trust, after 12 April 1989. The accruals provisions do not apply in relation to arm's length transfers or to certain post-marital or family relief trusts. See ¶21-320 for the meaning of ''attributable income'' and ¶21-290 for a discussion of the accruals measures.

Interest charge on distributions. A distribution to an Australian beneficiary out of accumulated income of a non-resident trust that has not been taxed under the accruals measures or the ordinary trust measures bears an interest charge, measured by reference to the period from the end of the income year in which the non-resident trust derived the income to the end of the income year (of the beneficiary) in which the income is distributed (¶21-350).

[FTR ¶51-370, ¶51-398]

¶6-077 Net capital gain and franked dividends: special rules

Some fundamental changes to the taxation of trust income (and, in particular, where the net income of a trust for tax purposes includes a franked distribution or a net capital gain) were made with effect from and including the 2010/11 income year. The following points should be particularly noted:

- Where the net income of a trust (¶6-080) does not include a net capital gain or a franked distribution, the changes had no practical consequence and the principles of Div 6 that had previously applied continue to apply. This requires determining whether a beneficiary is presently entitled to a share (ie a fraction or percentage) of

http://www.pbookshop.com

Based on the ''refinancing principle'' recognised in *Roberts & Smith* (¶16-740), interest incurred by a trustee on a loan used to finance the payment of a returnable amount is deductible. A returnable amount arises where: (a) an individual has subscribed money for units in a unit trust, and has a right of redemption in relation to the units and the money is used by the trustee to purchase income-producing assets; and (b) a beneficiary has an unpaid present entitlement to some or all of the capital or net income of the trust estate, and the amount to which the beneficiary is entitled has been retained by the trustee and used in the gaining or producing of assessable income of the trust (TR 2005/12). For example, this would be the case if the borrowed funds are used to repay the beneficiary an amount lent by the beneficiary to the trustee who uses the amount for income-producing purposes. Amounts attributable to internally generated goodwill or the unrealised revaluation of assets are not ''returnable amounts''. In the absence of a returnable amount, interest is not deductible if the purpose of the loan is merely to discharge an obligation to make a distribution to a beneficiary.

Foreign trust with capital gain or loss

If a trust is a foreign trust for CGT purposes (¶12-720), a capital gain or capital loss from a CGT event happening in relation to an asset of the trust that is not taxable Australian property is disregarded under ITAA97 s 855-10, despite the fact that the trust is treated as a resident taxpayer when calculating its net income under ITAA36 s 95 (see above); also, in such circumstances the beneficiaries are not treated as having capital gains or making capital losses under ITAA97 Subdiv 115-C (TD 2017/23). Whether a distribution to a beneficiary by the trustee that is attributable to such a capital gain is assessable will largely turn on whether ITAA36 s 99B (¶6-130) is attracted. However, if s 99B is attracted, the beneficiary would not be able to offset a prior year net capital loss or a current year capital loss against the amount, and the discount capital gain concession would not be available (TD 2017/24).

PAYG instalment income of a trust

Under the PAYG system, unless a trustee is absolutely certain that no beneficiary is a quarterly PAYG instalment taxpayer, the trust must calculate the beneficiaries' instalment income quarterly. This is based on the trust's instalment income for the quarter (generally, only its ordinary income). The trustee must notify each affected beneficiary, so that PAYG instalments can be paid (¶27-270).

[FTR ¶50-545, ¶50-685]

¶6-085 The income of a trust

The income of a trust estate is an underlying concept of the trust assessing provisions of ITAA36 Div 6. It is the share of the income of a trust to which a beneficiary is presently entitled which determines the amount (share) of the net income for tax purposes on which the beneficiary (or the trustee on the beneficiary's behalf) is assessable. A beneficiary's share of the income of a trust is also the basis for determining the beneficiary's adjusted Division 6 percentage (which is relevant where the trust has a net capital gain, a franked distribution or a franking credit included in its net income for tax purposes).

The ''income'' of a trust estate is not a defined term and is simply the distributable trust income determined in accordance with trust law principles and the trust deed (*Bamford*). This means that, in determining the income of a trust for an income year any definition of income in the trust deed will be relevant, as well as any powers conferred on the trustee by the trust deed to characterise an amount as being income or capital.

''Net income'' for tax purposes is a defined term and is discussed at ¶6-080.

Commissioner's views

The Commissioner has issued a draft ruling on the meaning of the expression ''the income of the trust estate'' in ITAA36 Div 6 (*Draft* TR 2012/D1). This draft ruling was issued in March 2012 but has not been finalised. The draft ruling was treated in TR 2017/D10 as expressing the current view of the ATO. Points made in the draft ruling include:

- the ''income of the trust estate'' (ie the trust's distributable income for an income year) is measured in respect of distinct income years (being the same years in respect of which the trust's net income is calculated)
- ''income'' and ''trust estate'' are distinct concepts, income being the product of the trust estate. This means that something which formed part of the trust estate at the start of an income year cannot itself, for the purposes of ITAA36 Div 6, be treated by the trustee as income of the trust for that year
- the ''income of the trust estate'', is a reference to the income available for distribution to beneficiaries or accumulation by the trustee, (commonly referred to as ''distributable income'')
- notwithstanding how a particular trust deed may define income, the ''income of the trust estate'' must be represented by a net accretion to the trust estate for the relevant period
- if the trust's net income includes notional income amounts, those amounts cannot (except in the circumstances noted below) be taken into account in calculating the ''income of the trust estate''. Examples of amounts that may be included in calculating a trust's net income but which may not form part of the income of the trust estate are: the amount of a franking credit; so much of a share of the net income of one trust (the first trust) that is included under ITAA36 s 97 in the calculation of the net tax income of another trust, but which does not represent a distribution of income of the first trust; so much of a net capital gain that is attributable to an increase of what would have otherwise been a relevant amount of capital proceeds for a CGT event as a result of the market value substitution rule; and an amount taken to be a dividend by ITAA36 Div 7A that is paid to the trustee of the trust.

The draft ruling states that the effect of a clause in the trust instrument (or the valid exercise of a power by the trustee) to equate the distributable income of the trust with its net income is that an amount of notional income is able to satisfy any notional expenses chargeable against trust income. However, to the extent that the total notional income amounts for an income year exceed notional expense amounts of the trust estate for that year, they cannot form part of the ''income of the trust estate'' for ITAA36 Div 6 purposes (the trust estate's ''distributable income'') for that year.

Present Entitlement

¶6-100 Meaning of presently entitled

''Present entitlement'' is a critical concept in the trust provisions. This is because the method of taxing trust income varies according to whether it is income to which a beneficiary is presently entitled or income to which no beneficiary is presently entitled. Note that, where a franked distribution or a capital gain is streamed, the relevant concept in relation to these amounts is now the statutory concept of specific entitlement which is a wider concept than the concept of present entitlement; a beneficiary who or which is presently entitled to a relevant amount will be specifically entitled, but a beneficiary may be specifically entitled without being presently entitled. For discussion of the specific entitlement concept, see ¶6-107.

http://www.pbookshop.com

When a beneficiary has a specific entitlement to a capital gain or franked distribution, the associated tax consequences in respect of that distribution apply to that beneficiary (¶4-860, ¶11-060).

Capital gains and franked distributions to which no beneficiary is specifically entitled are attributed proportionally to beneficiaries and/or the trustee based on their ''adjusted Division 6 percentage'', that is, broadly, their share (expressed as a percentage) of the income of the trust excluding amounts of capital gains and franked distributions to which any beneficiary is specifically entitled.

To be specifically entitled, a beneficiary must receive, or reasonably be expected to receive, an amount equal to their ''share of the net financial benefit'' that is referable to the capital gain or franked distribution (see (1) above). This does not require an ''equitable tracing'' to the actual trust proceeds from the event that gave rise to a capital gain or the receipt of a franked distribution. For example, it does not matter that the proceeds from the sale of an asset or a franked distribution were re-invested during the year, provided that a beneficiary receives (or can be expected to receive) an amount equivalent to their share of the net financial benefit.

The Commissioner's view is that (depending on the circumstances) a beneficiary can be said to be specifically entitled to receive a share of the net financial benefit of a capital gain even if the making of the capital gain is not established until after the end of the income year (eg because of the settlement of a contract after the end of the income year) (TD 2012/11).

The entitlement can be expressed as a share of the capital gain or franked distribution. More generally, the entitlement can be expressed using a known formula even though the result of the formula is calculated later. For example, a trustee could resolve to distribute to a beneficiary:

- $50 referable to a franked distribution
- half of the ''trust gain'' realised on the sale of an asset
- the amount of franked distribution remaining after calculating directly relevant expenses and distributing $10 to another beneficiary
- 30% of a ''net dividends account'' that includes all franked and unfranked distributions, less directly relevant expenses charged against the account (so long as their entitlement to net franked distributions can be determined), or
- the amount of (tax) capital gain included in the calculation of the trust's net tax income remaining after the application of the CGT discount concession. (In such a case the beneficiary would generally be specifically entitled to only half of the gain, and that entitlement is taken to be made up equally of the taxable and discount parts of the gain.)

A beneficiary under a deceased estate who was entitled to a remainder interest was specifically entitled to a capital gain that arose to the trustee of the deceased estate from the happening of CGT event E5 (beneficiary becoming absolutely entitled to a trust asset) on the death of the life tenant (ID 2013/33).

''Net financial benefit''

A ''net financial benefit'' is the ''financial benefit'' or actual proceeds of the trust (irrespective of how they are characterised) reduced by (trust) losses or expenses (subject to certain conditions).

''Financial benefit'' is defined to mean anything of economic value (including property and services) (ITAA97 s 974-160). It includes a receipt of cash or property, an increase in the value of units in a unit trust, the forgiveness of a debt obligation of the trust or any other accretion of value to the trust. When determining a beneficiary's fraction of the net financial benefit referable to a ''capital gain'', the (gross) financial

benefit referable to the gain is reduced by trust losses or expenses only to the extent that tax capital losses were applied in the same way. When determining a beneficiary's fraction of the net financial benefit referable to a ''franked distribution'', the (gross) financial benefit is reduced by directly relevant expenses only.

Other points

Some other points to note are:

- no beneficiary can be specifically entitled to the part of a capital gain that arises because of the market value substitution rules
- the net financial benefit referable to a franked distribution will normally equal the amount of the franked distribution after being reduced by directly relevant expenses (eg any annual borrowing expenses (such as interest) incurred in respect of the underlying shares)
- the net financial benefit referable to a capital gain will generally be the trust proceeds from the transaction or circumstances that gave rise to the CGT event, reduced by any costs incurred in relation to the relevant asset. This may be further reduced by other trust losses of a capital nature (to the extent consistent with the application of capital losses for tax purposes)
- care must be taken where a capital gain is treated under the trust deed as being partly capital and partly income as could be the case where a discount capital gain is treated as capital to the extent that it is reduced by the CGT discount concession but is otherwise treated as income
- it is not possible to stream tax amounts to beneficiaries where there is no referable net financial benefit remaining in the trust — such as when the gross benefit has been reduced to zero by losses or directly relevant expenses. However, if the trustee deals with all of the franked distributions received by the trust as a single ''class'' (or as part of a broader class), the provisions apply to the total franked distributions as if they were a single franked distribution (ITAA97 s 207-59), and
- it is not possible to make a beneficiary specifically entitled to franking credits, or to separately stream franked distributions and franking credits.

Note that the changes that apply from and including the 2010/11 income year did not alter the rules that allow franking credits to flow proportionally to beneficiaries that have a share of a trust's (positive) income for an income year notwithstanding that the franked distributions of the trust were entirely offset by expenses.

When and How Beneficiary is Taxed

¶6-110 Beneficiary presently entitled and not under legal disability

A beneficiary who is presently entitled to a share of the income of a trust (¶6-085) and is not under a legal disability is assessable on (s 97(1)):

- that share of the net income for tax purposes (¶6-080) that is attributable to a period when the beneficiary was a resident, whatever the source of the income, and
- that share of the net income for tax purposes that is attributable to a period when the beneficiary was not a resident and that is also attributable to sources in Australia.

The reference to a beneficiary being presently entitled to a ''share'' of the income of a trust is a reference to a proportion, fraction or percentage and the reference to that share of the net income is a reference to that same fraction, proportion or percentage of the net income (*Bamford*). This is called the ''proportionate'' approach to the operation of Div 6 and its implications are considered in TD 2012/22. Just how the proportionate approach operates depends on the wording of the distribution resolution. The determination shows,

http://www.pbookshop.com

by example, the effect of distribution resolutions based on fixed amounts, fixed amounts "and the balance" and distributions by proportions. The consequences of later amendments to the net income of a trust for tax purposes are also explained.

Note that in the ATO decision impact statement on *Lewski*, where it was held that a "variation of income" resolution meant that the beneficiary had a "contingent" present entitlement (and so was not assessable), it is stated that the ATO is considering the changes that may need to be made to TD 2012/22 (and in particular to examples 6 and 7). The decision impact statement states that outcomes may vary depending on whether income entitlements are expressed as a percentage share or a specific amount and also whether a variation resolution seeks to deal with both decreases and increases by the Commissioner. It should be kept in mind that the examples in TD 2012/22 are part of the ruling and would be binding on the Commissioner until such time as he may vary them.

The impact statement also indicates that where a resolution is a valid exercise of a trustee's power to deal with income under the deed but operates to create an entitlement for trust purposes that is not vested and indefeasible as at year-end, there will be no scope for a default beneficiary clause to operate. The result would seem to be an assessment of the trustee usually under s 99A.

Where a trust has a net capital gain or a franked distribution, the provisions noted at ¶6-077 apply.

In the case of a deceased estate, the ATO accepts an apportionment of net income between the executor and the beneficiaries in the income year in which the estate is fully administered (IT 2622: ¶6-190).

The beneficiary's share of the net income is aggregated with other assessable income of the beneficiary subject to Australian tax and, after taking into account all deductions, the total taxable income is taxed at the rate applicable to the beneficiary. Where franked distributions are received by the trust, the beneficiary may be entitled to a franking rebate (¶4-860).

Generally, the exempt income of a beneficiary includes the beneficiary's individual interest in the exempt income of a trust. However, exempt income of the trust is not included in the beneficiary's exempt income to the extent that it is taken into account in calculating the net income of the trust (s 97(1)(b): ¶6-080). The High Court has held that exempt income is only "taken into account" in determining the net income of a trust estate when the trust has a loss that, in effect, absorbs the exempt income. If the trust has incurred a loss in a prior year, this must first be offset against any net exempt income of the trust; as a consequence, the beneficiary's interest in the exempt income is reduced (¶16-895). The separation of annuity income into exempt income and assessable income under s 27H (¶14-510) does not involve "taking exempt income into account" in calculating net income (*ANZ Savings Bank*).

The non-assessable non-exempt income of a beneficiary (¶10-890) includes the beneficiary's individual interest in the non-assessable non-exempt income of a trust.

The Commissioner takes the view that the assessable income of an investor under s 97 should include the amount of any commission paid by the investment fund to an intermediary (eg an investment adviser, accountant or solicitor) in relation to the capital of the investor where the intermediary is under an obligation to pass on the amount to the investor. The amount to be included in assessable income is reduced by deductions, such as fees charged by the intermediary for collection and administration of the commission (TR 93/36).

A distribution by the trustee of a unit trust (eg a cash management, equity, mortgage or property trust) is assessable to the unitholder in the income year in which the unitholder is presently entitled to a share of the income of the unit trust, rather than in the year in which the distribution is received by the unitholder. Unless the trust deed provides

otherwise, a unitholder is entitled to a share of the income of a unit trust at the end of the period in which the income is derived (TD 94/72). This does not, however, apply to corporate unit trusts (¶6-280).

Trust income to which a resident beneficiary is deemed to be presently entitled by virtue of s 95A(2) (¶6-100) is normally assessed to the trustee under s 98, even if the beneficiary is not under a legal disability. The beneficiary continues to be assessable under s 97 where the beneficiary is a company or a beneficiary in the capacity of trustee of another trust.

Where a private company beneficiary is presently entitled to income of a trust but the present entitlement is not paid, a loan made by the trustee to a shareholder of the company beneficiary (or to an associate of a shareholder) is treated as a loan by the company to the shareholder (or associate) and potentially subject to the deemed dividends provisions of ITAA36 Div 7A (¶4-110). The Div 7A implications of an unpaid present entitlement have, however, diminished because the Commissioner now takes the view that where a company is an unpaid presently entitled beneficiary there will be circumstances in which the company will be taken to have made a loan to the trust for the purposes of ITAA36 Div 7A because there will be an in-substance loan by the company to the trust or a loan to the trust by the provision of financial accommodation (¶4-200). The practical effect of a loan by the company to the trust would be to extinguish the present entitlement and the Div 7A trust rules would not apply. However, the loan that arises from the company to the trust would potentially fall within the Div 7A company loan rules (¶4-210).

[FTR ¶50-580, ¶50-600]

¶6-120 Beneficiary presently entitled but under legal disability

Where a beneficiary is presently entitled to a share (proportion) of the income of a trust (¶6-085) but is under a legal disability, the trustee is liable to pay tax on that share (proportion) of the net income (¶6-080) (s 98). Minors, bankrupts and insane persons are under a legal disability because they cannot give a discharge for money paid to them.

If the beneficiary is a resident for the whole of the income year, the trustee is assessable on the whole of the beneficiary's share of the net income, including net income attributable to foreign sources. If the beneficiary is a non-resident for the whole or a part of the year, the trustee is assessable on the beneficiary's share of the net income, but excluding so much of it as is attributable both to foreign sources and to a period when the beneficiary was a non-resident. The ATO will accept an apportionment of net income between executors and beneficiaries in the income year in which a deceased estate is fully administered (IT 2622: ¶6-190).

The beneficiary is also assessable on their share of the net income of the trust if that person is a beneficiary in more than one trust or has income from other sources (eg salary or wages, rent, interest or dividends). In such a case, the beneficiary's individual interest in the net income of the trust is aggregated with their other income. However, to prevent double taxation, the beneficiary is entitled to a credit against the total tax assessed for the tax paid or payable by the trustee in relation to the beneficiary's interest in the net income (s 100). The credit cannot exceed the tax otherwise payable by the beneficiary, even though the trustee assessment may have been for a greater amount. Where the trust derives franked dividend income, the tax payable by the trustee that is allowable as a credit to the beneficiary is the gross tax payable by the trustee reduced by the beneficiary's share of the trust's imputation rebate (TD 93/186).

▶ Example

Melinda, who is 17, is absolutely entitled to a one-third share of the income ($54,000) of the Beetle Trust, although she cannot actually receive it until she is 18. She is also a discretionary beneficiary of the Morris Trust. In the relevant year, the trustee of the Morris Trust pays $4,000 towards Melinda's

http://www.pbookshop.com

university fees. In addition, she earns $1,800 from a holiday job. She is assessable on $23,800 ($18,000 + $4,000 + $1,800), but the tax otherwise payable is reduced by the aggregate of the tax paid by the trustees of the two trusts on her share of the net income of each trust.

Where the beneficiary is under 18 years of age and is a "prescribed person", special rates of tax apply to certain types of trust income to which the beneficiary is presently entitled (¶2-160 and following). A beneficiary who is presently entitled to income of a trust in the capacity of the trustee of another trust is treated as not being under a legal disability in respect of their present entitlement to that share (s 95B).

Where the only source of income of a beneficiary under a legal disability is a distribution from one trust, the beneficiary is not required to lodge a tax return (TD 92/159).

A trustee carrying on a primary production business may make farm management deposits (FMDs) on behalf of a presently entitled beneficiary who is under a legal disability (¶18-290). In such a case, the beneficiary is assessable under s 97 on their share of the trust income, regardless of whether the beneficiary is under a legal disability (s 97A). This means that the deduction for the deposit will be allowed in the beneficiary's assessment, instead of being reflected in the trustee's assessment.

The same result applies where an FMD is lodged on behalf of a beneficiary who is not under a legal disability and is deemed to be presently entitled because of their vested and indefeasible interest (¶6-100).

[FTR ¶50-600]

¶6-130 Distributions of trust income

Trust income that has been previously assessed to the trustee or the beneficiary is not assessable when received by the beneficiary. On the other hand, receipts of previously untaxed trust income may be assessable to the beneficiary. This is the case where an amount is paid to, or applied for the benefit of, a beneficiary who is a resident at any time during the income year and the amount represents trust income of a class that is taxable in Australia but which has not previously been subject to tax in the hands of the beneficiary or trustee (s 99B; *Howard* (Full Federal Court); ID 2011/93).

Where, for example, an amount is paid to an Australian resident beneficiary out of foreign source income that has been accumulated in a non-resident trust which would, therefore, not have been assessable to the trustee: ¶6-230), such an amount is assessable to the beneficiary in the year of receipt if the beneficiary is a resident *at any time* during the year (there is no requirement that the beneficiary be resident at the time of the distribution) and Pt III Div 6AAA (¶6-075) does not apply.

