2017/18 income thresholds and shading-in ranges

Category of taxpayer (col 1)	No levy payable if taxable income (or family income) does not exceed . . . (col 2)	Reduced levy payable if taxable income (or family income) is within the range (inclusive) . . . (col 3)	Ordinary rate of levy payable where taxable income (or family income) is or above . . . (col 4)
3	$47,307	$47,308–$59,133	$59,134
4	$50,713	$50,714–$63,391	$63,392
5	$54,119	$54,120–$67,648	$67,649
6	$57,525#	$57,526#–$71,906†	$71,907†

* These figures also apply to taxpayers who are entitled to a dependant (invalid and carer) tax offset and those who are notionally entitled to a rebate for a dependant child or student (including sole parents).

Where there are more than six dependent children and/or students, add $3,406 for each extra child or student.

† Where there are more than six dependent children and/or students, add $4,257 each extra child or student.

Shading-in rules

The following rules apply where the family income falls within the relevant shading-in range (column 3 of the table), thereby attracting a reduced levy.

(1) Where one spouse only derives taxable income, the amount of levy payable by that spouse is 10% of the excess of the taxable income over the relevant threshold shown in column 2 of the table.

▶ Example 2

Tanya is married with two children. Her taxable income in 2017/18 is $45,000. Her husband has no income. The relevant family income threshold is $43,901 and the levy payable by Tanya is limited to 10% × ($45,000 – $43,901) = $109.90.

(2) Where each spouse has a taxable income in excess of $27,476 and the family income falls within the shading-in range, the levy payable by each represents his/her proportion of 10% of the excess of the family income over the relevant threshold. The proportion is calculated by dividing the spouse's taxable income by the family income.

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▶ Example 3

For 2017/18, Adrian has a taxable income of $29,000 and his wife Jill has a taxable income of $27,000, giving a total family income of $56,000. They have four children, so the family income falls within the relevant shading-in range ($50,714 to $63,391).

The amount of levy payable by Adrian is calculated as:

$$\frac{\$29{,}000}{\$56{,}000} \times 10\% \times (\$56{,}000 - 50{,}713)$$

$$= \$273.79$$

The amount of levy payable by Jill is calculated as:

$$\frac{\$27{,}000}{\$56{,}000} \times 10\% \times (\$56{,}000 - \$50{,}713)$$

$$= \$254.91$$

(3) Where one spouse has a taxable income in excess of $21,980 and the other spouse does not, the lower earner is not liable for any levy. The higher earner pays a levy calculated by subtracting a "reduction amount" from the levy otherwise payable. The reduction amount equals 2% of the relevant family income threshold minus 8% of the excess of the family income over the threshold.

▶ Example 4

Frida has a 2017/18 taxable income of $30,000 and her husband Benny has a taxable income of $17,000, giving a total family income of $47,000. They have one child, so the family income falls within the relevant shading-in range ($40,496 to $50,618).

Since Benny earns less than $21,980, he pays no levy. The levy otherwise payable by Frida is $600 (ie 2% × $30,000). This amount is reduced by the "reduction amount", which is calculated as:

$$(2\% \times \$40{,}495) - (8\% \times (\$47{,}000 - \$40{,}495))$$

$$= \$289.50$$

The amount of levy payable by Frida is therefore $310.50, ie $600 – $289.50.

(4) Where one spouse has a taxable income in excess of $27,476 and the other has a taxable income in excess of $21,980 but not in excess of $27,476, the "reduction amount" (see (3) above) is apportioned on the basis of each spouse's contribution to the family income. However, if the reduction amount as apportioned exceeds the levy otherwise payable by one spouse, the excess goes in reduction of the levy payable by the other (s 8(4)).

▶ Example 5

Bill has a taxable income of $28,000 in 2017/18 and his wife Honey has a taxable income of $23,000, giving a total family income of $51,000. They have three children, so the family income falls within the relevant shading-in range ($47,308 to $59,133).