The beneficiary could also be assessable where an amount representing foreign source income is paid and the beneficiary, although presently entitled, is not a resident at the time the income is derived by the trust, but is a resident at some time during the year in which the amount is paid.

The amount to be included in the assessable income of the beneficiary under s 99B is the amount paid to, or applied for the benefit of, the beneficiary other than:

- amounts that would not be assessable if derived by a resident taxpayer
- amounts liable to tax in the hands of the beneficiary or the trustee, even if the amount would not actually bear tax in the hands of the beneficiary or trustee (eg because the income is below a minimum amount)
- corpus of the trust — but not to the extent that it is attributable to an amount derived by the trust that would be subject to tax if it were derived by a resident taxpayer, or
- amounts assessed under Div 6AAA (¶6-075) — such amounts are classified as non-assessable non-exempt (¶10-895).

The determination of whether an amount has been applied for the benefit of a beneficiary for the purposes of s 99B is governed by s 99C. Section 99C is expressed in extremely broad terms and has the potential to expand the scope of s 99B considerably. It is understood, however, that the Commissioner does not administer s 99C in accordance with its wide literal terms.

Interest on non-resident trust distributions

Where a resident beneficiary's assessable income includes a distribution by a non-resident trust of income of previous years that is not assessable under Pt III Div 6 or 6AAA (¶6-075), the beneficiary may be liable to pay additional tax in the nature of an interest charge in respect of that distribution (s 102AAM; *Taxation (Interest on Non-resident Trust Distributions) Act 1990*: ¶21-350). The interest charge does *not* apply to: (a) distributions from the estate of a deceased person made within three years after the date of death; or (b) amounts attributable to the income or profits of a public unit trust that is not a controlled foreign trust.

Income for trust purposes exceeds income for tax purposes

Where the income of a trust calculated for trust purposes *exceeds* the net income of the trust calculated for tax purposes, eg where receipts treated as income for trust purposes are treated as capital for tax purposes, the excess is not, in practice, taxed, despite the potential application of s 99B. For example, if two beneficiaries are presently entitled to 50% of trust income of $20,000, but the net income for tax purposes is only $12,000, each beneficiary will be assessed on $6,000 and not $10,000.

There have been situations where the beneficiary of a unit trust is a financial institution and holds the units as part of a financing arrangement under which the institution has effectively provided money for use by a third party. The third party may have guaranteed a particular rate of return to the institution if trust distributions do not meet an agreed rate. Because of deductions available to the trust, or because trust receipts are claimed to be capital, the income of the trust available for distribution to the institution exceeds the trust's income for tax purposes. Any distribution of the excess is income in the hands of the institution because it arises from the commercial activities of the institution (IT 2512).

[FTR ¶51-120ff]

¶6-140 Distributions out of corpus to income beneficiary

Payments made out of corpus to an annuitant or other beneficiary entitled to income, either to make up a deficiency of income or in advance on account of income, are assessable income in the hands of the recipient. For example, the fact that an annuity is paid out of capital does not affect its character as income in the hands of the annuitant.

[FTR ¶50-670]

¶6-150 Distributions to non-resident beneficiary — refund of tax

Where a trust derives foreign income to which no beneficiary is presently entitled, the trustee is assessable on that income only if the trust is a resident trust (¶6-230). The distribution of such income to a beneficiary may entitle the beneficiary to a refund of the tax paid by the trustee if the income is attributable to a period when the beneficiary was not a resident of Australia (s 99D).

An application for a refund of tax must be made to the Commissioner in writing, by or on behalf of the beneficiary, within 60 days after the date on which the payment of the trust income is made to the beneficiary or within such further period as the Commissioner allows. For a refund to be payable, the beneficiary must satisfy the Commissioner that the payment:

- is attributable to a period when the beneficiary was not a resident and to income from sources out of Australia

http://www.ebookstore.com

- was taken into account in calculating the net income of the trust, and
- is not income that is deemed not to have been paid to, or applied for the benefit of, the beneficiary or to be income to which the beneficiary is not presently entitled, by virtue of s 100A (this deals with trust stripping schemes: ¶6-270).

The Commissioner may, however, refuse to refund the tax if he considers that the whole or a part of the amount was paid to the beneficiary by the trustee for the purpose, or for purposes that included the purpose, of enabling the beneficiary to become entitled to a refund of tax under s 99D in relation to that amount.

[FTR ¶51-150]

¶6-170 Rates of tax payable by beneficiaries

Trust income assessable to a beneficiary is generally aggregated with the beneficiary's other assessable income and is taxable at whatever rate of tax is applicable to the beneficiary, ie:

- if the beneficiary is a company, at the appropriate company rate (¶42-025), or
- if the beneficiary is an individual, at the appropriate individual rates (¶42-000, ¶42-015).

Capital gains derived by a trust may be reduced by 50% in certain circumstances (¶11-033 – ¶11-038).

Distributions by trusts to a superannuation fund, other than where the fund has a fixed entitlement to the income, have been taxed at 47%. In the case of fixed entitlements to the income that are acquired under non-arm's length arrangements, any distribution to a superannuation fund in excess of an arm's length amount are also taxed at 47% (¶13-170). Distributions by trusts to a complying superannuation fund that has a fixed entitlement to the income and where the distribution is an arm's length arrangement are taxed at 15%.

Special rates of tax apply to certain trust income of minor beneficiaries (¶2-150).

When and How Trustee is Taxed

¶6-180 Deceased's income received after death

The trustee of the estate of a deceased taxpayer is assessed on amounts received after the death of the deceased that would have been assessable to the deceased had they been received during the deceased's lifetime — such amounts are deemed to be income to which no beneficiary is presently entitled (s 101A).

This applies to receipts by the trustee for rents or interest, etc, accrued at the date of death but only received after death (which would be corpus under trust law). It also applies to fees received after the death of a professional sole practitioner or partner whose returns were filed on a cash basis. Following the High Court's decision in *Single's case*, it seems that it affects not only fees subsequently received for completed work for which an account was rendered, but also subsequent receipts for work incomplete at the date of death.

Receipts of this kind are aggregated in the trustee's hands with other amounts of income to which no beneficiary is presently entitled and are assessed under s 99A, or under s 99 if the Commissioner is of the opinion that it would be unreasonable for s 99A to apply (¶6-230). For the applicable rates of tax, see ¶42-030. Note that an assessment of the trustee under s 99 for the income year of death and the next two years is at the ordinary individual rates of tax.

The deeming rules in s 101A do *not* apply to lump sum payments for unused annual or long service leave that, had they been received by the deceased, would have been assessable (IT 248). An ETP received by the trustee is treated as income to which no beneficiary is presently entitled.

A farm management deposit (¶18-290) that is repaid to a trustee of a deceased estate because of the death of the deposit owner is treated as income of the deceased owner (s 101A(4)).

For a checklist of the tax consequences of death, see ¶44-170.

[FTR ¶51-275]

¶6-190 Period of administration of deceased estate

Until the administration of a deceased estate has reached the stage where, in general terms, the residue can be ascertained with certainty, there is no trust income legally available for distribution to the beneficiaries (¶6-100).

During the period of incomplete administration, the trust income is taxed to the trustee as income to which no beneficiary is presently entitled. That income is aggregated with other income (if any) to which no beneficiary is presently entitled and is assessed under s 99.

However, if during an intermediate stage of administration of a deceased estate, part of the net income of the estate that is not required to pay debts, etc, is paid to the beneficiaries, those beneficiaries will be assessed on the basis that they are presently entitled to the income actually paid to them or paid on their behalf (IT 2622).

In the income year in which the estate is fully administered, the ATO will accept an apportionment of net income between executors and beneficiaries. Income derived during the period from the beginning of the income year to the day the administration is complete is assessed to the executors, and income derived in the period constituted by the balance of the year is assessed to the beneficiaries presently entitled to the income (or to the trustee if the beneficiary is under a legal disability) (IT 2622). There must be evidence of the income derived during these periods and apportionment of the net income of the trust estate in this manner must be requested by the taxpayers concerned (ie the executor or administrator and the beneficiaries). An apportionment of the income derived by the estate for the whole income year concerned into the two periods merely on a time basis is not acceptable. Of course, if an executor or administrator does in fact pay part of the income of the estate to a beneficiary before the estate is fully administered (ie during the first of the periods mentioned above), the beneficiary would be assessed on the basis that he or she was presently entitled to that income.

[FTR ¶50-615]

¶6-200 Net income for tax purposes exceeds actual trust income

The actual net trust income legally (ie according to the terms of the trust or trust law) available for distribution among the income beneficiaries may be less than the net income of the trust computed for tax purposes. Situations where this may occur include:

- the incomplete administration of a deceased estate (¶6-190)
- where items that are assessable income of the trust are corpus (ie capital) according to trust law or the terms of the particular trust instrument, or
- where items that are to be met from income according to trust law or the relevant trust instrument are non-deductible for tax purposes, or are deductible but to a lesser extent, eg when depreciation may be calculated at a higher rate for trust purposes than for tax purposes.

http://www.pbookshop.com

Regulatory Regime — Superannuation Entities

¶13-800 Regulation of superannuation entities

The SIS legislation, together with the *Financial Sector (Collection of Data) Act 2001* (FSCODA), the *Corporations Act 2001* and TAA, constitute the principal legislation governing the prudential supervision of superannuation funds, ADFs and PSTs. Compliance with the SISA and other regulatory Acts, insofar as is applicable, is mandatory in order for an entity to qualify as a complying superannuation fund, complying ADF or PST for tax purposes (¶13-100, ¶13-410, ¶13-440).

The generic term ''regulatory provision'' is used to refer to the prudential requirements that may be applicable to an entity under the above Acts (SISA s 38A). Where a contravention occurs, various forms of penalties may be imposed under the SISA, in addition to the potential loss of the entity's complying status and entitlement to concessional tax treatment under the tax Laws.

Professional service providers to superannuation entities (such as auditors and actuaries) are also subject to the SIS prudential regime with respect to certain duties to the entities (eg providing audit report to trustees). Superannuation fund auditors and actuaries are generally required to report contraventions of a regulatory provision to the ATO.

The prudential supervision regime for superannuation entities is complex with diverse rules for different types of superannuation entities. Trustees and other superannuation professionals responsible for compliance management may refer to other Wolters Kluwer products such as the *2017/18 Australian Master Superannuation Guide* or *Superannuation Law & Practice* for more comprehensive coverage.

The rules dealing with the preservation and payment of superannuation benefits under the SIS regulations, and certain prudential requirements covering the operation of superannuation funds, are briefly outlined below. The rules dealing with acceptance of contributions by superannuation funds are summarised at ¶13-825.

Preservation, portability and payment of benefits

Under the SISR, a member's benefits in a superannuation fund are categorised as preserved benefits, restricted non-preserved benefits and unrestricted non-preserved benefits. This categorisation of benefits is for the SISR preservation and payment of benefit rules. This is not the same as the division of superannuation benefits into its tax free and taxable components under ITAA97 for taxation purposes, as discussed in Chapter 14.

A member's preserved benefits and restricted non-preserved benefits can only be accessed if the member satisfies a condition of release in SISR Sch 1, subject to a cashing restriction in certain cases. The conditions cover a range of situations such as retirement on or after preservation age (see below), attaining age 65, death, permanent or temporary incapacity, severe financial hardship or compassionate grounds, ATO release authority, and temporary residents departing Australia (SISR Sch 1). Not all conditions of release are applicable to all members. Penalties may be imposed if a person promotes an illegal early release scheme of superannuation benefits which does not comply with the SIS payment standards (SISA s 68B: a civil penalty provision) (see also ''Review of rules for early release of superannuation'' below).

Benefit payments which do not comply with the preservation rules do not receive concessional tax treatment as superannuation benefits but are taxed as ordinary income at marginal tax rates (¶14-300).

Under the SISR, the payment (cashing) of a member's benefits can be *voluntary* (generally by satisfying a condition of release and cashing restriction (if any) as set out in SISR Sch 1), or *compulsory* (when the member dies as explained below). Member benefits which are paid as a lump sum (but not as income streams) may be made in

specie, provided the SISR investment provisions and the fund's trust deed are satisfied (reg 6.01(2), definition of ''lump sum''). A superannuation benefit payable with a cheque or promissory note is ''cashed'' for the SISR purposes at the time the cheque or note is received by the member or beneficiary if, at that time, money is payable immediately and available for payment, the fund trustee takes all reasonable steps to ensure that the money is paid promptly, the money is paid, and the SISR rules are met (SMSFD 2011/1).

The SISR rules for payment of a member's benefits govern the manner, time and extent to which a benefit must be paid, and they require fund trustees to have regard to death benefit nominations and any other duty that may arise in a particular case, such as giving or seeking information or restrictions under the family law (SISR reg 6.17A; 6.17AA; 6.17B; 6.17C).

Under the *compulsory* cashing rule from 10 May 2006, a member's benefits in a regulated superannuation fund must be cashed, or rolled over for immediate cashing, *as soon as practicable* after the member dies (reg 6.21(1), (3)). This rule effectively allows fund members to keep their superannuation entitlements in the fund until their death.

A fund member's benefits may be cashed as a lump sum, or as one or more income stream benefits each of which is a superannuation income stream that is in the retirement phase (subject to reg 6.21(2A) and (2B) which impose additional conditions for payment of a death benefit as an income stream, see below) (reg 6.21(2)).

From 1 July 2007, a superannuation provider is allowed to pay a death benefit as a superannuation income stream (rather than a lump sum), or to purchase an annuity only, if the entitled recipient (beneficiary):

- is a dependant of the member, and
- in the case of a child of the member:
  - is less than 18 years of age
  - being 18 or more years of age, is either financially dependent on the member and less than 25 years of age, or has a disability of the kind described in s 8(1) of the *Disability Services Act 1986* (reg 6.21(2A)).

In addition, if death benefits are being paid to a child of the deceased member as a pension (or annuity) under reg 6.21(2A), the benefits must be cashed as a lump sum on the earlier of:

(a) the day on which the pension is commuted, or the term of the pension expires (unless the benefit is rolled over to commence a new annuity or pension), and

(b) the day on which the child attains 25 years of age, unless the child has a disability of the kind described in s 8(1) of the Disability Services Act on the day that would otherwise be applicable under item (a) or (b) (reg 6.21(2B)).

The SIS and RSA Regulations also prescribe rules for the portability of superannuation allowing members of certain superannuation funds to move their benefits between funds using the appropriate approved form (NAT 71223: for roll-overs to a non-SMSF; NAT 74662: for roll-overs to an SMSF). Certain fund members may electronically request the consolidation of their superannuation benefits through the ATO electronic portability scheme, or through myTax and myGov (SISA s 34A; SISR reg 6.33; 6.33A; Pt 6A; RSAA s 138A; RSAR reg 4.35C to 4.35P, Pt 4AA).

http://www.pbookshop.com

Preservation age

A person's preservation age is based on the person's date of birth, as below.

For a person born . . .	Preservation age
Before 1 July 1960	55
1 July 1960 – 30 June 1961	56
1 July 1961 – 30 June 1962	57
1 July 1962 – 30 June 1963	58
1 July 1963 – 30 June 1964	59
After 30 June 1964	60

SMSF auditor registration regime

A natural person who is an Australian resident may apply to the Australian Securities and Investments Commission (ASIC) to be registered as an approved SMSF auditor (SISA s 128A).

The ASIC is responsible for setting competency standards and registration of approved SMSF auditors (SISA s 128Q; also *Class Order* CO 12/1687 available at www.comlaw.gov.au/Details/F2012L02497). ASIC may take enforcement action against auditors who do not comply with their ongoing obligations (*Adiga v ASIC*: non-resident cannot apply for registration). An auditor's ongoing obligations include meeting professional obligations, submitting annual statements to ASIC and notifying ASIC of certain matters. Various fees are payable under the SMSF auditor registration regime, eg for undertaking a competency examination, giving statements and notifications to ASIC (*Superannuation Auditor Registration Imposition Act 2012* and regulations; ASIC guidelines in *Regulatory Guide* RG 243 *Registration of self managed superannuation fund auditors*).

The ATO continues to be the Regulator of SMSFs under the SISA, and is empowered to monitor compliance with relevant standards by auditors and refer non-compliant auditors to ASIC for enforcement action.

Administrative penalties may be imposed for certain contraventions

In addition to the general penalties regime, APRA is empowered to issue infringement notices for a broad range of breaches of the SISA (Pt 22).

The ATO is empowered to give rectification directions and education directions to trustees of SMSFs and impose administrative penalties for certain contraventions of the SIS legislation (SISA Pt 20).

Taxpayer Alerts on certain superannuation fund operations

The ATO has raised various tax and regulatory concerns in the following alerts:

- TA 2008/3 — Uncommercial use of certain trusts (¶13-150, ¶13-170)
- TA 2008/4 — SMSFs deriving income from certain uncommercial trusts (¶13-150, ¶13-170)
- TA 2008/5 — Certain borrowings by SMSFs (instalment borrowing arrangements)
- TA 2008/12 — Non-cash contributions to superannuation funds (¶13-775, ¶13-780)
- TA 2009/1 — Superannuation illegal early release arrangements
- TA 2009/8 — Exploitation of 1999 superannuation transitional provisions for in-house asset rules
- TA 2009/10 — Non-commercial use of negotiable instruments involving SMSFs (promissory notes)

- TA 2009/16 — Circumvention of in-house asset rules using related party agreements
- TA 2009/17 — Life insurance bonds issued by tax haven entities (¶13-150, ¶13-160)
- TA 2009/19 — Uncommercial offshore superannuation trusts (¶14-420)
- TA 2010/3 — Non-market value acquisition of shares or share options by an SMSF (¶13-775)
- TA 2010/5 — Using an unrelated trust to circumvent superannuation lending restrictions
- TA 2011/2 — Certain labour hire arrangements utilising a discretionary trust to split income (and possible avoidance of SG obligations) (¶39-022)
- TA 2012/7 — SMSF borrowing arrangements to acquire property which contravene superannuation laws
- TA 2015/1 — Dividend stripping arrangements involving the transfer of private company shares to an SMSF (¶13-160)
- TA 2016/6 — Diverting personal services income to SMSFs.

Other ATO guidelines

The ATO has also released a range of Law Companion Guidelines and Practical Compliance Guidelines on various aspects of the transfer balance cap and total superannuation balance regime (¶14-320).

Superannuation data and payment standards

Trustees of superannuation entities and employers are required to comply with the superannuation data and payment standards made under SISA Pt 3B (SuperStream standard). The Commissioner is responsible for administration of Pt 3B and may impose penalties non-compliance of the standard.

Briefly, the SuperStream standard requires:

- employers, when making superannuation contributions on behalf of their employees, to provide the payments and associated data to superannuation funds in a specific electronic format, and
- superannuation funds, including SMSFs, to receive contributions electronically in accordance with standard and to use the standard for processing roll-overs.

SuperStream applies to SMSFs which do not receive any employer contributions, or which only receive personal member contributions and contributions from related-party employers. Roll-overs to SMSFs are not required to be made using SuperStream.

The ATO's SuperStream checklists for employers and superannuation funds (including a SuperStream decision tool and FAQs) may be found at www.ato.gov.au/super/superstream/employers/employer-checklist--a-step-by-step-guide/?sbn) and www.ato.gov.au/super/superstream/employers/employer-superstream-faqs/?anchor=DoyouhavetouseSuperStream#DoyouhavetouseSuperStream.

http://www.pbookshop.com

Proposed measures affecting superannuation

Proposed measures affecting the regulation of superannuation are summarised below.

Australian Financial Complaints Authority will replace the Superannuation Complaints Tribunal

The Treasury Laws Amendment (Putting Consumers First — Establishment of the Australian Financial Complaints Authority) Bill 2017 introduces a new external dispute resolution framework and an enhanced internal dispute resolution framework for the financial system.

The new external dispute resolution framework will ensure that consumers have easy access to a single external dispute resolution scheme, known as the Australian Financial Complaints Authority (AFCA), which will resolve disputes about products and services provided by financial firms. The *Superannuation (Resolution of Complaints) Act 1993* (RCA) will be repealed and the AFCA scheme will replace the Superannuation Complaints Tribunal (SCT) and other ASIC-approved external dispute resolution schemes.

When the AFCA scheme is operational, a person who is dissatisfied with certain notices and information provided to the Commissioner in connection with tax administration (eg under TAA Sch 1 s 133-120(2) and s 133-140(1) (about Division 293 tax end benefits), s 155-90 (about review of assessments), s 390-5(1) (about member contributions) and under s 24 of the *Superannuation Contributions Tax (Assessment and Collection) Act 1997* about surchargeable contributions) may make a complaint under the AFCA scheme (rather than under the RCA as is currently the case).

All Australian financial services licensees (AFS licensees), unlicensed product issuers, unlicensed secondary sellers, Australian credit licensees and credit representatives, regulated superannuation funds (other than SMSFs), ADFs, RSA providers, annuity providers, and life policy funds and insurers (collectively, financial firms) will be required to be AFCA members.

Improving accountability and member outcomes in superannuation

The Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No 1) Bill 2017 proposes a range of amendments as below:

- Sch 1: Annual MySuper outcomes assessment — amends the SISA to strengthen the obligation on superannuation trustees to consider the appropriateness of their MySuper product offering annually including how that product continues to deliver appropriate outcomes to MySuper members.
- Sch 2: Authority to offer a MySuper product — amends the SISA to give APRA an enhanced capacity to refuse a registerable superannuation entity (RSE) licensee a new authority to offer a MySuper product or to cancel an existing authority.
- Sch 3: Director penalties — amends the SISA to impose civil and criminal penalties on directors of RSE licensees who fail to execute their responsibilities to act in the best interests of members, or who use their position to further their own interests to the detriment of members.
- Sch 4: Approval to own or control an RSE licensee — amends the SISA to strengthen APRA's supervision and enforcement powers when a change of ownership or control of an RSE licensee takes place.
- Sch 5: APRA directions power — amends the SISA to strengthen APRA's supervision and enforcement powers to include the power to issue a direction to an RSE licensee where APRA has prudential concerns.

- Sch 6: Portfolio holdings disclosure — amends the *Corporations Act 2001* to refine the requirements for RSE licensees to make publically available their portfolio holdings. When effected, members will have access to information on how superannuation funds invest member contributions on a semi-annual basis.
- Sch 7: Annual members' meetings — amends the SISA to require RSE licensees to hold an annual members' meetings within nine months after the end of each income year.
- Sch 8: Reporting standards — amends the *Financial Services (Collection of Data) Act 2001* to provide APRA with the ability to obtain information on expenses incurred by RSE and RSE licensees in managing or operating the RSE.

Strengthening trustee arrangements

The Superannuation Laws Amendment (Strengthening Trustee Arrangements) Bill 2017 proposes amendments as below:

- Sch 1 — amends the SISA to require trustees of registrable superannuation entities (RSE licensees) that have a board of trustees to have a minimum of one-third independent directors, including an independent Chair, and to require RSE licensees that are a group of individual trustees to have at least one-third of the trustees that are independent.
- Sch 2 — amends the *Governance of Australian Government Superannuation Schemes Act 2011* (Governance Act) to enable the trustee board of the Commonwealth Superannuation Corporation (CSC Board) to comply with the independence requirements set out in Sch 1.

The proposed trustee governance rules do not apply to SMSFs or a fund that has an acting trustee appointed under SISA s 134.

APRA will make prudential standards to prescribe transition arrangements to ensure compliance with the amended trustee arrangements before the end of 2020. The transition period is for three years starting on the day after the Bill receives the Royal Assent, and RSE licensees will need to comply with these prudential standards during the transition period (¶41-300).

APRA consultation on measures to strengthen superannuation member outcomes

APRA has released a consultation package on measures aimed at assisting APRA-regulated superannuation licensees to be better positioned to deliver sound outcomes for their members (available at www.apra.gov.au/Super/Pages/Strengthening-Member-Outcomes-Consultation-Dec17.aspx).

The package outlines proposed changes to the prudential framework designed to enhance strategic and business planning, oversight of fund expenditure and the assessment of outcomes for members of registrable superannuation entities (RSEs). APRA's proposals are independent of, but aligned with, legislative proposals currently before the parliament. In considering the final form of the standards being issued for consultation, APRA will have regard to both feedback from consultation on its own proposals and the final form of any new legislation passed by parliament.

Review of rules for early release of superannuation

The government has announced a review of the current rules governing early release of superannuation on grounds of severe financial hardship and compassionate grounds which are contained in the SISR and RSAR, including whether, and the circumstances in which, superannuation assets should be available to pay compensation or restitution to victims of crime (treasury.gov.au/consultation/c2017-t246586).

http://www.pbookshop.com

Also, the regulatory role of administering the early release of superannuation benefits on compassionate grounds will be transferred from the Department of Human Services to the ATO in 2018 (Minister for Revenue and Financial Services, media release, 8 December 2017: kmo.ministers.treasury.gov.au/media-release/118-2017).

Enhancing Whistleblower Protections

Amendments have been proposed to:

- the *Corporations Act 2001* to consolidate and broaden the existing protections and remedies for corporate and financial sector whistleblowers
- the TAA to establish a whistleblower protection regime for disclosures of information by individuals regarding breaches of the tax laws or misconduct relating to an entity's tax affairs, and
- repeal, among others, SISA Pt 29A Div 1, which contains the protections for whistleblowers which will be superceded by the proposed consolidated regime in the Corporations Act (Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017: ¶41-400.

Royal Commission into banking, superannuation and financial services industry

A Royal Commission into misconduct in the banking, superannuation and financial services industry has been established on 14 December 2017. The Commission's terms of reference include inquiry into the nature, extent and effect of misconduct by a financial services entity (including by its directors, officers or employees, or by anyone acting on its behalf), and the use by a financial services entity of superannuation members' retirement savings for any purpose that does not meet community standards and expectations or is otherwise not in the best interest of members.

For the above inquiry, a ''financial service entity'' includes a licensee of a registrable superannuation entity (as that term is defined in the SISA) and any entity that has any connection (other than an incidental connection) to the RSE licensee of a registrable superannuation entity. SMSFs are not RSEs.

The Commission may submit to the government an interim report no later than September 2018 and must submit a final report of its findings and recommendations within 12 months (financialservices.royalcommission.gov.au/Pages/Terms-of-reference.aspx).

[AMSG ¶3-000ff; SLP ¶2-100ff]

¶13-825 Acceptance of contributions and benefit accruals

The rules governing whether a regulated superannuation fund can accept contributions (or grant benefit accruals in the case of defined benefit funds) and on related contribution matters are set out in Pt 7 of the SISR (reg 7.01–7.11). Similar acceptance of contribution rules apply to RSA providers under the RSAR.

A ''contribution'' in relation to a fund or an accrual of benefit does not include benefits that have been ''rolled-over'' or ''transferred'' to the fund (ie payments within the superannuation system (SISR reg 1.03(1); 5.01(1); 7.01(1). The contribution rules also do not apply to proceeds from an insurance policy (eg for a claim paid in respect of a member's life or disability insurance policy) or to superannuation interests subject to a payment split as provided for under SISR Pt 7A. Examples of transfers or roll-overs from outside the superannuation system which will be subject to the contribution rules include funds transferred from an overseas superannuation fund (¶14-420) and payments of a CGT exempt amount to the fund (¶13-780).

The governing rules of a fund may prescribe requirements with regard to contributions that are more restrictive than the SISR contribution rules. Subject to the governing rules, a fund may accept in specie contributions provided the SISA investment rules and, where applicable, restrictions on the acquisition of assets are also complied with.

An exception to the acceptance of contribution rules applies for contributions of the proceeds of the sale of a business involving earnout rights to which the small business retirement concession applies (see ''Exception: contributions related to earnout rights'' below).

A fund which receives a contribution in a manner that is inconsistent with contribution rules is generally required to return the contribution to the contributor (see below).

APRA has provided guidelines for RSE licensees on the contribution rules, covering risk management associated with the processing of contributions, administration (eg establishing, monitoring and reviewing policies and procedures regarding the acceptance, classification and allocation of contributions), and contributions made in error in various circumstances (*Prudential Practice Guide SPG 270 — Contribution and Benefit Accrual Standards*).

Rule 1: Age of member and work test

A regulated superannuation fund may accept contributions only in accordance with reg 7.04(3) (see the table below). Where applicable, Rule 2 and reg 7.04(4) (see ''Returning contributions made in breach of rules'' below) must also be complied with.

Member's age	Contributions that can be accepted
Member is under age 65	All contributions made in respect of the member
Member is age 65 or more but is under age 70	(a) ''mandated employer contributions'' (see below) (b) if the member has been gainfully employed on at least a part-time basis during the financial year in which the contributions are made (this is commonly referred to as the ''work test'': see below): ● employer contributions (other than mandated employer contributions) ● member contributions
Member is age 70 or more but is under age 75	Contributions made in respect of the member that are: ● mandated employer contributions ● if the member has been gainfully employed on at least a part-time basis during the financial year in which the contributions are made — contributions received before the 28th day after the end of the month in which the member turns 75 that are: (i) employer contributions (other than mandated employer contributions), or (ii) member contributions made by the member
Member is age 75 or more	Mandated employer contributions

In any of the above circumstances, a fund may accept contributions in respect of a member if it is reasonably satisfied that the contribution is in respect of a period during which the fund may accept the contribution, even though the contribution is actually made after that period (reg 7.04(6)).

http://www.pbookshop.com

Employer contributions and member contributions

''Employer contributions'' are contributions by or on behalf of an employer-sponsor of the fund, and ''member contributions'' are contributions by or on behalf of a member other than employer contributions, eg personal contributions, spouse contributions and government co-contributions (SISR reg 1.03(1); 5.01(1)).

''Mandated employer contributions'' are:

- superannuation guarantee (SG) contributions, ie contributions made by or on behalf of an employer to reduce the employer's potential liability to the SG charge (¶39-240)
- payments of SG shortfall components, ie ATO payments of the shortfall component of the SG charge (¶39-600)
- award contributions made by or on behalf of an employer in satisfaction of the employer's obligations under an industrial agreement or award
- payments from the Superannuation Holding Accounts Special Account (¶39-650) (SISR reg 5.01(1), (2)).

Contributions made under an effective salary sacrifice arrangement are considered to be employer contributions. However, only those contributions to the required SG level (9.5% in 2017/18: ¶39-100), or the industrial award or agreement level (if higher than the SG level), are mandated employer contributions. Any excess over these levels may be accepted only if the relevant rules for non-mandated employer contributions in the above are satisfied.

Work test

A person is ''gainfully employed on a part-time basis'' during a financial year if the person was gainfully employed at least 40 hours in a period of not more than 30 consecutive days in that financial year (SISR reg 7.01(3)). For example, a person who works 40 hours in a fortnight can make superannuation contributions for the rest of the financial year.

''Gainfully employed'' means being employed or self-employed for gain or reward in any business, trade, profession, vocation, calling, occupation or employment. ''Gain or reward'' is the receipt of remuneration such as wages, business income, bonuses and commissions, in return for personal exertion in these activities. It does not include the passive receipt of income, eg receipt of rent or dividends (SISR reg 1.03(1)).

Exception: contributions related to earnout rights

A regulated superannuation fund may accept a contribution of an amount from the proceeds of the sale of a business to which the small business retirement concession applies, if the sale involved an earnout right and the contribution would not have been affected by the contribution restrictions had it been made during the financial year in which the business was sold.

Specifically, despite reg 7.04(1), a fund may accept, as a contribution, an amount to the extent that the amount does not exceed the member's CGT cap amount (¶13-775) if:

(a) the amount to be accepted as a contribution could be covered under ITAA97 s 292-100 (certain CGT-related payments) in relation to a CGT event referred to in that section

(b) the capital proceeds from the CGT event were or could have been affected by one or more financial benefits received under a look-through earnout right (¶11-675), and

(c) reg 7.04(1) would not have prevented the fund from accepting the amount as a contribution had it been made to the fund in the financial year in which the CGT event happened (reg 7.04(6A)).

The relevant CGT event is the one referred to in whichever of s 292-100(2), (4), (7) and (8) that could cause the amount to be covered under that subsection (reg 7.04(6A) note). In reg 7.04(6A), the terms ''capital proceeds'', ''CGT cap amount'', ''CGT event'', ''financial benefit'' and ''look-through earnout right'' have the same meaning as in the ITAA97 (reg 7.04(7)).

Rule 2: Member contributions where no TFN is provided

In addition to Rule 1, a regulated superannuation fund must not accept any *member contributions* if the member's TFN has not been quoted (for superannuation purposes) to the trustee of the fund (SISR reg 7.04(2)).

The expression ''quoted (for superannuation purposes)'' is discussed at ¶13-180.

Returning contributions made in breach of rules

If a fund receives a contribution in a manner that is inconsistent with Rules 1 or 2, the fund is required to return the contribution to the entity or person that paid the amount within 30 days of becoming aware of the inconsistency unless, in the case of Rule 2, a TFN number has been provided to the fund within the 30-day period (reg 7.04(4)). The contribution must be returned even if more than 30 days has expired since the trustee became aware of the inconsistency (ID 2009/29).

Where a contribution is returned, the fund is also authorised to take certain actions under reg 7.04(4) to the extent permitted by the rules of the fund. For example, a fund may return an amount that reflects investment outcomes such as gains or losses that the fund made after the contribution was accepted and that is net of administrative costs.

[AMSG ¶3-220; SLP ¶2-982]

¶13-840 TFN approvals

The TFN rules in ITAA36 are discussed in ¶33-000 and following.

In addition to the above, SISA Pt 25A contains specific TFN provisions for trustees of eligible superannuation entities and regulated exempt public sector superannuation schemes (superannuation providers) and their members (SISA s 299A–299Z). APRA shares administration of Pt 25A with the Commissioner of Taxation (SISA s 6(1)).

APRA has made Superannuation Industry (Supervision) Tax File Number approval No 1 of 2017 (F2017L01262) which sets out the ''approved manner'' in which a TFN can be collected, reported, quoted, dealt with and used. The 2017 approval also reflects the current Privacy (Tax File Number) Rule 2015 (2015 TFN Rule) issued by the Privacy Commissioner under s 17 of the *Privacy Act 1988*.

The 2017 approval is made under Pt 25A Div 2 and 3 which are administered by APRA except to the extent that they relate to SMSFs (in which case the Divisions are administered by the Commissioner). The approvals made by the 2017 approval under s 299E(1), 299G(1), 299M(2), 299N(2) and 299P(a) therefore do not apply to SMSFs, except for the approval made under s 299S(1)(b) which also applies to an SMSF.

The RSAA 1997 contains TFN provisions equivalent to SISA Pt 25A (RSAA Pt 11). APRA has made a similar TFN approval which outlines the approved manner in which a TFN can be collected, reported, quoted, dealt with and used by RSA providers and RSA holders under RSAA s 134, 135(1), 136(1), 138(2), 142(1) and 139(a) (Retirement Savings Accounts Tax File Number approval No 1 of 2017 (F2017L01270).

http://www.bookshop.com

¶13-850 Unclaimed superannuation money

Unclaimed superannuation money can be general unclaimed money and small superannuation accounts of lost members and inactive accounts of unidentifiable members and unclaimed superannuation of former temporary residents.

Under the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (SUMLMA), superannuation funds, ADFs and RSA providers must report certain "lost members" information to the ATO and pay to the ATO any "unclaimed money" (defined in SUMLMA s 12 and 14) and unclaimed superannuation of "former temporary residents" (defined in SUMLMA s 20AA) that they hold.

Funds and RSA providers must also pay to the ATO "lost member accounts" (within the meaning in SUMLMA s 24B) from the 2010/11 financial year. These are accounts of lost members with balances below the threshold amount of $6,000 (increased from $4,000 from 31 December 2016), or inactive accounts of unidentifiable lost members where the fund has not received an amount for the member within the last 12 months (reduced from five years from 30 December 2012) (SUMLMA s 24B(1)(b), (2)(b)).

The unclaimed money provisions do not apply to defined benefit interests. Prescribed state and territory public sector superannuation schemes are permitted, but not required, to pay unclaimed money, lost member accounts and former temporary resident's unclaimed moneys to the Commissioner (SUMLMA s 18AA; 20JA).

Taxation treatment of unclaimed money repayments

The Commissioner must, if satisfied that it is possible to do so, pay a person's unclaimed superannuation money that it holds to a complying superannuation fund identified by the person or, if the person has reached eligibility age or the amount is below the threshold amount, to the person. If the person has died, payment can be made to the deceased person's beneficiaries or legal personal representative (SUMLMA s 17(2); 20H; 24G).

Individuals are also able to reclaim unclaimed money that has been paid to the Commissioner at any time. Payments of former unclaimed money and other amounts which are made by the Commissioner to entitled persons under s 17(2), 20H or 24G are treated as if they are paid from a complying superannuation fund and are taxed as superannuation benefits (¶14-100, ¶14-130).

An amount of less than $200 repaid by the Commissioner is non-assessable non-exempt income (¶14-310).

An amount repaid by the Commissioner under s 20H that is a departing Australia superannuation payment (DASP) is non-assessable non-exempt income but is subject to final withholding tax (¶14-340).

Interest payable on unclaimed money held by the ATO

From 1 July 2013, the Commissioner must pay interest under s 24G(3A) or 24G(3B) on all unclaimed superannuation money payments in respect of individuals under s 24G(2). Also, from that date, interest will be paid under s 17(2AB) or 17(2AC) on general unclaimed money paid by the Commissioner under s 17(2), or under s 20H(2AA) on unclaimed money payments for former temporary residents under s 20H(2). The interest amount payable is worked out in accordance with the Superannuation (Unclaimed Money and Lost Members) Regulations 1999 (reg 4D to 4F).

The tax treatment of the interest paid by the Commonwealth on unclaimed money is as follows:

- interest paid, other than interest paid on the superannuation of former temporary residents, is a tax free component of a superannuation benefit (¶14-140)
- interest paid on the return of unclaimed superannuation to former temporary residents is subject to DASP tax (¶14-340)
- interest paid to current residents of Australia is tax-free, and
- interest paid in respect of unclaimed First Home Saver Accounts is exempt from tax (ITAA97 former s 51-120(c), (d); s 307-142(3B), (3C)).

¶13-870 Superannuation levies

All superannuation entities are liable to pay a supervisory levy each year, while superannuation entities (other than SMSFs) may also be liable to pay a financial assistance fund levy as determined from time to time.

For non-SMSFs, the supervisory levy is imposed by the *Superannuation Supervisory Levy Imposition Act 1998* (SSLIA) and the funding levy is imposed by the *Superannuation (Financial Assistance Funding) Levy Act 1993*. Administrative provisions for both levies are set out in the *Financial Institutions Supervisory Levies Collection Act 1998*. For SMSFs, the relevant Acts are the *Superannuation (Self Managed Superannuation Funds) Supervisory Levy Imposition Act 1991* and the *Superannuation (Self Managed Superannuation Funds) Taxation Act 1987*.

Supervisory levy

The supervisory levy is an annual impost on superannuation entities (ie funds, ADFs and PSTs) to recover the cost of their supervision by APRA and the Commissioner. The levy is deductible as a tax-related expense (ITAA97 s 25-5). Late lodgment charges and payments by way of or as a penalty are not deductible (ITAA97 s 26-5; 26-90).

Supervisory levy

Levy payer	Maximum restricted levy amount	Minimum restricted levy amount	Restricted levy percentage	Unrestricted levy percentage
SAF or SMADF				
– 2012/13 and later years	$590	$590	0%	0%
SMSF				
– 2013/14 and later years	$259	$259	0%	0%
Other superannuation entity (not an SMSF, SAF or SMADF)				
– 2016/17	$260,000	$2,500	0.00324%	0.007075%
– 2016/17 (if a PST)	$130,000	$2,500	0.00162%	0.001641%
– 2017/18	$300,000	$3,500	0.00307%	0.005655%
– 2017/18 (if a PST)	$150,000	$3,500	0.00154%	0.001413%

http://www.pbookshop.com

balance includes his/her superannuation interests in *all* funds (ie the superannuation income stream can be from another income stream provider, which is not the member's SMSF or small APRA fund), and

- at a time during the income year this member has a superannuation interest (in accumulation or in retirement phase) in the fund (ITAA97 s 295-387) (¶13-140).

Law Companion Guideline LCG 2016/12 provides guidelines and examples on how an individual's total superannuation balance is calculated (see also *Draft* LCG 2016/D12: www.ato.gov.au/law/view/pdf/adhoc-html/lcg2016-012dc.pdf).

The terms ''immediately before'' and ''just before'' the start of the financial or income year as the relevant time for calculating a total superannuation balance refer to the end of 30 June of the previous financial or income year (LCG 2016/12 para 4).

What is an individual's total superannuation balance at a particular time

An individual's total superannuation balance at a particular time is the *sum* of the amounts below, *reduced* by the sum of any structured settlement contributions:

- the accumulation phase value of the individual's superannuation interests that are *not* in the retirement phase (s 307-205(2); 307-230(1)(a))
- if the individual has a superannuation income stream in the retirement phase, the individual's transfer balance or modified transfer balance (but not less than nil). For an individual who receives certain account-based superannuation income streams in the retirement phase and/or who has made structured settlement contributions, the individual's transfer balance is modified for the purpose of calculating the total superannuation balance (see below) (s 307-230(1)(b), (4)), and
- the amount of any roll-over superannuation benefit (¶14-450) not already reflected in the individual's accumulation phase value of superannuation interests or transfer balance (ie under the first and second dot points) (307-230(1)(c)).