The reduction amount is calculated as follows:

$$(2\% \times \$47{,}307) - (8\% \times (\$51{,}000 - \$47{,}307))$$

$$= \$650.70$$

The reduction amount is apportioned between Bill and Honey as follows:

Bill: $\frac{\$28{,}000}{\$51{,}000} \times \$650.70 = \$357.25$ Honey: $\frac{\$23{,}000}{\$51{,}000} \times \$650.70 = \$293.45$

Levy liability of Honey

The amount of levy payable by Honey equals the amount of levy otherwise payable (ie 10% × ($23,000 – $21,980) = $102.00) minus her share of the reduction amount.

ie $102.00 – $293.45
= –$191.45

In other words, no levy is payable by Honey and the excess goes to reduce the amount of levy payable by Bill.

Levy liability of Bill

The amount of levy payable by Bill equals the amount of levy otherwise payable (ie 2% × $28,000 = $560) minus his share of the reduction amount and minus the excess from Honey.

ie $560.00 – $357.25 – $191.45
= $11.30

For the thresholds relevant to trust income, see ¶6-250.

Liability for Medicare levy surcharge

The income test for determining whether a taxpayer is liable for the Medicare levy surcharge is the taxpayer's "income for surcharge purposes". This is the *sum* of the taxpayer's taxable income (including the net amount on which family trust distribution tax has been paid), reportable fringe benefits, reportable superannuation contributions and total net investment loss (including both net financial investment losses and net rental property losses) *less* any taxed component of a superannuation lump sum received, other than a death benefit, which does not exceed the taxpayer's low rate cap (¶14-220).

Liability to the Medicare levy surcharge is also based on whether a taxpayer is a single person without dependants, is a single person with dependants or is married (two persons, whether of the same or different sex, are treated as being married if they are in a registered relationship under a prescribed state or territory law with another individual or are living together as a couple; if either individual was legally married to another person then that relationship is disregarded). A single taxpayer's surcharge liability is measured only against the taxpayer's own income for surcharge purposes. For a couple, the combined income for surcharge purposes is generally applied against the family surcharge threshold, with each member of the couple being liable if the threshold is exceeded (see below). Note that the Commissioner has no power to remit the Medicare levy surcharge imposed on a taxpayer (*McCarthy*).

The Medicare levy definition of dependant (¶2-310) is modified for levy surcharge purposes as follows (ITAA36 s 251V):

- a child in receipt of full-time education who is 21 or more but less than 25 will be a dependant regardless of the level of the dependant's adjusted taxable income (¶2-133), and
- a child whose parents are separated is potentially a dependant of each parent (ie the child may also be a dependant of the parent not in receipt of family assistance for the child).

The definitions of "dependant" and "prescribed person" (¶2-340) are also modified for levy surcharge purposes during a period where the taxpayer is: (a) a Defence Force member, or a relative or person associated with a Defence Force member, who is entitled to full free medical treatment; (b) a repatriation beneficiary entitled to full free medical treatment; or (c) a blind pensioner or a sickness allowance recipient. In this situation:

- the special rules which treat a taxpayer who would otherwise be taken to have dependants as not having dependants (¶2-340) do not apply, ie the taxpayer is taken to have dependants during the period (s 251V), and
- the special rule which treats a taxpayer as a prescribed person for one-half of the period where the taxpayer has a dependant who is not a prescribed person does not apply, ie the taxpayer is taken not to be a prescribed person during the *whole* of the period (ITAA36 s 251VA).

A single taxpayer with no dependants is liable to the surcharge if the taxpayer's income for surcharge purposes for the **2017/18** year totals more than $90,000. A taxpayer who is a member of a couple is liable to surcharge if their combined income for surcharge purposes exceeds the family surcharge threshold for **2017/18** of $180,000. If a taxpayer has dependants, the threshold above which the surcharge applies is the same for single taxpayers and members of a couple. For only one dependant, the threshold remains at $180,000. For two or more dependants, the threshold is increased by $1,500 for each dependant after the first.