The default rule for determining the value of an individual's accumulation phase superannuation interest at a particular time is the accumulation phase value of the superannuation interest as set out in regulations made for the purposes of ITAA97 s 307-205(2)(a), or the total amount of superannuation interests that would become payable if the individual had voluntarily ceased the interest at that time (ITR97 reg 307-205.02C).

For the purposes of the second dot point, the individual's transfer balance is modified by disregarding the debit that has arisen in the transfer balance account in respect of the structured settlement contribution (ie the structured settlement contribution debit is added back to the individual's transfer balance).

The effect of third dot point is to ensure that roll-overs that occur just before the end of a financial year are included in the individual's total superannuation balance which is calculated at the end of 30 June of that financial year.

Transitional arrangements — calculating an individuals' transfer balance just before 1 July 2017

An individual's total superannuation balance may need to be calculated just before 1 July 2017, for example, to determine the individual's eligibility to access the bring forward non-concessional contributions cap in the 2017/18 financial year.

For this purpose, an individual's transfer balance just before 1 July 2017 (transitional transfer balance) is taken to be equal to the sum of the individual's transfer balance credits in his/her transfer balance account (¶14-340) just after 1 July 2017 *less* the sum of any transfer balance debits in the transfer balance account arising from a payment split (subject to any applicable modification rules) (ITTPA s 307-230).

When is a superannuation income stream in the retirement phase?

A superannuation income stream is in the **retirement phase** at a time if:

- a superannuation income stream benefit is payable from it at that time (see ''Exceptions — income streams not in the retirement phase'' below), or
- it is a deferred superannuation income stream (within the meaning in the SIS Regulations) and income stream benefits will be payable from it to a person after that time, and the person has satisfied (whether at or before that time) the condition of release (dealing with retirement, terminal medical condition, permanent incapacity, or attaining age 65) (s 307-80(2)(c)).

Exceptions — income streams not in the retirement phase

Certain superannuation income streams are not in the retirement phase by operation of the law, either because the law specifically excludes the superannuation income stream from being in the retirement phase, or the superannuation income stream fails to meet the definition of a superannuation income stream in the retirement phase (s 307-80(3), (4)).

Examples of income streams that are not in retirement phase (and are therefore in the accumulation phase) are:

- a deferred superannuation income stream that has not yet become payable to a person and the person has not yet met a relevant condition of release. For example, if a person purchases a deferred superannuation income stream before meeting a relevant condition of release, it will form part of the accumulation phase value until he/she satisfies a relevant condition of release or income streams start to become payable
- a transition to retirement income stream, or a transition to retirement income pension, and a non-commutable allocated annuity or non-commutable allocated pension, within the meaning in SISA Pt 6 or the RSAA Pt 4 (s 307-80(3)), and
- a superannuation income stream that stops being in the retirement phase, eg when a commutation authority is not complied with or the income stream fails comply with the SISR pension and annuity standards (see *Taxation Ruling* TR 2013/5 which explains when a superannuation income stream commences or ceases: ¶14-125).

An individual's transfer balance account is discussed in ¶14-340. The requirement that the transfer balance cannot be less than nil is determined after the modifications below have been made.

An individual has a modified transfer balance if he/she has:

- a prescribed account-based superannuation income stream in the retirement phase, and/or
- made a structured settlement contribution to:
  - disregard certain credits and debits that have arisen in the individual's transfer balance account in respect of the account-based superannuation income streams, and
  - reflect the current value of superannuation interests that support those prescribed account-based superannuation income streams in the retirement phase (s 307-230(3)).

Modifications for account-based income streams

An individual's transfer balance is modified if a credit has arisen in the individual's transfer balance account in relation to the following account-based superannuation income streams:

- allocated annuities or pensions
- account-based annuities or pensions
- market linked annuities or pensions (s 307-230(4)).

http://www.pbookshop.com

benefits which are rolled over. That is, the roll-over superannuation benefit is not treated as a superannuation contribution (¶13-825), and are considered as non-assessable non-exempt income (ITAA97 s 306-5).

When determining if a superannuation fund has made a death benefit payment for the purpose of s 307-5(1), journal entries are insufficient as a death benefit must actually be paid (eg by the transfer of ownership of a deceased member's assets). Simply debiting the amount of a deceased member's benefits from his/her account in a superannuation fund and crediting the account of the member's spouse in the fund with that amount by way of journal entry in the fund's accounts does not constitute a ''payment'', or a ''cashing'', of the deceased member's benefits as a lump sum to the spouse (ID 2015/23). For the deceased member's benefits to be ''cashed'' as a lump sum to the spouse under the benefit payment standard in SISR reg 6.21 (which requires a member's benefits to ''cashed'' as soon as practicable after the member's death: ¶13-800) the benefits must actually be ''paid'' (by being ''cashed'') to the spouse as required by SISR reg 6.17.

Contributions-splitting superannuation benefit

From 1 January 2006, eligible members of superannuation funds and exempt public sector superannuation scheme (EPSSS) and RSA holders can split personal and employer contributions with their spouse. Contributions-splitting is effectively a roll-over, transfer or allotment of an amount of a member's benefit to his/her spouse in accordance with SISR Div 6.7 and RSAR Div 4.5. Such an amount is a ''contributions-splitting superannuation benefit''.

A contributions-splitting superannuation benefit payment is not a superannuation benefit of the member spouse originally entitled, but a benefit of the receiving spouse (s 307-5(6)).

Family law superannuation payment

A ''family law superannuation payment'' is a payment of any of the following kinds and which satisfies the requirements specified in the ITR97:

- a payment in accordance with Pt VIIIB of the *Family Law Act 1975* or the Family Law (Superannuation) Regulations 2001
- a payment in accordance with Pt 7A of the SISR or Pt 4A of the RSAR, or
- a payment specified in the ITR97 (s 307-5(7)).

These are payments from a member spouse's entitlement in a superannuation fund for the benefit of a non-member spouse. A family law superannuation payment is not a superannuation benefit of the member spouse originally entitled but a benefit of the non-member spouse (s 307-5(5) to (7)).

Payments that are not superannuation benefits

The following are not superannuation benefits (s 307-10):

- Payments under an income stream because a person is temporarily unable to engage in gainful employment. These payments are considered to be replacement of regular income and are taxable at marginal rates.
- A benefit to which ITAA36 s 26AF(1) or 26AFA(1) applies. These are benefits paid in breach of the payment standards in the SISR and are taxable at marginal rates (¶14-300).
- An amount required by the *Bankruptcy Act 1966* to be paid to a trustee in bankruptcy. These amounts are not subject to tax.

- Payments received from a commutation of a pension from a constitutionally protected fund or a superannuation provider and wholly applied to pay a superannuation contributions surcharge liability. These payments are tax-free.
- Pension or annuity payments from a foreign superannuation fund (¶14-420).

[AMSG ¶8-130; FITR ¶296-000ff; SLP ¶38-050ff]

¶14-120 Superannuation lump sums and income streams

A superannuation benefit can be paid as either a lump sum or an income stream benefit. The benefit can be either a superannuation member benefit or a superannuation death benefit (ITAA97 s 307-5). A superannuation lump sum means a superannuation benefit that is not a superannuation income stream benefit (s 307-65).

A superannuation benefit is a ''superannuation member benefit'' if:

- it is paid to the member (as provided in column 2 of the table in s 307-5(1)), or the member requests that it be paid to another person or to an entity
- it arises from the commutation of a superannuation income stream and would have been a superannuation death benefit but was paid after the latest of six months after the death of the deceased member, six months after the grant of probate or letters of administration in respect of the deceased member's will or estate, or six months after the legal action or the processing of the benefit is completed, or
- it is paid as a ''contributions-splitting superannuation benefit'' or a ''family law superannuation payment'' (¶14-100) (s 307-5(1) to (3); 307-15) (¶14-100).

The meaning of ''superannuation income stream benefit'' and the minimum standards with which a payment from a superannuation interest will qualify as a superannuation income stream for tax purposes are discussed in ¶14-125.

The tax treatment of superannuation member benefits received from a complying superannuation plan is discussed in ¶14-200 and the treatment of benefits received from a non-complying plan (including foreign superannuation funds) is discussed in ¶14-400 and ¶14-420.

Superannuation income stream benefits (eg superannuation pensions) made to a person in each year may be subject to tax, based on the person's age and whether the payer is a taxed or untaxed source (¶14-220, ¶14-240, ¶14-280).

Superannuation death benefits

A superannuation benefit is a ''superannuation death benefit'' if it is paid to a taxpayer (eg a dependant or non-dependant or the trustee of a deceased estate) because of the death of the person originally entitled to the benefit (eg a fund member), or the payment arose from the commutation of a superannuation income stream that was originally payable to the deceased within certain time limits (¶14-100) (s 307-5(1), Table column 3; 307-5(3)).

The tax treatment of superannuation death benefits from a complying plan is governed by Div 302 and is discussed at ¶14-220 and ¶14-240.

Excess transfer balance tax and additional tax consequences for certain income streams

From 1 July 2017, a transfer balance cap applies to limit the amount of an individual's total income stream benefits in the retirement phase (¶13-140). An excess transfer balance tax is payable for exceeding the cap (¶14-360). Income streams that are capped defined benefit income are not subject to the transfer balance tax, but if they exceed a defined benefit income cap in a year from 2017/18, additional tax consequences apply (¶14-370).

http://www.pbookshop.com

Standards for innovative income stream products

From 1 July 2017, innovative income stream products which meet the standards in SISR reg 1.06A are also pensions and annuities under SISA and are superannuation income stream benefits for tax purposes.

The standards are intended to cover lifetime products that do not meet the annuity and pension standards in SISR 1.05(11A) and reg 1.06(9A). Under the reg 1.06A standards, the income streams are required to be payable for a beneficiary's remaining lifetime, and income stream payments can be guaranteed in whole or part by the income stream provider, or determined in whole or part through returns on a collective pool of assets or the mortality experience of the beneficiaries of the asset pool. The income streams may also have a deferral period for annual payments and are permitted to be commuted subject to a declining capital access schedule and preservation rules (see further ''Income streams must meet minimum standards'' below). Examples of innovative income streams products are deferred superannuation income streams, pooled investment pensions and pooled investment annuities (¶14-130).

The standards in reg 1.06A(3) contain four key elements:

- benefit payments must not commence until a primary beneficiary has retired, has a terminal medical condition, is permanently incapacitated or has attained the age of 65 (these are the conditions for the release of benefits under items 101, 102, 102A, 103 and 106 in SISR Sch 1 where there is also no cashing restriction)

- benefit payments, of at least annual frequency, must be made throughout a beneficiary's lifetime following the cessation of any payment deferral period

- after benefit payments start, there must be no unreasonable deferral of payments of the income stream

- the income streams must comply with restrictions on amounts that can be commuted to a lump sum or for roll-over purposes based on a declining capital access schedule commencing from the retirement phase.

The first element ensures that income streams payments can only commence on the happening of the prescribed condition of release to the primary beneficiary and that the income stream providers do not receive an earnings tax exemption (¶13-140) until the primary beneficiary has satisfied the specified condition of release in SISR Sch 1 (see above).

The second element requires income stream benefit payments to be made at least annually (unless the income stream is a deferred superannuation income stream and payment of the benefits has not yet started), and benefit payments must continue throughout the life of a beneficiary once payment starts.

Under the third element, the amount of benefit payments must be determined using a method which ensures there is no unreasonable deferral of benefit payments after income stream payments commence. That is, a genuine retirement income stream must be paid to a beneficiary, and benefit payments are made in a manner that does not circumvent the commutation rules or provide estate planning benefits (see reg 1.06A(3)(c) which sets out the factors to determine whether there is any unreasonable deferral of benefit payments).

The fourth element imposes restrictions on the amount of capital from the income stream that can be accessed through a lump sum commutation or a commutation of an amount that is then rolled over within the superannuation system. These restrictions apply from the day that the primary beneficiary of the income stream enters the ''retirement phase''. The ''retirement phase start day'' means:

- for a deferred superannuation income stream — the *later* of:
  - the day that the primary beneficiary satisfies items 101, 102, 102A, 103 or 106 of the conditions of release in SISR Sch 1 (see above), and
  - the day the superannuation interest is acquired
- otherwise — the day that payments of the benefit start to be payable (SISR reg 1.03(1)).

The retirement phase start day aligns with the point in time that a credit arises for the beneficiary is his/her transfer balance account (¶14-340) in respect of the superannuation income stream.

When an income stream commences and ceases

The time of commencement and cessation of a superannuation income is important to determine the taxation consequences for both the superannuation fund (¶13-130, ¶13-140) and the member in relation to superannuation income stream benefit paid (¶14-220).

TR 2013/5 clarifies when a ''superannuation income stream'' (within the meaning in ITR97 reg 995-1.01(a)(ii)) commences and when it ceases. These are income streams which meet the standards in SISR reg 1.06(1) and 1.06(9A)(a) (commonly called account-based pensions, including transition to retirement income streams).

A superannuation income stream commences on the first day of the period to which the first payment of the income stream relates, as determined by reference to the terms and conditions of the income stream agreed by the trustee and member, the fund rules and the SISR standards. Once an income stream commences, it is payable (ie there is an obligation to pay the benefits under that superannuation income stream) until such time as that income stream ceases.

An income stream ceases when there is no longer a member who is entitled, or a dependent beneficiary of a member who is automatically entitled, to be paid an income stream benefit from the superannuation interest supporting the income stream, as determined by reference to the fund's trust deed, the SISR standards and the particular facts and circumstances for payment of the member's or dependent beneficiary's benefits. It is not the effect of ITR97 reg 307-200.05 to ensure that, once an income stream commences, it can only cease once the amount in the relevant interest is exhausted. The common circumstances in which an income stream ceases are:

- failure to comply with SISR pension standards and payment standards in an income year — this is the case even if a member remains entitled to receive a payment from the fund in relation to the purported income stream under the fund's trust deed or general trust law concepts

- exhaustion of capital — ie when the capital supporting the income stream has been reduced to nil, and the member's right to have any other amounts applied (other than by way of contribution or roll-over) to his/her superannuation interest has been exhausted

- commutation — ie upon receipt of a valid request from a member or a dependent beneficiary to *fully* commute his/her entitlements to future superannuation income stream benefits for a lump sum entitlement (a partial commutation does not result in the cessation of the income stream)

http://www.pbookshop.com

assessments under different provisions in respect of the same income for a particular year are valid (*Case X36*), as are assessments against more than one taxpayer in respect of the same income (¶25-100).

[FTR ¶79-700, ¶79-800]

¶25-140 Default or arbitrary assessments

In certain circumstances, the Commissioner may make a default or arbitrary assessment of the amount on which, in the Commissioner's judgment, tax ought to be levied and that amount then becomes the taxpayer's taxable income (ITAA36 s 167). A default assessment may be made where a taxpayer has failed to furnish a return, or where the Commissioner is dissatisfied with the return filed, or has reason to believe that a person who has not made a return has derived taxable income. It may be issued as an original or amended assessment.

The Commissioner's policy on issuing a default assessment is set out in PS LA 2007/24. Reasonable grounds for determining a taxpayer's income may include information provided by third parties, any internal or external data matching information, indirect audit methodologies, relevant economic statistics or extrapolation from previous years' returns. The Commissioner will generally advise the taxpayer of the intention to issue a default assessment and the basis upon which it has been calculated.

A default assessment is commonly made where, following an investigation into a taxpayer's financial affairs, the increase in net assets over a fixed period is found to be inconsistent with the taxpayer's disclosed income. That increase, adjusted for private and other non-allowable expenditure and for non-assessable receipts, forms the basis of what is often called an assessment on an ''assets betterment'' basis.

If sufficient information is not available to enable the variation in net assets to be calculated separately for each year in the period under investigation, the practice is to apportion the increase from the beginning to the end of the period over the intervening years either equally or on some other basis considered appropriate.

The Commissioner is not required to correctly ascertain the taxpayer's assessable income and allowable deductions when making a default assessment (*Eldridge*; *Allard*). The Commissioner does not have to make inquiries of the taxpayer or the taxpayer's agent before issuing the assessment (*McCleary*). As long as the Commissioner makes a genuine estimate of the taxpayer's taxable income and does not simply pluck a figure out of the air, a default assessment may come close to guesswork and still be valid (*Briggs*). The onus is then on the taxpayer to object against the assessment (¶28-010) and, if necessary, prove in review or appeal proceedings that the assessment is excessive (¶28-130). To do this, the taxpayer must show what the assessment ought to have been, not merely that it was excessive (*Mulherin*).

An assessment is not rendered invalid because it effectively induces the taxpayer to discuss his/her affairs with the ATO so that a more accurate assessment of the taxable income can be made (this is likely to happen in any event as the taxpayer has to prove that the assessment is excessive: ¶28-130). The mere indication that an assessment will be reviewed later will not make that assessment invalid (*Simons*; *McCleary*). An assessment made for the purpose of opposing bail would not be a bona fide assessment, whereas one made for the purpose of issuing a notice to collect a tax liability from a third party (¶25-540) would be (*Madden v Madden*). The issue of a ''garnishee notice'' (¶25-540) before the issue of a notice of assessment did not affect the validity of the assessment in *Marijancevic* and there was no evidence of conscious maladministration of the assessment process, see *Futuris Corporation* (¶25-100).

[FTR ¶79-600]

Audits and Access Powers

¶25-200 Tax audits

A tax audit is the systematic examination of a taxpayer's affairs by the ATO to determine whether the taxpayer has fully complied with the tax laws. This includes whether the taxpayer has disclosed all assessable income and has correctly claimed deductions or tax offsets in the income years concerned (an audit may cover more than one year). The ATO's audit programs are also designed to promote voluntary compliance with the tax laws and to help the ATO identify areas of law that may need clarification.

Tax audits are not governed by any particular statutory provisions, except those that confer on the Commissioner responsibility for the general administration of relevant tax laws (ITAA36 s 8). In addition, the ATO relies on its access and information-gathering powers (¶25-220, ¶25-240) to carry out its audit programs effectively. It is lawful for the Commissioner (and duly authorised ATO officers) to randomly select for audit a taxpayer within a particular group (*Industrial Equity* (1990)).

Decisions made by the Commissioner in the course of an audit are only reviewable under the *Administrative Decisions (Judicial Review) Act 1977* where they are made under a specific provision (as distinguished from the general power of administration under ITAA36 s 8) (*Robinswood*).

Conduct of audits

Under the *Taxpayers' Charter*, the ATO undertakes to conduct audits in an impartial, fair, reasonable and professional manner and to treat taxpayers in accordance with the law, its policy and the principles outlined in the charter.

It also undertakes to take into account the taxpayer's relevant circumstances when it makes decisions, try to minimise cost and inconvenience to the taxpayer, and complete audits as quickly as it can. This, however, will vary from case to case.

Although the ATO has a benchmark of two years for completing large business audits, there is no particular time period within which the Commissioner must complete an audit. It should be noted, however, that in the absence of fraud or evasion (¶25-330), there are specified time limits for amending assessments (¶25-310 – ¶25-320).

Further, it has been held that failure to comply with the Commissioner's Guidelines for the Conduct of Auditors and Taxpayers in Complex and Large Case Audits was not reviewable (*Robinswood*).

The ATO also undertakes during an audit to guide the taxpayer through the process, arrange mutually convenient interviews or meetings, explain the purpose of any interview or visit, ask clear and unambiguous questions and provide the taxpayer with all reasonable assistance and explanations to clarify their meaning, and allow the taxpayer to choose someone to act on their behalf or to attend interviews with them.

ATO's expectations of the taxpayer

In turn, the ATO expects the taxpayer to: work cooperatively with them; be truthful and honest in their dealings with the ATO; provide complete, accurate and timely responses to requests for information; and provide tax officers with full and free access to buildings, premises, records and documents.

Completion of audit

When completing an audit or sometimes during the audit, the ATO will inform the taxpayer of the results and its decision. If an adjustment is made, it is required in accordance with the charter to clearly explain the basis for them as well as the reasons for any penalty imposed. It is also required to give the taxpayer written notification of the outcome of the audit (generally within seven days of the decision) and inform the taxpayer of their rights of review.

http://www.ibookshop.com

ATO's overall approach and results

The ATO says that it wants to make it easy for taxpayers to participate in the tax and superannuation systems. It will do this by fostering willing participation through improved services. For the majority of taxpayers who meet their obligations, the ATO aims to intervene as little as possible.

However, it will also deal with non-compliance, taking care to strike the right balance between encouragement and enforcement according to individual circumstances based on:

- risk — the likelihood of non-compliance and the amount of revenue or superannuation at stake
- transparency — the extent to which a taxpayer is honest and open about their tax and superannuation affairs, and
- behaviour — whether a taxpayer shows signs of non-compliance, such as failing to lodge tax returns.

Tax practitioners

The ATO undertakes ongoing practitioner compliance programs focused on: practice management, including lodging clients' returns by lodgment program due dates; return preparation processes, including omission of income and refund fraud; information security; and promotion of tax avoidance schemes.

The ATO also maintains a focus on tax professionals who fail to meet their own obligations, such as lodging returns and paying liabilities, targeting them for compliance action as appropriate.

GST

For GST, the ATO issues around 2.2 million refunds with a value of $54b each year. It tackles incorrect and fraudulent activity statement refunds through a program of verification checks before and after payment. In such cases the ATO may contact the business, their representative or third parties to understand the nature of the enterprise and what gave rise to the refund.

The ATO continually finds enterprises that fail to meet their GST obligations for real property transactions. It also sees the incorrect reporting of sales, acquisitions and input tax credits, and failure to lodge BASs. Accordingly, the ATO uses external data to match property transactions with BASs to identify under-reporting of sales. Through its matching and linkages to external data sources the ATO is able to identify and track those who fail to meet their GST obligations.

Individuals

For individual taxpayers, the ATO focuses on:

- work-related expenses, especially higher than normal claims, claims for already-reimbursed expenses and private expense claims such as travel between home and work, and
- rental property expenses, especially excessive deductions claimed for holiday homes, husbands and wives inappropriately splitting rental income and deductions for jointly owned properties, claims for repairs and maintenance shortly after the property was purchased and interest deductions being claimed for the private proportion of loans.

Private groups and high wealth individuals

Private groups and high wealth individuals are defined by the ATO as non-public or non-foreign-owned economic groups with an annual turnover of greater than $2m or resident individuals who, with their business associates, control net wealth of over $5m.

For this segment, the behavioural characteristics that attracts the ATO's attention include large one-off or unusual transactions, a history of aggressive tax planning, tax outcomes inconsistent with the intent of the tax law, lifestyles not supported by after-tax income, treating private assets as business assets, accessing business assets for tax-free private use, and poor governance and risk-management systems. In particular, the ATO also looks closely at claimed capital losses.

Public groups and international

In relation to public groups and international entities, the ATO focuses on six broad industry groups: superannuation, insurance, energy and resources, banking and finance, manufacturing, and sales and services. However, across all industries, it looks at particular tax risks, such as losses and international profit shifting, and particular events in the business life cycle, such as private equity investments. Increasingly, the ATO seeks to understand taxpayers' business models, tax performance and changes/variations over time or relative to peers.

The ATO says that it wants to identify compliance risks and opportunities for enhanced taxpayer service. By clustering common issues across taxpayers it can treat them in a more timely, consistent and effective manner — for example, it is reviewing the offshore service hubs used by several mining companies to address profit shifting risk through transfer pricing.

The following issues will attract the ATO's attention: capital gains tax, losses — capital and revenue, profit shifting, concessions and offshore evasion.

The following structuring and business events will also attract the ATO's attention: mergers and acquisitions, divestment of major assets and demergers, share buy-backs, capital raisings and returns of capital, private equity entries and exits, initial public offerings, trusts, consolidation, infrastructure investments, financial arrangements and cessation of business operations in Australia.

Small business

In relation to small business, the ATO has developed benchmarks for over 100 industries, using data from income tax returns and business activity statements (BASs). Businesses can use these benchmarks to compare their performance with the rest of their industry. The ATO may review businesses if they are outside the benchmark range.

SMSFs

Issues that the ATO was focusing on in relation to SMSFs for 2016/17 included:

- supporting trustees who are willing to self-correct and rectify regulatory issues in their fund
- bringing more intensity and effort to compliance activities and enforcement actions where trustees will not engage with the ATO and/or are deliberately and persistently not complying with their obligations
- bringing more intensity and focus to activities that review and assess the independence and quality of SMSF audits
- maintaining and building on strategies aimed at trying to help prevent non-compliance or other issues for SMSFs. This includes identifying at-risk entrants into the system and taking appropriate action
- making it easier for SMSF trustees to comply with their regulatory and income tax obligations, eg with practical compliance guidelines and safe harbours, and
- supporting and assisting trustees in complying with new measures.

http://www.ebookshop.com

Tax Avoidance Taskforce

The ATO has established a special 1,000 strong Tax Avoidance Taskforce, to extend current compliance programs targeting multinationals, large public and private groups operating in Australia. The Taskforce's activities include 71 audits in the large business area covering 59 multinational corporations.

According to the ATO, at least seven major multinational audits are expected to come to a head before 30 June 2017, four in e-commerce and three in the energy and resource industries. The ATO says that it raised $2.9b in tax liabilities from multinational enterprises in 2016/17.

The ATO has also met with 175 affected taxpayers or their advisors about their structures and to ensure they are compliant with the requirements of the Multinational Anti-Avoidance Law (MAAL) (¶30-200).

Professional firms and Pt IVA risk

The ATO released guidelines on how it will assess the risk of ITAA36 Pt IVA applying to the allocation of profits from a professional firm carried on through a partnership, (service) trust or company, where the income of the firm is not personal services income. The guidelines apply to relevant arrangements within professional firms including those providing services in the accounting, architectural, engineering, financial services, legal and medical professions. The guidelines apply from 30 June 2015. However, the ATO has committed to reviewing them during the 2016/17 year, subject to the possibility of judicial guidance pending an appropriate test case.

The guidelines deal with: (1) individual professional partnerships (IPPs) that provide professional services; (2) legally effective partnerships, trusts or companies; (3) income of the firm that is not personal services income; (4) ATO risk assessment factors for remuneration of IPPs; (5) additional information on the application of benchmarks, and; (6) Everett assignments, ie assignment of an interest in a partnership.

In relation to Everett assignments (¶5-160), the ATO says that Pt IVA is capable of applying to them and it will consider applying Pt IVA to assignments entered into from the 2015/16 year.

Annual compliance arrangements

The purpose of Annual Compliance Arrangements (ACAs) entered into by the ATO and key/large taxpayers is to provide a compliance and risk management relationship framework between the parties. ACAs are available for income tax, GST, excise, petroleum resource rent tax, minerals resource rent tax and FBT or any combination of these taxes. Each tax covered by an ACA will have a separate schedule and is built around the taxpayer having sound tax risk management processes and a commitment to ongoing disclosure of tax risk.

Key benefits of entering into an ACA include: a speedier resolution of technical issues; administrative solutions to resolve compliance irritants; centralised points of contact and ongoing dialogue on technical matters, including access to ATO senior officers; a closure of returns to further ATO review; concessional treatments of penalties and interest; a plan outlining agreed processes and timelines; the possibility of extension of thresholds for correcting GST errors for a GST ACA; not being subject to post-lodgment risk reviews or audits for periods and income years covered by an ACA; not needing to complete the RTP schedule for income years covered by an ACA; and not being subject to a pre-lodgment compliance review.

External compliance assurance process pilot

The ATO has been piloting an ''external compliance assurance process'' (ECAP) which allows selected companies, with an annual turnover of between $100m and $5b, to use a registered company auditor to clarify factual matters identified by the ATO. Under ECAP, agreed-upon procedures are used by the external company auditors.

The ATO hopes that ECAP will deliver an enhanced client experience, reduced compliance cost and red tape, greater cost-effectiveness and more efficient use of ATO resources.

According to the ATO, the ECAP pilot was successful in all its objectives and the use of agreed-upon procedures was effective for both taxpayers and the ATO. However, further consideration will be given to the use of ECAP.

¶25-210 Negotiated settlements

The ATO policy on the settlement of taxation and superannuation disputes, including disputes involving debt, are set out in PS LA 2015/1 (Code of settlement). Among other things, the code provides that settlements under the code must be finalised by the parties signing a deed of settlement. The ATO has model deeds available to use as a basis for a deed of settlement. ''A practical guide to the ATO code of settlement'' provides examples and illustrations of how the code operates.

PS LA 2007/6 provides practical guidance for the settlement of widely-based tax disputes, including disputes involving tax planning arrangements (whether subject to the general anti-avoidance rules or not). A panel has also been established to advise on widely-based settlements and this panel accepts submissions from taxpayers and/or their advisers through the ATO officer who is the decision-maker for the relevant case(s).

Settlement under the code involves an agreement between parties to resolve matters in dispute where one or more of the parties make concessions on what they consider is the legally correct position. The code focuses on resolving disputes as early as possible with settlement being part of good tax administration and all settlements being predicated on the following factors: (1) litigation risk; (2) cost vs benefit; and (3) the potential impact on future compliance.

The basic duty of the Commissioner is to administer tax law, but in exercising that duty the Commissioner must also provide for reasonable and sensible administration and good management of the tax system. The *Public Governance Performance and Accountability Act 2013*, which underpins the code, requires the Commissioner to manage ATO resources efficiently, effectively, ethically and economically.

A dispute that would be considered for settlement would ordinarily be one where the taxpayer has (or will have) a right to challenge the Commissioner's decision, however settlement is considered as potentially a way to resolve a wide range of disputes and disagreements.

The code states that settlement would generally not be considered where: (1) there is a contentious point of law that requires clarification; (2) it is in the public interest to litigate; (3) there is an impact on future compliance.

Generally speaking, the ATO prefers to settle cases on an issue-by-issue basis and ''global'' settlements will only be entered into in exceptional cases and as a last resort. Ability to pay is not relevant in determining a taxpayer's liability, but it may give rise to other administrative arrangements to assist the taxpayer. A taxpayer's ability to pay will affect the likely cost-effectiveness of any litigation action; inability to pay would normally result in the debt being written off as being uneconomical to pursue. However, where it is considered that inability to pay tax has been deliberately created, settlement will be considered inappropriate without first escalating the matter.

Where settlements are not appropriate

According to the ''A practical guide to the ATO code of settlement'', settlement should generally not be considered where: (1) there is a contentious point of the law which requires clarification — in such cases, it may be appropriate to fund the litigation under the test case litigation program; (2) it is in the public interest to litigate; (3) the

http://www.pbookshop.com

behaviour is such that there is a need to send a strong message to the community — behaviour such as persistent, ongoing and/or expanding non-compliance, or blatant non-compliance which the community would expect the ATO to take action.

Alternative dispute resolution

A range of alternative dispute resolution (ADR) approaches, including mediation and conciliation, may be used to assist in reaching settlement of a tax dispute.

PS LA 2013/3 sets out what policies and guidelines must be followed by ATO officers when using ADR to resolve or limit disputes. It also suggests that ADR may be appropriate: (1) after the ATO issues a position paper (¶25-200); (2) during a review at the objection stage before a decision is made (¶28-070); or (3) during the litigation stage (¶28-080).

The ATO has embarked on a program to improve its ability to resolve disputes at an earlier point in time. It is currently running a pilot ADR program relating to smaller, less complex disputes, although the process may be used for any dispute if the parties agree. Taxpayers can access the program by emailing facilitation@ato.gov.au.

Potential for prosecution

It is ATO policy that officers do not use the threat of either prosecution or the imposition of severe penalties as a lever in settlement negotiations.

ATO officers do not have authority to make it a condition of a settlement agreement that the taxpayer will not be prosecuted for a possible offence or that proceedings associated with a prosecution will not be taken. ATO officers must make it clear to taxpayers that settlements and prosecutions are separate and the decision whether to prosecute is the responsibility of the Director of Public Prosecutions. Where the ATO advises a taxpayer that there is no intention to prosecute, the taxpayer should also be advised that the matter may be reconsidered if further information comes to light that reveals that the misconduct is more serious than first thought.

Where the ATO does decide to prosecute, officers must act in accordance with the ATO's prosecution guidelines, which are available on the legal database of the ATO website (law.ato.gov.au). See also ¶29-700.

The settlement agreement

All settlements should be evidenced by a written agreement between the parties. The settlement agreement will normally include how each particular issue has been resolved, relevant undertakings by the parties, treatment in future years, withdrawal of objections, requests for reviews and appeals, and payment arrangements. *Grofam* exemplifies the need for clarity in drafting the agreement.

The settlement should represent the final agreed position between the parties. Consequently, the ATO expects the taxpayer to agree not to object to any subsequent assessment (*Jonshagen*), or to agree to withdraw any objection, application for review or appeal already lodged. The ATO will adhere to the terms of the settlement, unless it emerges that relevant facts were not disclosed to the ATO.

The ATO will adopt the settlement as the basis for treating similar issues in future year assessments of the taxpayer unless: (i) the agreement relates to a particular issue but the application of the law remains unclear; (ii) the taxpayer's circumstances are materially different; (iii) there are subsequent amendments to the law; (iv) a taxation ruling has been released on the particular issue; (v) the settlement agreement specifically indicates that it is not to apply for future years or it provides for a different basis for dealing with the relevant issue; or (vi) the ATO has reviewed the matter and at a suitably senior level determined that the ATO position should be different or that the settlement is not soundly based.

¶25-220 Commissioner's right of access

The Commissioner and an individual authorised by the Commissioner are entitled to full and free access at all reasonable times, to documents, books or other property (TAA Sch 1 s 353-15).

Full and free access to electronically-stored records extends to the provision of login codes, encryption keys, passwords, and computer and software manuals, as well as access to hard copies of the records (TD 2002/16; TR 2005/9). All records should be able to be examined by the ATO to determine their authenticity and integrity. This may also include updating all of the encrypted data to allow for that data to remain accessible in the event of changes to either computer hardware or software and to ensure that the data stored on magnetic or other media does not become corrupted over time. The Commissioner's requirements for keeping electronic records are set out in TR 2005/9 (¶9-045).

This access power enables the Commissioner to obtain tax-related information from, for example, the offices of solicitors and accountants whose clients are being investigated for tax avoidance. In one case, it was held that the access power could be used to obtain documents from a bank for use in proceedings to recover unpaid tax (*Simionato Holdings (No 2)*). In another case, the Commissioner could access affidavits filed by the taxpayer husband in the Family Court but had to get permission from the court to use them for audit purposes (*Darling*, Full Family Ct).

It is an offence for a person to hinder or obstruct ATO officers exercising their right of access (¶29-700). This access power is subject to legal professional privilege (see below) and the public interest immunity (*Middendorp Electric Co v Law Institute of Victoria*) but documents and records held by a law institute on the income or assessment of one of its members were not protected from disclosure by the public interest immunity (*Law Institute of Victoria*). Note, however, that the decision to utilise the access power is subject to judicial review (¶28-180).

Examples of cases where the Commissioner has used the access power include ones involving: significant risk of destruction of records; significant offshore funds not accounted for in Australia; offshore promotion of tax avoidance for Australian residents; phoenix operations (¶25-420); evasion of a range of taxes; lodgment of false BASs; and significant risk to the revenue (*National Tax Liaison Group minutes of 31 March 2010 meeting*).

Scope of access power

The access power can also be used to obtain documents that the Commissioner considers will assist in an audit of a taxpayer's affairs, including documents held at the premises of a person acting for or advising the taxpayer (*Industrial Equity* (1990)). The random selection of the taxpayer in the *Industrial Equity case* did not invalidate the access notices as the Commissioner was endeavouring to fulfil his statutory function of ascertaining the taxpayer's taxable income.

An occupier of a building or any other place is specifically required to provide a duly authorised ATO officer with all reasonable facilities and assistance for the effective exercise of the access power. Such an officer should therefore be able to make reasonable use of, for example, office space, lighting, telephones, photocopiers and facilities to extract information stored on computer. The officer is also entitled to reasonable assistance in the form of advice as to where relevant documents are located and the provision of access to areas where those documents are located. An occupier who fails to provide the necessary facilities or assistance is liable for a fine (¶29-700).

Authorised officers are entitled to take all reasonable and necessary steps to remove any physical obstruction to access but should not act in an excessive manner. For example, if the owner of a safe deposit box refuses to open it or supply a key, the officer would be entitled to attempt to open the box with the assistance of a locksmith and, if that

http://www.pbookshop.com

fails, to break open the box by the reasonable use of force (*Kerrison*). Officers are not entitled to take possession of a taxpayer's records but they are entitled to make extracts or copies.

The access power does not permit ATO officers to take control of a taxpayer's offices or deny its staff access to their computer records. Nor does it permit the copying of all documents without any consideration of whether they are required for the purposes of the Act (*JMA Accounting*).

An officer is not entitled to enter or remain on premises if, after having been requested by the occupier to do so, the officer does not produce written proof of authority. An authorisation must be signed by the Commissioner or his delegate. It does not have to specify the premises to be searched or the documents that are to be the subject of the search. As written authorisation is only required to be produced on request, the existence of written authorisation is not a condition precedent to the exercise of the right of access (*Citibank*).

The Commissioner's access guidelines state that: (1) prior notice should be given of access requests unless there are exceptional circumstances; (2) officers should grant a request by the occupier of premises to delay the search temporarily to enable professional advice to be obtained; (3) where it is expected that some of the records sought will be subject to legal professional privilege, the custodian should be given the opportunity to make a privilege claim; (4) where access is temporarily delayed to enable professional advice to be obtained, arrangements should be made to ensure there is no tampering with the records; (5) the Commissioner reserves the right to argue that legal professional privilege does not apply to salaried lawyers employed by the client; (6) when acting under an access provision, answers can only be demanded to questions that are incidental to the exercise of the right of access (eg the location of records); and (7) access to documents includes access to hard discs, CD-ROMs, magnetic tapes or other forms of storing electronic information (*Access and Information Gathering Manual*).

PS LA 2004/14 sets out the ATO's policy regarding access to corporate board documents on tax compliance risk. These are documents created by advisers for the sole purpose of providing tax risk advice or opinion to the board of directors. Access to such documents will not be sought by the ATO during a compliance risk review or an audit of a corporate taxpayer except in exceptional circumstances. In that case, access would need to be approved by an appropriate ATO Senior Executive Service officer as described in the Accountants' Guidelines (¶25-230). These circumstances would include cases where the taxpayer has not cooperated with the ATO or has a history of serious non-compliance.

Legal professional privilege

The access power is restricted by the doctrine of legal professional privilege (*Citibank*). This doctrine protects communications made between a lawyer and client for the dominant purpose of giving or receiving legal advice. It does not currently apply to communications between an accountant and client but may be extended to tax advice documents prepared by accountants (¶25-230). The doctrine also applies to communications made between a client, the client's lawyer and third parties for the dominant purpose of use in existing or anticipated litigation (*Esso Australia Resources*). The Commissioner's power to obtain information under TAA Sch 1 s 353-10 is subject to legal privilege claims (¶25-240).

The privilege belongs to the client, not the lawyer, and can only be waived by the client. If a lawyer is in any doubt as to whether a particular document is privileged, the lawyer should withhold the document and the Commissioner may then have to test the claim for privilege in the courts. In the *Citibank case*, a large-scale "raid" on the premises of a bank by ATO officers in search of documents was held to be beyond their power as lack of warning of the raid meant that the bank was not given sufficient opportunity to assert claims for legal professional privilege in relation to documents of its clients.

Privilege is not infringed merely by taking a copy of a privileged document. In some circumstances it may be appropriate for the ATO officer to look at a document for which privilege is claimed to determine whether it might be covered by the privilege. The document should not be looked at closely; just enough for the officer to decide whether it may be copied (*JMA Accounting*).

Examples of privileged documents or communications include a solicitor's advice, legal counsel's opinions, letters between a solicitor and a client, a solicitor's notes of a conference with a client or officers of a client company, and a detailed bill of costs if it discloses the nature of the advice sought or given. The following have also been held to be privileged: (i) communications between the Australian Government Solicitor and the ATO relating to tax recovery proceedings, including advice on the taxpayer's applications for an extension of time to pay and remission of late payment penalties (*Webb*); and (ii) documents held by the Australian Federal Police concerning the investigation of alleged tax offences (*Grofam v ANZ Banking Group*).

The following documents have been held *not* to be protected by legal professional privilege: (i) a solicitor's trust account records (*Allen, Allen & Hemsley*; *Clarke*); (ii) a bill of costs (*Packer*); and (iii) fax books recording faxes sent (*Sharp*), but only to the extent that they do not disclose the actual advice. It appears that legal advice prepared by a firm of solicitors but never offered to or used by clients is not protected by legal professional privilege (*May*: ¶25-240). The names of a lawyer's clients have also been held not to be protected by legal privilege (*Coombes (No 2)*: ¶25-240). Privilege does not extend to cases where documents were created in furtherance of a criminal, illegal or improper purpose. In *Clements, Dunne & Bell*, communications between a firm of accountants and a solicitor advising the accountants on the implementation of employee benefit schemes were held not to be privileged because there was evidence of fraudulent avoidance of income tax in relation to the schemes.

As noted above, legal privilege may attach to confidential communications between a client, the client's lawyer and third parties, for the dominant purpose of use in litigation. If litigation is not in prospect, legal privilege may extend to non-agent third party authored documentary communications, provided the dominant purpose test is met. However, where an accounting firm was employed to prepare a valuation and paper for use as part of taxation advice provided by the client's lawyer, most of the third party documents were not subject to the privilege as they were not brought into existence for the dominant purpose of obtaining legal advice (*Pratt Holdings*).

Where a witness for a taxpayer used a document, which would otherwise attract legal privilege, to refresh his memory in legal proceedings, there was a waiver of the privilege limited to that part of the document referred to in the evidence (*Case 29/97*). The Commissioner had impliedly waived his legal privilege by filing a statement of facts, issues and contentions in tax appeal proceedings and previously disclosing the substance of audit report documents in a freedom of information request (*Rio Tinto*). However, the Commissioner did not waive legal privilege by releasing documents in a freedom of information request that referred to legal advice in other documents over which he wished to claim privilege, as the reference did not disclose the substance of the advice (*Devereaux Holdings*).

The Commissioner has issued guidelines (with the agreement of the Law Council of Australia) concerning the exercise of the access power in relation to documents held on lawyers' premises in circumstances where a claim of legal privilege is made. The guidelines, which aim to minimise the frequency and volume of disputes and help resolve disputes as quickly as possible, state, among other things, that:

- as a general rule, an ATO officer will give adequate notice of an intention to inspect documents. What represents adequate notice will depend on the facts of each case (the guidelines outline certain steps to be taken in a routine case where it is unlikely that relevant documents will be privileged)

http://www.pbookshop.com

¶25-310 Standard two-year amendment period

The period during which the Commissioner may amend an assessment for most individuals or very small business taxpayers is two years. The amendment period applies from the day on which the Commissioner gives notice of the assessment to the taxpayer (s 170(1)).

Taxpayers with more complex tax affairs are subject to a four-year amendment period. These include businesses that are not small business entities (¶7-050). The period for review and amendment of assessments involving arrangements with a dominant tax avoidance purpose is also four years. For details of the exclusions from the standard two-year period, see ¶25-320.

Eligibility for the standard two-year amendment period depends on the actual tax affairs of the taxpayer for that year, and not the taxpayer's or the Commissioner's understanding of the status of the affairs at the time of the assessment.

▶ Example 1

George includes in his 2014/15 tax return his salary and a share of his interest in the net income of a partnership that he wrongly believes to be a small business entity for that year. In December 2015, the Commissioner issues a notice of assessment to George based on his return as lodged. Subsequently, in August 2018, the Commissioner adjusts the net partnership income and issues an amended assessment to George reflecting that adjustment. The amended assessment was issued more than two years after George received his original assessment. He is not eligible for the standard amendment period for the 2014/15 year because he is a partner in a partnership that was not a small business entity.

▶ Example 2

In her 2015/16, Rachel declares as part of her assessable income her salary and a distribution from a trust. It appears that the trust is not a small business entity so she is not eligible for the standard amendment period. Three years after she receives her notice of assessment for 2015/16, she discovers that the trust was a small business entity and, therefore, Rachel was subject to the standard amendment period for the 2015/16 year.

¶25-320 Four-year amendment period

Certain taxpayers are not eligible for the standard two-year amendment period, but are subject to a four-year amendment period (s 170(1)). Exclusions from the standard two-year amendment period apply to:

- a taxpayer that carries on a business (or is a partner in a business) unless the taxpayer is a small business entity (¶7-050)
- a taxpayer in the capacity of a trustee of a trust
- a taxpayer who is a beneficiary of a trust unless the trust is a small business entity or the trustee of the trust (in that capacity) is a full self-assessment taxpayer. For these purposes, a taxpayer who is an object of a discretionary trust is considered to be a beneficiary (*Yazbek*)
- a taxpayer who (either alone or with others) entered into or carried out a scheme for the sole or dominant purpose of obtaining a scheme benefit, and
- a taxpayer in a high risk category or special case to be prescribed by regulation (see below).

Avoidance schemes

The avoidance exclusion is not limited to cases where ITAA36 Pt IVA applies. The exclusion can also apply where the benefit sought is unavailable because of any provision of the law, if the relevant purpose is present. In that case, the four-year amendment period will apply regardless of whether the taxpayer is actually entitled to the benefit.

The four-year amendment period for taxpayers involved in tax avoidance arrangements only applies for the 2004/05 and later income years. The former six-year amendment period continues to apply to assessments for earlier years.

Other exclusions

The following "high risk" categories are excluded from the standard two-year amendment period (ITR15 reg 14).

- **Non-arm's length transactions between associates where there is a mismatch in the review periods of the parties involved.** This exclusion applies, for example, where a private company has a four-year amendment period and a shareholder in the company with a majority voting interest has a two-year amendment period. The exclusion would not apply to transactions that do not have income tax consequences, eg gifts between parties in a personal relationship.
- **Distributions to entities connected with a private company.** This excludes taxpayers involved in transactions to which Div 7A applies, where there is a mismatch between the company's amendment period of at least four years and the related entity's amendment period. The exclusion applies to related entities that are shareholders, former shareholders and their associates.
- **Unpaid present entitlements.** This excludes taxpayers involved in transactions where, as a result of Subdiv EA of Div 7A applying, certain amounts are included in assessable income as if they were dividends.
- **Employee share scheme anti-avoidance rule.** An anti-avoidance rule operates in respect of employee shares and rights offered by a company whose predominant business is the acquisition, sale or holding of shares, securities or other investments. Employee shareholders who are subject to this rule are excluded from the two-year amendment period unless the company is a small business entity that itself has a two-year amendment period.
- **Omitted income from foreign transactions.** This exclusion applies to individual taxpayers who omit income from foreign transactions from their tax returns. However, this does not mean that taxpayers have to correctly identify income from foreign transactions at a correct label on the tax return (*Elliott*).
- **Transfer of property and services and tainted services income.** Exclusions apply where information is required from overseas in relation to two specific anti-avoidance provisions, namely deemed transfers of property and services and tainted services income.
- **Other specific anti-avoidance provisions.** This excludes taxpayers whose affairs fall under various specific anti-avoidance provisions not covered by the general avoidance exclusion (see above). The provisions relate to distributions of preferentially taxed capital, excluded income of minors, stripping of company profits, franking debit creation and franking credit cancellation schemes, schemes to take advantage of deductions, expenses for a leisure facility or boat, the use of a company's losses and the cancellation of gross up or tax offset where the imputation system has been manipulated.

¶25-330 No time limits for certain amendments

If an under-assessment of tax was due to fraud or evasion, the Commissioner can amend the assessment at any time. There are also other specific provisions that give rise to unlimited review periods.

http://www.pbookshop.com

Release will not normally be granted if it would *not* relieve hardship, eg where the existence of other creditors make bankruptcy inevitable. In *Rollo v Morrow*, an application by a tax consultant was refused because of his knowledge of the tax laws and his obligations under them, his ability to earn large sums of money and the fact that money was owing to him.

A solicitor in receipt of a very substantial income was granted release from his tax debt on the basis of serious hardship. The Federal Court found that, while the AAT's decision to grant relief was initially surprising, it was based on a consideration of the taxpayer's particular circumstances. These included whether he could achieve acquisitions of food, clothing, accommodation, medical supplies, education and other basic requirements that were not excessive or unreasonable in the circumstances. The court accepted that the taxpayer's income was highly vulnerable should he be made bankrupt (*Taxpayer*). Similarly, in *Milne*, because of the taxpayer's age and serious health problems, the few remaining years of his working life, the dependency of his two children and the likely loss of his practicing certificate in the event of bankruptcy, his circumstances constituted serious hardship.

In *Rollason*, however, a solicitor failed to obtain relief. Although the taxpayer established that serious hardship arose from misfortune for which he was not responsible his compliance record was very bad and the hardship was attributable to his own conduct. The AAT considered that the relief provisions were not designed to allow a taxpayer to escape an obligation that he did not discharge through his own fault. Similarly, in *Rasmussen*, the AAT found that the taxpayer would suffer serious hardship but that did not arise merely because of his tax liability but rather his other liabilities. Accordingly, he did not satisfy the condition that he would suffer serious hardship if required to satisfy the tax liability (s 340-5(3), item 1).

[FTR ¶978-415]

Collection and Recovery

¶25-500 Collection and recovery regime

The collection and recovery of unpaid tax-related liabilities (including penalties) is covered by a common set of rules in TAA Sch 1 Pt 4-15.

The collection and recovery regime allows the Commissioner to collect and recover amounts of taxes and other liabilities that remain unpaid after they have become due and payable. The rules also allow multiple taxation liabilities to be recovered under one legislative provision, rather than a number of separate provisions.

Specific rules about the collection and recovery of tax-related liabilities from third parties, eg liquidators, receivers, agents, trustees of the estate of a deceased person, and people who owe money to a person with a tax-related liability, are discussed at ¶25-520 and following.

What is a tax-related liability?

The collection and recovery regime applies to all tax-related liabilities, including PAYG instalment and PAYG withholding amounts. A tax-related liability is defined as a pecuniary liability to the Commonwealth arising under a taxation law (TAA Sch 1 s 255-1). A "taxation law" is defined in TAA s 2.

A full list of the different types of tax-related liabilities that arise throughout the various taxation laws is contained in two tables in TAA Sch 1 s 250-10. The tables also set out the various provisions that specify when those liabilities become due and payable.

Commissioner's policies

Guidelines on the Commissioner's poli
of tax-related liabilities are set out in PS LA
liabilities from trustees is set out in PS LA 2

¶25-510 Recovery of tax

Income tax (and other tax-related l
(¶25-400), is a debt due to the Commor
Liability to pay tax is a civil one and fail
criminal remedies. However, a criminal
are entered into with the purpose of renc
to be able, to pay tax (¶30-000).

Unpaid tax may be sued for and r...
Deputy Commissioner in any court of competent jurisdic...
enactment is made competent to entertain a claim for recovery of unpaid ta...
s 255-5(2)). For these purposes, tax includes penalty tax under ITAA36 former Pt VII (¶29-000) and GIC (¶29-510).

If a taxpayer cannot be found after reasonable inquiry, or has left Australia and has no agent or attorney in Australia, service of any process in proceedings for the recovery of tax (eg a Supreme Court writ) may be effected by posting it to the taxpayer's last known place of business or abode in Australia (TAA Sch 1 s 255-40). This does not apply to service of a bankruptcy notice and creditors' petition by the Commissioner (they must be served personally in accordance with the *Bankruptcy Rules*) (*Re Kassab*), however, the Commissioner may obtain an order for substituted service from the court. For example the court may order that the document be sent to the debtor or given to another person who will bring the document to the attention of the debtor.

An application may also be made to the Federal Court for service outside Australia. Rule 10.43 of the Federal Court Rules 2011 allows this if it is permitted under Australia's double tax agreements (¶22-160), the Hague Convention or the law of the foreign country. Some of Australia's double tax agreements provide for mutual assistance on the collection of taxes (TAA Sch 1 Subdiv 263-A) and these are effective (*Ben Nevis*).

In recovery proceedings, a certificate signed by the Commissioner (or duly authorised officer) setting out certain facts relating to the assessment (the name of the taxpayer, the particulars of the assessment and the amount of tax owed) is sufficient evidence of those facts, unless there is evidence to the contrary (TAA Sch 1 s 255-45; ITAA36 s 175; TAA Sch 1 s 350-10).

Where a husband and wife resided in and spent substantial amounts rebuilding a property that was orally gifted to them by the husband's parents (who remained the registered owners), a constructive trust existed in favour of the taxpayers. Consequently, in the event of proceedings to recover a tax debt, the taxpayers could not contend that they did not have an interest in the property (*Sarkis*; *Karas*).

Liability not suspended pending review

Liability to pay assessed tax, additional tax or any other amount is *not* suspended pending the outcome of an application for review or appeal (TAA s 14ZZM; 14ZZR). Thus, once assessed tax or any other amount (eg penalties and GIC) becomes due and payable, the Commissioner is entitled to take whatever steps necessary and appropriate to recover the tax or other amount. This rule applies even if any objection, review or appeal under TAA Pt IVC, or any further appeal, is still outstanding (*Broadbeach Properties*). Further, the AAT is specifically prevented from granting a stay of execution of the judgment debt pending determination of the review proceedings before it (TAA s 14ZZB; *Coshott*).

http://www.pbookshop.com

If the taxpayer is a company, the Commissioner can serve a statutory demand under s 459E of the *Corporations Act 2001* which may ultimately lead to the company being wound up: *Kalis Nominees*. There are a number of bases on which a court may set aside a statutory demand, eg on the ground that there is a ''genuine dispute'' about the existence or amount of the debt (*Corporations Act 2001*, s 459H). In *Hoare Bros*, the Full Federal Court held that challenging an assessment under the provisions of Pt IVC was not a genuine dispute to justify setting aside a demand as, in the meantime, the tax had to be paid. In *Broadbeach Properties*, the High Court upheld the correctness of *Hoare Bros*.

Where there is a risk of asset dissipation, the Commissioner may apply for a Mareva injunction or freezing order preventing the taxpayer and his/her associates from dealing with certain assets (*Ousley*; *Gashi*; *Hua Wang Bank Berhard*). The granting of a freezing order is discretionary; the relevant factors for and against are weighed up to see what the balance of convenience requires. In *Uysal*, the taxpayer breached a Mareva injunction by deliberately mortgaging his family home; he was found guilty of contempt of court and imprisoned (*Uysal*).

Where an extension of time for payment of tax has been granted (¶25-410), recovery action will normally be held in abeyance but will recommence if the taxpayer defaults on the terms of the extension.

In proceedings for the recovery of outstanding tax, the taxpayer is prevented from challenging the assessment(s) creating the tax liability (ITAA36 s 175; TAA Sch 1 s 350-10) although the taxpayer is not prevented from arguing that the assessment(s) are invalid for lack of bona fides (*Broadbeach Properties*; *Futuris Corporation*).

Income tax is recoverable only from a person who is given a legal right to contest the correctness of an assessment. For example, tax under an assessment issued to the trustee of a deceased estate who, having had no reason to believe there was any unpaid liability for tax, had distributed the assets to the beneficiaries, was not recoverable from the beneficiaries (*Brown*). However, see ¶25-540 for the Commissioner's right to recover tax from any person owing money to the taxpayer.

The Commissioner does not have to comply with time limitations in state legislation when seeking to recover a tax debt (*Moorebank*). The federal regime excludes the operation of state limitations and extends to the collection of tax-related liabilities that arose before 1 July 2000 and remained payable after that date (*Muc (No 2)*; High Court special leave application refused). Tax debts can be recovered at any time. State legislation allowing for judgment debts to be paid by instalments does not apply to tax debts (*Zarzycki*; *Re Mazuran*; *Homewood*).

Stay of proceedings or execution

If the Commissioner commences proceedings to recover unpaid tax, or petitions the court for a sequestration or winding-up order on the basis of the taxpayer's failure to pay a tax debt, the taxpayer can apply to the court for a stay of proceedings or dismissal of the petition (the AAT has no power to stay recovery proceedings: TD 93/226). A taxpayer may also apply for a stay of execution where judgment is entered against the taxpayer. Whatever the nature of the proceedings, the taxpayer will have to show good cause before the court will grant a stay. Hardship to the taxpayer, the merits of any objection or appeal against the assessment(s) in question and abuse of office are relevant factors, although the fact that an objection or appeal is pending or that it has substance will not of itself justify a stay (eg *Palumbo*). However, where the taxpayers had an arguable case that an agreement with the Commissioner for settlement of the amount of tax owing had been entered into under economic duress, a summary judgment for money owing under the agreement was set aside (*Caratti*).

In *Pollock*, although the taxpayer was not represented at his bankruptcy hearing, through no fault of his own, the sequestration order made at the hearing was not set aside as he could not show that his grounds of objection to the assessment in question had any substance. Similarly, a taxpayer who argued that the Commissioner had delayed

instituting recovery proceedings in order that penalty taxes would accrue was unsuccessful in having the judgment entered against him set aside on grounds of unconscionability (*Pickering*). It seems that the taxpayer could obtain an injunction in recovery proceedings where the assessment imposing the unpaid tax was made contrary to representations made to the taxpayer, eg in a private ruling (*Atkinson*).

Except in quite exceptional circumstances, a stay of proceedings will not be granted where the taxpayer has been a party to a scheme to avoid liability for tax (*Mackey*). The Federal Court refused to stay recovery proceedings pending the outcome of criminal proceedings in which the taxpayers were charged with conspiracy to defraud the Commissioner (*Alvaro*). However, a stay of execution was granted to a mother of four dependent children whose only means of financial support was social security benefits; significant factors in the decision were that she and her estranged husband, who was being held in custody on armed robbery charges, had been assessed on an assets betterment basis (¶25-140) and she was ignorant of her husband's alleged criminal activities (*Gergis*).

[FTR ¶977-595]

¶25-520 Liability of liquidators and receivers

A liquidator of a company or a receiver for a debenture holder is required to notify the Commissioner *within 14 days* of the fact of: (i) being appointed as liquidator; or (ii) taking possession of the assets of the company (TAA Sch 1 Subdiv 260-B; 260-C).

As soon as practicable after notice has been given, the Commissioner is required to notify the liquidator or receiver of the amount which would be sufficient to cover income tax (including penalties and GIC: ¶29-000, ¶29-510) which the Commissioner considers is payable or will become payable. Until this notification is received, the liquidator or receiver must not, without the leave of the Commissioner, part with any of the assets of the company except to pay secured or preferred debts (eg debts owed to employees of an insolvent company for unpaid wages, accrued leave or a similar entitlement). If there are any assets available for payment of ordinary debts, the liquidator or receiver must set aside a pro rata share of them for payment of the amount of income tax notified by the Commissioner (and also for payment of any other amounts, such as FBT and GST, which the Commissioner considers are or may become payable and are notified by him under the relevant Acts).

A liquidator's general duty to act honestly and impartially may require the liquidator to notify the Commissioner where he/she subsequently becomes aware that the Commissioner's claim for tax is clearly understated (*Re Autolook*). On the other hand, once the liquidator has finally distributed the assets of the company and paid the tax notified by the Commissioner, it appears that the Commissioner cannot subsequently vary the notice so as to increase the amount of tax for which the liquidator should have made provision (*Bettina House of Fashion*).

Similar duties are imposed on agents for non-resident principals (TAA Sch 1 Subdiv 260-D). The agent must notify the Commissioner within 14 days after being required by the principal to wind up the business or realise the assets. However, unlike a liquidator or receiver, the agent cannot part with any of the assets to pay out secured or preferred debts until after receiving notification from the Commissioner of the tax likely to be payable. The agent is required to set aside out of the assets enough to pay the full amount of the tax.

A refusal or failure to comply with these requirements renders the liquidator, receiver or agent personally liable for the tax to the extent of the value of the assets that were in his/her possession and required to be set aside for payment of the tax. The liquidator, etc, is also guilty of an offence carrying a fine of up to 10 penalty units (¶29-000). In *Tideturn's case*, the liquidator continued the trading operations of the company and was subsequently held personally liable for group tax which the company

http://www.pbookshop.com

had failed to remit to the Commissioner during his administration. However, as the liquidator's decision to continue trading was based on promised finance (which never materialised) and he had not been remunerated, the court reduced his liability to some extent.

¶25-530 Liability of trustees of deceased taxpayer

Special rules apply where the whole of a deceased's tax liability up to the time of death has not been satisfied (TAA Sch 1 s 260-140). The Commissioner has the same powers and remedies for the assessment and recovery of tax against the trustees of the deceased's estate (including the executors and administrators) after death as he would have had against the taxpayer had he/she not died.

The trustees must furnish any returns required from them for that purpose. The trustees are also specifically required to furnish a return of any income or profits or gains of a capital nature of the deceased not covered by previous returns. This would generally include: (i) a return for such income or profits derived by the deceased for the period from the end of the last income year for which the deceased filed a return to the date of death; (ii) a return for any earlier year not filed by the deceased; and (iii) a return disclosing amounts omitted from a previous return (¶2-080).

The Commissioner may issue original or amended assessments to the trustees and the trustees can become liable to penalties for late payment or default in furnishing returns in the same way as the deceased would have been. Notification from the Commissioner in the form of a notice of assessment or nil tax advice may be relied on by a trustee to distribute the assets of the estate.

The trustees may be personally liable for the tax if they do not set aside sufficient assets to pay it (¶6-040).

Where the trustees are unable, refuse or fail to furnish a return, or where probate or letters of administration are not taken out within six months of death, the Commissioner can make an arbitrary assessment of the taxable income and the tax (including relevant penalties) payable thereon (TAA Sch 1 s 260-145; 260-150). In cases where probate or administration is not granted within six months, a person who claims an interest in the estate may object against such an assessment in accordance with TAA Pt IVC (the objection is called a ''delayed administration (beneficiary) objection''). Where probate or letters of administration are eventually granted, the executor or administrator may also object against the assessment in accordance with Pt IVC (the objection is called a ''delayed administration (trustee) objection''). See ¶28-020 for the time limits for lodging a delayed administration (beneficiary) objection or a delayed administration (trustee) objection. (Note that the Commissioner may grant an extension of time: ¶28-030.)

For a checklist of the tax consequences of death, see ¶44-170.

¶25-540 Recovery from third party

Where a tax-related liability (¶25-500) is payable, the Commissioner may issue a notice under TAA Sch 1 s 260-5 requiring any person who owes money to the taxpayer to pay that money to the Commissioner instead. This power enables the Commissioner to collect the tax-related liability without proceeding to judgment or execution against the taxpayer.

The s 260-5 procedure is akin to garnishee proceedings and, accordingly, a s 260-5 notice is sometimes referred to as a garnishee notice or third party notice. The service of a notice on a third party creates a statutory charge in favour of the Commissioner over any moneys payable, or which become payable, by the recipient of the notice to the taxpayer (*Donnelly*; *Lanstel*). However, it does not create a proprietary interest in the moneys (*Hansen Yuncken v Ericson*) and may be subject to a pre-existing charge (*Market Nominees*).

Notices were ineffective where the recipients did not owe money to the taxpayer (*Ultra Thoroughbred Racing*) or would not owe money until they had received its share of a retained sum (*Elsinora Global*). A notice attempting to recover tax owing by a company in liquidation was void because it was an attachment to the property of the company in contravention of the *Corporations Act 2001* (*Bell Group*). However, in *Park*, a notice to the purchasers of real property in respect of the vendor's tax liabilities was effective even though the property was subject to two registered mortgages which exceeded the value of the property.

A s 260-5 notice may be issued to the third party where there is a debt or tax-related liability due by the taxpayer to the Commissioner whether or not the debt has become due and payable. However, a decision to issue a notice in respect of tax liabilities for which judgment was stayed by the Queensland Supreme Court was held to be unreasonable (*Denlay*).

Unless there are special circumstances, the Commissioner is not required to give advance notice before issuing a notice to a third party (*Woodroffe*; *Saitta*). In *Shail*, notices were invalid because a notice of assessment left at the taxpayer's post office box on the same day was not validly served, so there was no debt due and payable on that date.

Failure by a third party to comply with a notice is an offence (TAA Sch 1 s 260-20) — the penalty is a 20 penalty units (¶29-000) and the offender may also be required to pay the amount sought by the Commissioner. Alternatively, the Commissioner may sue in debt for the recovery of the amount due under the notice when the time for payment has arrived (*Barnes*). Any person making a payment under the notice is indemnified for the amount paid. The validity of a notice can be challenged, eg on grounds of bad faith or improper purpose, by any person with an interest in the matter, including the person on whom the notice is served (*Sunrise Auto*). However, any such person cannot challenge the correctness of the underlying assessment giving rise to the tax debt unless the taxpayer challenges the assessment under TAA Pt IVC (*Sunrise Auto*) (¶28-000).

The Commissioner's power to issue a notice to a third party is not confined to the collection of debts due to the taxpayer, but may also apply where the third party owes or may later owe money to the taxpayer (*Saitta*). The Commissioner used the comparable power under ITAA36 former s 218 to require a solicitor to hand over money held in the solicitor's trust account on behalf of a client as security for future costs (*Gilshenan & Luton*).

Minor errors in a notice issued under TAA Sch 1 s 260-5 will not necessarily invalidate it (*Goodin*). However, a notice which was ambiguous as to whether payments were to be made to the Commissioner every two or four weeks was invalid (*De Martin and Gasparini*).

A Mareva injunction obtained by the Commissioner preventing a taxpayer from dealing with his/her assets does not nullify a notice served on a third party (*Zumtar*).

In *Brown v Brown & Ors*, a notice issued to a third party in respect of a debt owed by a company that was subsequently wound up was effective. The court also rejected an argument that, by lodging a proof of debt, the Commissioner had surrendered the security interest created by the notice.

Where notice will be ineffective

A notice to a third party is ineffective against money held in a joint account, even though tax is owing by each of the joint account holders (*Westpac Savings Bank*). A notice directed to the Official Trustee is also ineffective (*Kunz*). Where taxpayers assign money due to them before the issuing of a notice, that notice will not defeat the right of the assignee, even if the person holding the money received the notice before receiving notice of the assignment (*Zuks*).

http://www.pbookshop.com

A notice requiring the payment by a bank of moneys held on account of a taxpayer will be invalid where the moneys held in the account are denominated in foreign currency (*Conley*).

The Commissioner cannot use the power to collect from a third party as an instrument of oppression to deprive a taxpayer of virtually all his/her income flow. Nor can it be used to collect tax owed not by the taxpayer but by companies associated with the taxpayer (*Edelsten v Wilcox*).

Where a taxpayer who owes tax sells mortgaged land, the purchaser will generally not be required to pay the whole, or part, of the purchase price to the Commissioner to the detriment of the mortgage provider's secured interest. In these cases, the Commissioner says that he will generally only seek to apply a notice to so much of the purchase moneys to be paid to the vendor, or as the vendor directs, as remains after the mortgage has been discharged (PS LA 2011/18). However, the result in *Park*, where the Commissioner enforced a notice ahead of two secured creditors, seems to sit uneasily with his stated policy in PS LA 2011/18.

A notice does not override an equitable lien held by the taxpayer's solicitor over the moneys charged by a notice for costs reasonably incurred in recovering those moneys (*Government Insurance Office of NSW*; *Heath*).

A notice issued to a third party after the commencement of the winding up of the taxpayer company, ie where a liquidator has been appointed, is invalid (*Bruton Holdings*); TAA Sch 1 s 260-45 provides a specific regime for the collection and recovery of tax liabilities of such companies, ie by requiring liquidators to set aside from the available assets of the company an amount sufficient to pay the Commissioner the amount recoverable as an unsecured creditor in the liquidation.

Further, once the taxpayer's debt is discharged, whether by payment or otherwise (eg where the taxpayer successfully challenges the relevant assessment), the notice ceases to have effect (*Government Insurance Office of NSW* — in that case, the tax debt was discharged upon the taxpayer being discharged from bankruptcy).

Review of s 260-5 notices

A decision to issue a notice under TAA Sch 1 s 260-5 is subject to judicial review (*Edelsten v Wilcox*); however, it is not reviewable by the AAT under TAA Pt IVC because it is not a reviewable objection decision (*Rossi*).

[FTR ¶977-690]

¶25-550 Departure prohibition orders

The Commissioner can issue a departure prohibition order (DPO) to stop a person with a tax debt leaving Australia (TAA s 14Q to 14ZA). The issue of a DPO ensures that the debtor does not leave Australia without discharging an outstanding tax liability or without making satisfactory arrangements for it to be discharged. The penalty for defying a DPO is severe: a fine of up to 50 penalty units (¶29-000); and/or one year's imprisonment.

Where a DPO is in force, the debtor may still leave Australia temporarily if he/she obtains a departure authorisation certificate from the Commissioner. These will generally only be issued if the Commissioner is satisfied that the debtor will return to Australia and the tax liability will be discharged or that a temporary departure should be allowed on humanitarian or general policy grounds.

The Commissioner is required to revoke a DPO if: (1) the debtor's tax liabilities have been wholly discharged and the Commissioner is satisfied that any future tax liabilities in respect of matters that have occurred will be wholly discharged or completely irrecoverable; or (2) the Commissioner is satisfied that the debtor's tax liabilities are completely irrecoverable.

An appeal lies to the Federal Court or the Supreme Court against the making of a DPO. An appeal is not simply a rehearing of the matter and the onus is on the debtor to prove the DPO is invalid (*Poletti*). A decision to make a DPO is also reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) (¶28-180), but is not reviewable by the AAT (*Case 7/95*). The Commissioner's refusal to revoke a DPO or to issue a departure authorisation certificate is reviewable by the AAT or, in appropriate circumstances (eg where the matter involves the interpretation of the legislation), by the Federal Court under the ADJR Act (¶28-180). A taxpayer who wanted to go overseas to visit sick relatives, spend time with his wife and children and participate in certain volunteer works was granted a departure authorisation certificate by the AAT on humanitarian grounds (*Crockett*). However, the Commissioner's refusal to issue a departure authorisation certificate has been upheld in cases where taxpayers had previously breached DPOs and failed to provide any security for their return (*Eid*; *Koueider*). Further, a taxpayer who owed $23m in tax debts and offered some security but not enough to satisfy the Commissioner could not obtain a departure authorisation certificate even though his wife was dying overseas (*Lui*).

Penalties will be attracted if a person fails to answer questions from police or Customs officers directed at determining whether the person is affected by a DPO (maximum penalty is a fine of 10 penalty units: ¶29-000) and for knowingly making a false reply to such a question (maximum penalty is a fine of 10 penalty units (¶29-000) or six months' imprisonment, or both).

Appeals against DPOs were unsuccessful in the *Briggs*, *Winter* and *Poletti cases*.

However, an appeal was successful in *Pattenden* because the DPO had been altered by an ATO officer after it had been authorised by the decision-maker and reasonable grounds did not exist for the belief that the taxpayer was a flight risk. Further, in *Skase's case*, the Federal Court said that because the taxpayer had very few assets in Australia, the recovery of tax could not be affected by his departure. In *Edelsten's case*, the Federal Court held that the taxpayer's bankruptcy released him from his tax liabilities at the time the sequestration order was made.

[FTR ¶970-700]

¶25-560 Directors penalties

Special regimes enable the Commissioner to recover from the directors of companies unpaid amounts under the PAYG withholding system (¶26-500) and unpaid superannuation guarantee (SG) charge (¶39-000). These are proposed to be extended to GST (¶25-580).

The regimes are contained in TAA Sch 1 Div 268 and TAA Sch 1 Div 269.

Estimates of liabilities

Under Div 268: s 268-1 to 268-100, the Commissioner may make a reasonable estimate of a person's PAYG liability under TAA Sch 1 s 16-70, having regard to anything that the Commissioner considers is relevant, including previous PAYG amounts withheld. The Commissioner may also make an estimate of the unpaid and overdue amount of SG charge for a quarter to the extent that the charge has not already been assessed.

When the Commissioner makes such an estimate, the person must be notified in writing of the estimate, and that the estimate may be reduced if the person makes a statutory declaration or affidavit specifying the actual amount of liability or declaring that no amounts had to be withheld or paid (TAA Sch 1 s 268-40(1), item 1; 268-90). Where an estimate remains unpaid after seven days, GIC is payable (TAA Sch 1 s 268-75).

http://www.pbookshop.com

Once an estimate has been made, the Commissioner may commence recovery proceedings based on that estimated liability (TAA Sch 1 s 268-20(2)). The person liable may defend the recovery proceedings by proving, by means of an affidavit, that the actual liability never existed, has been discharged or is less than the Commissioner's estimate (TAA Sch 1 s 268-40(1), items 2 and 3; 268-90).

Company directors personally liable

In conjunction with the regime for the recovery of unremitted amounts, the director of a non-remitting company may be personally liable to pay an amount equal to the company's tax liabilities (TAA Sch 1 Div 269: s 269-1 to 269-55). The regime applies where a company is required to remit an amount in respect of: (1) PAYG withheld; (2) an alienated personal services payment received; (3) a non-cash benefit provided; (4) an estimate under Div 268; and (5) SG charge for the relevant quarter.

Under Div 269, there is a duty on a director to ensure that the company:

- meets its obligations to remit amounts deducted or pay estimated liabilities (see above)
- goes into voluntary administration, or
- begins to be wound up (TAA Sch 1 s 269-15).

If the company has not undertaken one of these options on or before the due date for the remittance of the deductions or amounts withheld, the directors of the company are each personally liable to pay to the Commissioner, by way of penalty, an amount equal to the unpaid amount of the company's liability or the estimate. This liability applies to persons who were directors at any time during the period from the date the deductions were made to the due date for payment (TAA Sch 1 s 269-20(1), (2)). Importantly, new directors may be liable where, 30 days after they become directors, the company has still not complied with the above requirements (TAA Sch 1 s 269-20(3)). However, the Commissioner cannot take action to enforce an obligation or to recover a penalty if there was an instalment arrangement in force under s TAA Sch 1 s 255-15.

A director will also remain liable for penalty in certain cases, even if there is an appointment of an administrator or the commencement of winding up, if this takes place outside a three-month period during which the company's underlying liability remains unpaid and unreported (TAA Sch 1 s 269-30(2); *Roche*). It applies where:

- the directors penalty relates to a withheld amount, or SG charge, which has not been paid a period of three months after the due day for its payment, or
- the directors penalty relates to an estimated amount of PAYG withholding liabilities or superannuation guarantee charge which has not been paid within three months of the day by which the company was obliged to pay the underlying PAYG or SG charge to which the estimate relates.

In these cases, the subsequent appointment of an administrator, or the beginning of the winding up of the company, will not have the effect of remitting the directors penalty. That penalty will therefore continue to be payable. However:

- in the case of withheld amounts, remission may continue to be applicable to the extent that the company has notified the Commissioner within the three-month period of the amount of its liability
- in the case of SG charge, remission may continue to be applicable to the extent that the company has lodged an accurate SG statement within the three-month period.

Notice of penalty

The Commissioner must give 21 days' notice before instituting proceedings to recover, by way of penalty, the unpaid amount of the company's liability or the unpaid amount of the estimate of that liability (TAA Sch 1 s 269-25(1)). The penalty notice is a

condition precedent to recovery proceedings for the penalty and should not be equated with the point in time at which a duty of compliance by the directors arises. That duty arises on or before the due date for the remittance of the deducted amounts and not on the receipt of the notice. If directors are aware of their company's insolvency or inability to pay the unremitted instalments, they do not require a notice for them to reasonably undertake the options available to bring about compliance (*Re Scobie*).

The person to whom a notice is sent does not have to be a current director. It is sufficient if the person is in office for at least some of the period before the due date when the company became liable to make the payment (*Canty*).

Penalties imposed on directors are not subject to GIC (¶29-510), but may be subject to pre-judgment interest (*Canty*).

The government proposes to remove the 21-day notice period for high risk phoenix operators (¶25-580).

Service of penalty notice

If it appears from ASIC documents that a person is or has been a director of the company within the last seven days, the penalty notice can be served by delivering it or posting it to the person's place of residence or business as it appears on those documents (TAA Sch 1 s 269-50). The Commissioner may also send a copy of the notice to the director's tax agent's address (TAA Sch 1 s 269-52). The notice is taken to be given at the time that the notice is left or posted by the Commissioner (TAA Sch 1 s 269-25(4)), not at the time the letter would ordinarily have been delivered under s 29 of the *Acts Interpretation Act 1901* (*Roche*); the Commissioner does not need to satisfy the court that a notice was actually received by the director (*Tannous*).

Defences to personal liability

A director has three defences against proceedings to recover the penalty:

(1) because of illness or for some other good reason, it would have been unreasonable to expect the person to take part, and the person did not take part, in the management of the company at any time when the person was a director and the directors were under a duty to comply

(2) the person took all reasonable steps to ensure that the directors complied or there were no reasonable steps that could have been taken

(3) in relation to the SG charge, the company treated the SG charge legislation as applying to a matter in a way that was ''reasonably arguable'' and the company took reasonable care in applying the legislation (TAA Sch 1 s 269-35).

In practice, it can be difficult to meet the requirements of these defences. In *Saunig*, a director who had concerns about the management of a company was unable to rely on the second defence that he had taken all reasonable steps to ensure compliance. The court noted that, although he had tried unsuccessfully to convince the other directors to comply, as a single director he could have caused the company to begin to be wound up and should have obtained professional advice at an earlier stage. The need to seek legal advice as soon as a director becomes aware of the true state of a company's financial obligations was also underscored in *Solomon*.

A person who, two months after the unremitted amounts were due, became a director of a company for 17 days and who received a notice nearly three months after ceasing to be a director was also unable to rely on the defences (*Fitzgerald*). Although the director had not been aware of the company's financial position or the amounts due while he was a director, this was not sufficient to provide a defence. The court warned that it was the responsibility of new directors at the time of, or before taking up, their

http://www.pbookshop.com

potential residential land will be required to issue a notification to the purchaser 14 days before making the supply. However, purchasers will not be required to register with the ATO under PAYG withholding.

The administrative penalty under s 16-30 (¶29-300) will not apply where the purchaser reasonably believes that the premises are not new residential premises.

Entities that make a taxable supply of new residential premises or new subdivisions of potential residential land will be entitled to a credit on their BAS for the amount of the payment made to the ATO. Where a supply of new residential premises is made under the margin scheme (¶34-230), the supplier may apply to the ATO for a refund of a portion of the amount withheld by the purchaser.

Declarations

¶26-350 TFN and withholding declarations

TFN declarations

A person who receives a payment for work or services, a retirement payment, annuity, benefit or compensation payment, or is likely to receive such a payment, may give the payer a TFN declaration (ITAA36 s 202C). This extends to a non-cash benefit where withholding would have been required had the benefit been paid in cash. A TFN declaration cannot be given in relation to a voluntary agreement to withhold (¶26-150) — instead, the voluntary agreement discloses the payee's ABN, which is sufficient. A person can choose whether to provide a TFN declaration but, if one is not provided, the payment is subject to withholding at the top marginal rate plus Medicare levy.

To avoid amounts being withheld at the top marginal rate, an individual should complete a TFN declaration each time a new relationship is commenced with a payer (eg starting a job or converting a superannuation entitlement into a pension). An individual is exempt from quoting a TFN if he/she is:

- under 16 years of age and not earning enough to pay tax, or
- receiving certain Centrelink pensions, benefits or allowances or a service pension from the Department of Veterans Affairs.

The approved form of a TFN declaration requires the individual to answer questions about residency status, whether an exemption from tax up to the tax-free threshold is being claimed, entitlement to rebates and benefits, and accumulated HELP debts.

The payer must forward the declaration to the Commissioner within 14 days after the payee has given it, and must take information contained in the declaration into account when working out how much to withhold.

A payer making a payment for which a payee may make a TFN declaration must notify the Commissioner if the payee does not provide a declaration.

Optional arrangements from 1 January 2017

An employer may inform an employee that he/she is able to make a TFN declaration using the Commissioner's online service, rather than the employee providing the form directly to the employer (ITAA36 s 202C(2)). The Commissioner will then make available to the employer the information in the employee's TFN declaration where the employee has made a TFN declaration in relation to that employer to the Commissioner (ITAA36 s 202CG).

An employer that receives information from the Commissioner, rather than a TFN declaration from an employee, does not need to sign and send an original TFN declaration to the Commissioner. However, employers will need to continue to keep a record of the TFN declaration information made available by the Commissioner. An employer will not be required to notify the Commissioner that an employee has not provided a TFN declaration if the Commissioner has made the employee's TFN declaration available to the employer. However, if the Commissioner has not made the

employee's TFN declaration available to the employer within 14 days after the commencement of the employment relationship, then the employer must give notice to the Commissioner in the approved form (ITAA36 s 202CF(1A)).

Employers are still required to on-disclose an employee's TFN to a superannuation entity, where the employee quotes his/her TFN to the Commissioner and the Commissioner makes the TFN available to the employer (SISA s 299C(4)).

Optional TFN validation from 1 January 2017

The Commissioner can provide employers with both positive and negative validation of an employee's personal details, including his/her TFN, where the Commissioner is satisfied that the person is an employee of the employer and the employee has given a TFN declaration to the employer (ITAA36 s 202CEA).

Employers are not required to validate their employees' TFN information.

A negative validation notice is not a notice that the TFN quoted by the recipient is invalid. This is because a validation notice is not a notice under ITAA36 s 202CE(3) as that section relates exclusively to TFNs stated in a TFN declaration. If the Commissioner is unable to validate the information, then the employer can seek further information from the employee to resolve any discrepancies. The Commissioner may provide an electronic interface to receive information and give a notice.

Withholding declarations

A person who expects to receive a payment for work or services, a retirement payment, annuity, benefit or compensation payment, or an alienated personal services payment, and who wishes a matter relating to the person's income tax or certain other liabilities to be taken into account in working out the amount to be withheld from the payment, may give the payer a withholding declaration about the matter (TAA Sch 1 s 15-50). The declaration must be in the approved form (see further the ATO website Withholding declaration (NAT 3093)).

An individual may only make a withholding declaration if he/she has given the payer a TFN declaration or has entered into a voluntary agreement. A withholding declaration may also be used to change any information given in a TFN declaration. A withholding declaration can only be given about a particular matter to one payer at any given time.

Section 15-50(1)(b) lists the matters that may be taken into account in working out the amount to be withheld are any matters relating to the individual's liability to:

- income tax
- the Medicare levy
- repayments of accumulated HELP debts
- repayments of accumulated trade support loans, and
- repayments of accumulated FS debts.

A payer must take the information in the declaration into account when working out how much to withhold. Where the payee's circumstances change in relation to a prescribed matter, the payee must provide a new withholding declaration (TAR reg 56).

[FTR ¶976-805]

Payer's Obligations

¶26-440 PAYG payer obligations

A payer of a withholding payment has various obligations under PAYG. These include the obligation:

- to withhold amounts (¶26-450)

http://www.pbookshop.com

monthly. These taxpayers are referred to as ''deferred BAS payers'' (¶24-240). Therefore, small withholders may be eligible as they pay quarterly but large withholders are not.

Medium withholders who do not qualify for the deferral (eg because they pay GST monthly) are required to pay by the 21st day of the next month. Medium withholders who qualify for the deferral will be entitled to pay on the 28th day of the month (or 28 February in relation to amounts withheld in December) only if they are a deferred BAS payer for that month (ie only if they have another quarterly BAS obligation due on that day). If they do not have another quarterly BAS obligation due on that day, they are required to pay by the 21st day of the next month. This means that, during a year, a medium withholder's due dates may vary between the 21st and the 28th day of a particular month.

▶ Example 1: Large withholder

Abbott Manufacturing makes a payment of salary to its employees on the first Tuesday of every month. It is required to pay the amount withheld on that Tuesday on or before the following Monday.

▶ Example 2: Medium withholder

Surfboards'n'More pays its directors fortnightly on a Thursday. It pays its GST monthly. If it withholds an amount on Thursday 7 June 2018, it must pay that amount to the Commissioner on or by Monday 23 July 2018.

If Surfboards'n'More had quarterly GST obligations, it must pay the amount withheld on 7 June by Monday 30 July 2018. However, amounts withheld on 5 July 2018 are due by Tuesday 21 August 2018 as the company did not have another quarterly BAS obligation due in that month.

▶ Example 3: Small withholder

The Tipperary Cake Shop pays its employees on a monthly basis. The amount withheld from salaries in February 2018 must be paid to the Commissioner on or before 28 April 2018.

The Commissioner may, with a withholder's agreement, vary the means by which it pays amounts. Written notice must be given to the withholder.

Where a due date for payment of a tax debt falls on a Saturday, a Sunday or a public holiday, taxpayers may pay on the next business day without incurring a penalty or SIC (TAA s 8AAZMB).

Lodgment concessions

The ATO lodgment concession for tax agents *generally* offers a four-week extension for lodgment of the first, third and fourth quarterly activity statements if lodged electronically. Full details of the Tax agent lodgment program 2017/18 are available on the ATO website (www.ato.gov.au).

There is also a lodgment concession for entities that do not use tax agents for the lodgment of activity statements. This concession *generally* offers a two week extension for lodgment of the first, third and fourth quarterly activity statements if lodged electronically. However, this concession does *not* apply to:

- monthly activity statements
- monthly GST payers with quarterly PAYG instalments (or other quarterly obligations)
- monthly PAYG withholding payers
- head companies of consolidated groups
- large businesses with substituted accounting periods (a large business is one with annual total income over $10m, annual GST turnover over $20m, annual withholding payments over $1m, or a member of a company group where at least one member of the group has annual total income over $10m)
- statements that did not have an original due date of the 28th of the month

- quarterly instalment notices (PAYG instalment only, GST instalment only, or PAYG and GST instalment only).

TFN withholding tax

TFN withholding tax (¶26-200) is due and payable at the end of 21 days after the end of the income year in which the accrued gain is included in the investor's assessable income (s 14-55).

It is payable jointly and severally by the investor and the investment body except if the investment body is the Commonwealth or an untaxed Commonwealth entity, in which case it is payable by the investor who is taken to have authorised the investment body to pay it on his/her/its behalf.

The investment body may recover from the investor any TFN withholding tax it pays. It is also entitled to set off an amount that it can recover from the investor against a debt due by it to the investor or an amount accruing to the investor or that stands to the investor's credit.

Recovery of amounts by Commissioner

The Commissioner can take recovery action under TAA Div 268 by estimating a debt for *all* PAYG withholding amounts that have been withheld but not paid to the Commissioner (¶25-560). The taxpayer can have the estimate reduced or revoked by giving the Commissioner a statutory declaration. The Commissioner may then recover the amount under the collection and recovery rules in TAA Sch 1 Pt 4-15 (¶25-500).

[FTR ¶976-840 – ¶976-850]

¶26-600 Obligation to register under PAYG

Registration of withholders

An entity required to pay an amount to the Commissioner under PAYG withholding must apply to be registered with the Commissioner (TAA Sch 1 s 16-140). The entity must apply in the approved form by the first day on which it is required to withhold an amount (or pay an amount in respect of a non-cash benefit). However, the Commissioner may grant an extension (eg where an unregistered entity must withhold an amount from a payment for a cash-on-delivery supply because the payee did not quote an ABN). Purchasers of certain real property who will be required to withhold GST under proposed measures (¶26-330) will not be required to be registered.

The Commissioner may register an entity, or cancel registration, at any time.

Registration of branches

The Commissioner may register a branch of a registered entity if:

- the entity applies for registration of the branch in the approved form
- the entity has an ABN or has applied for one — the ABN allows the Commissioner to link each branch's running balance account (¶24-300) to the entity
- the Commissioner is satisfied that the branch maintains an independent system of accounting and can be separately identified by reference to its activities or location, and
- the Commissioner is satisfied that the entity is carrying on an enterprise through the branch (or intends to carry on an enterprise through the branch) (TAA Sch 1 s 16-142).

The Commissioner must cancel a branch's registration if it no longer satisfies these last two requirements (TAA Sch 1 s 16-144).

A branch that is registered is a ''PAYG withholding branch''. Note, however, that the entity remains legally responsible for all amounts that relate to its branches. PAYG withholding applies to an entity with a PAYG withholding branch as if the amounts it must pay to the Commissioner were separated into:

http://www.pbookshop.com

Further information on the consultation and design process and STP reporting i general can be found on the ATO website.

¶26-640 Obligation to provide information to a payment recipient

Standard annual payment summary rules

Under PAYG withholding (s 16-155), a payer must give a payment summary to an entity (the recipient) if:

(1) during the year, the payer made a withholding payment to the payee (other than a withholding payment in relation to a superannuation lump sum or an ETP, a payment for a supply where the recipient does not quote an ABN, a dividend, interest or royalty or other specified payment received for a foreign resident (see ¶26-265 for the types of payments that are specified), a closely held trust payment or a managed investment trust fund payment)

(2) during the year, the payer received a withholding payment in relation to a dividend, interest or royalty payment received for a foreign resident and the payee is the foreign resident

(3) during the year, the payer received a withholding payment of a specified type (see ¶26-265 for the types of payments that are specified) for a likely foreign resident and the payee is the likely foreign resident

(4) during the year, the payer received a withholding payment which is alienated personal services income, or is taken to have paid alienated personal services income as salary on the last day of the year

(5) the payee is an individual and has a reportable fringe benefits amount for the income year ending at the end of that financial year, in respect of his/her employment by the payer, or

(6) the recipient is an individual and reportable employer superannuation contributions have been made by the payer, in respect of the individual's employment, during the year.

A ''payment summary'' is a written statement that:

- names the payer and recipient
- states the recipient's TFN or ABN (if these have been given to the payer)
- states the total of the withholding payments (if any) that it covers and the total of the amounts withheld by the payer from those withholding payments
- specifies the financial year in which the withholding payments were made
- specifies the reportable fringe benefits amount and/or reportable employer superannuation contributions (if any) that it covers and the income year to which that amount relates
- includes other information that the Commissioner requires to be included (TAA Sch 1 s 16-170).

The Commissioner may vary any requirements by written notice and may do so in such instances and to such extent as he thinks fit.

Generally, the payment summary must be given within 14 days after the end of a financial year (ie generally, by 14 July) and it must cover each withholding payment and the reportable fringe benefits amount/employer superannuation contributions, where relevant, except where it is covered by a previous payment summary. However, from July 2018 (with a voluntary pilot starting in January 2017), it is proposed that Single Touch Payroll (¶26-630) will be able to automatically report payroll information to the ATO and employers using that system will no longer have to report employee-related PAYG withholding in their payment summaries.

Where a payer makes a withholding payment for a supply to a recipient who does not quote an ABN, the payer must give the recipient a payment summary when making the payment, or as soon as practicable afterwards (TAA Sch 1 s 16-167). The payment summary must cover only that payment.

Other payment summary rules

Standard payment summary rules do not apply to the managed investment trust withholding. Entities required to withhold must provide a statement each year to the payees that details the amounts of the payments from which withholding has occurred and the amounts withheld from those payments. The statement must be provided within 14 days after the end of six months after the end of the managed investment trust's income year. The statement may be provided in electronic form and a copy is not required to be given to the payee.

Generally, where a payer pays a superannuation lump sum, ETP or a departing Australia superannuation payment, the payer must give a payment summary covering the payment to the recipient within 14 days of the payment being made (TAA Sch 1 s 16-165; 16-166). A copy must also be given to the Commissioner. However, this has been deferred in respect of ETPs or departing Australia superannuation payments until 14 August following the end of the financial year in which the payments are made (F2012L00584).

An entity that makes a withholding payment in relation to a payment to recipients who do not quote an ABN must give the recipient a payment summary and a copy of it that covers that payment, unless the amount required to be withheld is nil. This must be done when making the payment, or as soon as practicable afterwards.

The ATO requires that an information statement be prepared in relation to TFN amounts withheld from ESS interests, which discloses the amount withheld.

A payment summary must not cover a withholding payment that is a payment of an amount purported to have been parental leave pay which was not lawfully payable. In this case, within 28 days of becoming so aware, the payer must give the recipient an amended payment summary, a notice in the approved form or inform the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) that the payer does not intend to give the recipient an amended payment summary or notice.

Part-year payment summary

The payer must give a part-year payment summary to the payee if the payee asks in writing for a payment summary covering one or more withholding payments (TAA Sch 1 s 16-160):

- made during the year, other than one in relation to an ETP, a supply where the payee hasn't quoted an ABN, or a dividend, interest, royalty or other specified amounts received for a foreign resident (see ¶26-265 for the types of payments that are specified). Further the payment summary must not cover a withholding payment that is a payment of an amount purported to have been parental leave pay if, at the time the recipient asks for the payment summary, the payer is aware that the amount was not lawfully payable
- that are dividend, interest or royalty withholding payments received for a foreign resident if the payee is the foreign resident
- that are of a type specified in the regulations received for a foreign resident, if the payee is the likely foreign resident (see ¶26-265 for the types of payments that are specified), or
- that are taken to be alienated personal services income and included in the payee's assessable income for the income year.

The application does not necessarily depend on the cessation of employment.

http://www.ibookshop.com

The recipient must ask for the payment summary not later than 21 days before the end of a financial year. The payer must comply with the request within 14 days after receiving it, unless the recipient is an individual and has a reportable fringe benefits amount for the income year ending at the end of that financial year. This is because there are reportable amounts that can only be calculated at the end of the FBT year on 31 March.

Where an employee ceases employment between 1 April and 30 June in a particular financial year, the reportable fringe benefits amount for the period from 1 April to when the employee ceased employment will be included on a payment summary issued by 14 July after the end of the *following* financial year. The withholding payments for this period are included on the payment summary issued by 14 July after the end of the *current* financial year together with any reportable fringe benefits amount calculated to 31 March of the current financial year.

▶ Example

David ceased employment on 12 April 2017 and there was a reportable fringe benefits amount in respect of his employment. David's employer, George, is required to issue a separate payment summary for the reportable fringe benefits amount paid from 1 April 2017 to 12 April 2017 no later than 14 July 2018.

Amounts withheld from payments made to David up to 12 April 2017 and the reportable fringe benefits amounts calculated to 31 March 2017 must be included on a payment summary provided by George to David by 14 July 2017.

Payers are not required to provide a part-year payment summary where the payer has made a reportable employer superannuation contribution in respect of the recipient's employment during the financial year (TAA Sch 1 s 16-160(2)).

Exemption from giving payment summaries

The Commissioner may exempt an entity from the payment summary obligations (TAA Sch 1 s 16-180). The following exemptions apply:

- where payments are made to a company director, committee member or office holder and the recipient is required to remit those payments to another entity (*Gazette* No S 676, 28 December 2000)
- where payments are made to a religious practitioner by an entity that is not a religious institution for work or services performed. In the case of chaplaincy and/or counselling services, the weekly payment must not exceed $100 or $433 monthly (*Legislative Instrument* F2006B00322)
- where a payment is made under a contract to an individual engaged as a performing artist to perform in a promotional activity that is: (a) conducted in the presence of an audience; (b) intended to be communicated to an audience by print or electronic media; (c) for a film or tape; or (d) for a television or radio broadcast and the payer has issued a payment summary to the performing artist at the time each individual payment is made (*Gazette* No GN 8, 27 February 2002)
- in relation to terminally ill recipients of lump sum superannuation member benefits (*Legislative Instrument* F2008L01999)
- for withholding amounts made on a passbook savings account where a TFN or ABN is not quoted and for dividends, interest and royalty payments (*Legislative Instrument* F2012L02333). However, entities are required to provide payment summaries if passbook savings account holders specifically request them.

Exemption from giving copies of payment summaries

Entities are not required to provide employees and other payees with a duplicate copy of a PAYG withholding payment (*Legislative Instrument* F2008L01659). This exemption applies to entities making payments covered under Subdiv 12-B, 12-C, 12-D, 12-E, 12-F, 12-FA, 12-FAA, 12-FB, 12-G, Div 13 and ITAA97 s 86-40.

Implications of single touch payroll (STP) reporting

Substantial employers that notify the Commissioner using single touch payroll reporting (¶26-630) will no longer need to comply with their obligations under s 16-155 and 16-165 to provide payment summaries to their employees in relation to amounts reported through STP (TAA s 389-20), although they will continue to be required to provide payment summaries in relation to amounts that are not reported through STP.

Employers may still choose to provide an annual payment summary if requested to do so by an employee. While it is not mandatory for substantial employers to notify the Commissioner of reportable employer superannuation contribution and reportable fringe benefit amounts through STP, a substantial employer may nonetheless choose to report these amounts to the Commissioner through STP by 14 July and, if so, that employer no longer needs to provide an annual payment summary covering these amounts (TAA s 389-20(1)(c); 389-15(3)).

With respect to payments notified using STP reporting, the Commissioner will be able to make the information currently recorded on an annual payment summary progressively available throughout the income year to affected employees on the Commissioner's online service. This will allow such employees to view information about income payments made to them by such employers. In effect, the Commissioner will provide the employee with a payment summary either through the Commissioner's online service or the employee's tax agent's pre-fill service. It is understood that paper payment summaries will be issued by the Commissioner where the employee cannot otherwise access it.

Substantial employers will not be required to comply with their obligation under s 16-160 to provide a part-year payment summary to the extent that it would relate to an amount that the employer has notified under STP.

[FTR ¶976-883]

http://www.pbookshop.com

Recipient's Rights and Obligations

¶26-650 PAYG recipient rights and obligations

Under PAYG withholding, a recipient of a withholding payment has various rights and obligations. These include the following:

- the right to a credit for amounts withheld (¶26-660)
- the right to a refund from the payer when amounts are withheld in error (¶26-680)
- the right to a refund from the Commissioner when amounts withheld in error have been paid to the Commissioner (¶26-700)
- the obligation to keep certain records (¶26-720).

¶26-660 Right to a credit

In general, an entity that receives a withholding payment is entitled to a credit for the amount withheld. Also, the foreign resident for whom a dividend, interest or royalty withholding payment, or other payment, is received is entitled to a credit for the amount withheld. Special rules exist for determining entitlement to the credit in the case of a partnership or trust.

As a general rule, a person is not entitled to a credit for an amount withheld to the extent that it must be refunded (TAA Sch 1 s 18-5).

A decision by the Commissioner to refuse a taxpayer's claim for PAYG credits is not subject to judicial review (*Perdikaris*; *James*).

Further information on the consultation and design process and STP reporting in general can be found on the ATO website.

¶26-640 Obligation to provide information to a payment recipient

Standard annual payment summary rules

Under PAYG withholding (s 16-155), a payer must give a payment summary to an entity (the recipient) if:

(1) during the year, the payer made a withholding payment to the payee (other than a withholding payment in relation to a superannuation lump sum or an ETP, a payment for a supply where the recipient does not quote an ABN, a dividend, interest or royalty or other specified payment received for a foreign resident (see ¶26-265 for the types of payments that are specified), a closely held trust payment or a managed investment trust fund payment)

(2) during the year, the payer received a withholding payment in relation to a dividend, interest or royalty payment received for a foreign resident and the payee is the foreign resident

(3) during the year, the payer received a withholding payment of a specified type (see ¶26-265 for the types of payments that are specified) for a likely foreign resident and the payee is the likely foreign resident

(4) during the year, the payer received a withholding payment which is alienated personal services income, or is taken to have paid alienated personal services income as salary on the last day of the year

(5) the payee is an individual and has a reportable fringe benefits amount for the income year ending at the end of that financial year, in respect of his/her employment by the payer, or

(6) the recipient is an individual and reportable employer superannuation contributions have been made by the payer, in respect of the individual's employment, during the year.

A ''payment summary'' is a written statement that:

- names the payer and recipient
- states the recipient's TFN or ABN (if these have been given to the payer)
- states the total of the withholding payments (if any) that it covers and the total of the amounts withheld by the payer from those withholding payments
- specifies the financial year in which the withholding payments were made
- specifies the reportable fringe benefits amount and/or reportable employer superannuation contributions (if any) that it covers and the income year to which that amount relates
- includes other information that the Commissioner requires to be included (TAA Sch 1 s 16-170).

The Commissioner may vary any requirements by written notice and may do so in such instances and to such extent as he thinks fit.

Generally, the payment summary must be given within 14 days after the end of a financial year (ie generally, by 14 July) and it must cover each withholding payment and the reportable fringe benefits amount/employer superannuation contributions, where relevant, except where it is covered by a previous payment summary. However, from July 2018 (with a voluntary pilot starting in January 2017), it is proposed that Single Touch Payroll (¶26-630) will be able to automatically report payroll information to the ATO and employers using that system will no longer have to report employee-related PAYG withholding in their payment summaries.

Where a payer makes a withholding payment for a supply to a recipient who does not quote an ABN, the payer must give the recipient a payment summary when making the payment, or as soon as practicable afterwards (TAA Sch 1 s 16-167). The payment summary must cover only that payment.

Other payment summary rules

Standard payment summary rules do not apply to the managed investment trust withholding. Entities required to withhold must provide a statement each year to the payees that details the amounts of the payments from which withholding has occurred and the amounts withheld from those payments. The statement must be provided within 14 days after the end of six months after the end of the managed investment trust's income year. The statement may be provided in electronic form and a copy is not required to be given to the payee.

Generally, where a payer pays a superannuation lump sum, ETP or a departing Australia superannuation payment, the payer must give a payment summary covering the payment to the recipient within 14 days of the payment being made (TAA Sch 1 s 16-165; 16-166). A copy must also be given to the Commissioner. However, this has been deferred in respect of ETPs or departing Australia superannuation payments until 14 August following the end of the financial year in which the payments are made (F2012L00584).

An entity that makes a withholding payment in relation to a payment to recipients who do not quote an ABN must give the recipient a payment summary and a copy of it that covers that payment, unless the amount required to be withheld is nil. This must be done when making the payment, or as soon as practicable afterwards.

The ATO requires that an information statement be prepared in relation to TFN amounts withheld from ESS interests, which discloses the amount withheld.

A payment summary must not cover a withholding payment that is a payment of an amount purported to have been parental leave pay which was not lawfully payable. In this case, within 28 days of becoming so aware, the payer must give the recipient an amended payment summary, a notice in the approved form or inform the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) that the payer does not intend to give the recipient an amended payment summary or notice.

Part-year payment summary

The payer must give a part-year payment summary to the payee if the payee asks in writing for a payment summary covering one or more withholding payments (TAA Sch 1 s 16-160):

- made during the year, other than one in relation to an ETP, a supply where the payee hasn't quoted an ABN, or a dividend, interest, royalty or other specified amounts received for a foreign resident (see ¶26-265 for the types of payments that are specified). Further the payment summary must not cover a withholding payment that is a payment of an amount purported to have been parental leave pay if, at the time the recipient asks for the payment summary, the payer is aware that the amount was not lawfully payable
- that are dividend, interest or royalty withholding payments received for a foreign resident if the payee is the foreign resident
- that are of a type specified in the regulations received for a foreign resident, if the payee is the likely foreign resident (see ¶26-265 for the types of payments that are specified), or
- that are taken to be alienated personal services income and included in the payee's assessable income for the income year.

The application does not necessarily depend on the cessation of employment.

http://www.pbookshop.com