Imposition of Medicare levy surcharge

Having determined whether a taxpayer is liable for the Medicare levy surcharge, the surcharge is then imposed on a taxpayer's taxable income (MLA s 8B to 8D) and reportable fringe benefits. The surcharge is also imposed on amounts derived by a

taxpayer on which family trust distribution tax has been paid (MLA s 3(2A)). However, if the combined income for surcharge purposes of a couple exceeds the family surcharge threshold, but the taxable income (including the net amount on which family trust distribution tax has been paid) and reportable fringe benefits of one member of the couple does not exceed the Medicare levy low income threshold (¶2-330), that member is not liable for the surcharge.

Surcharge is calculated on a per day basis, according to the number of days in an income year that there is insufficient private health insurance. Calculations on a per day basis may also be required if a taxpayer's circumstances change during a year, eg from single to married, or from not having a dependant to having a dependant.

Where the period during which the taxpayer qualifies for levy surcharge is the *whole* of the income year, the amount of levy surcharge is 1% to 1.5% of the taxpayer's taxable income and reportable fringe benefits for the year. Where the qualifying period is a *part* only of the income year, the amount of levy surcharge attributable to that period is as follows:

$$(1\% \text{ to } 1.5\% \times \text{taxable income and reportable fringe benefits for year}) \times \frac{\text{days in period}}{\text{days in income year}}$$

▶ Example

Rod and Isabelle are married and reside together. Neither Rod nor Isabelle are prescribed persons or have private patient hospital cover in 2017/18. Rod's taxable income is $90,000 and reportable superannuation contributions of $25,000. Isabelle has taxable income of $50,000, reportable fringe benefits of $10,000 and reportable superannuation contributions of $10,000.

Because Rod and Isabelle live together, each is treated as a dependant of the other unless the contrary is established. The applicable family surcharge threshold is $180,000 and Rod and Isabelle's combined income for surcharge purposes for 2017/18 is $185,000.

Rod is liable for a levy surcharge of $900 (ie 1% × $90,000) and Isabelle is liable for levy surcharge of $600 (ie 1% × $60,000).

Where a taxpayer marries or separates during the year, the relevant threshold (ie the single surcharge threshold or the family surcharge threshold, as appropriate) applies separately for each period, but is applied only against the taxpayer's own taxable income (s 8D(4)).

Trustees liability for Medicare levy surcharge

A trustee assessed under ITAA36 s 98 in respect of a beneficiary may be liable to pay the Medicare levy surcharge (under MLA s 8E, 8F and 8G) on the beneficiary's trust income. Essentially, a trustee will be liable for the Medicare levy surcharge if the beneficiary is a high income earner without adequate private patient hospital insurance.

Specifically, Medicare levy surcharge is payable by a trustee in respect of the net income of the trust estate to which the beneficiary is presently entitled ("beneficiary's trust income") if:

- the beneficiary on behalf of whom the trustee is assessed is not covered by an insurance policy that provides private patient hospital cover, and
- if the beneficiary is single, the amount of the beneficiary's trust income exceeds the beneficiary's singles Tier 1, Tier 2 or Tier 3 threshold for the year of income, or
- if the beneficiary is married, the sum of the beneficiary's trust income and the beneficiary's spouse's income for surcharge purposes exceeds the beneficiary's family Tier 1, Tier 2 or Tier 3 threshold for the year of income and the amount of the beneficiary's trust income exceeds $21,980 (for **2017/18**).

The rate of the Medicare levy surcharge will be 1%, 1.25% or 1.5%, depending on whether the Tier 1, Tier 2 or Tier 3 threshold applies. Where the relevant provisions do not apply to the beneficiary for the whole year, for example if the beneficiary is married for only part of the year, the Medicare levy surcharge is apportioned.

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¶2-370 Collection of Medicare levy and surcharge

The levy and surcharge are collected in conjunction with, and in the same way as, income tax (ITAA36 s 251R(7)). Taxpayers can elect to pay Medicare levy and surcharge through the PAYG system by giving notice to the employer to vary the PAYG amounts withheld from salary or wages (TAA Sch 1 s 15-50) (¶26-350).

[FTR ¶778-300]

Higher Education Support

¶2-380 Higher Education Loan Programme

Most students who enrol to study in award courses in higher education institutions are required to pay a contribution towards the cost of their study under the Higher Education Contribution Scheme (HECS) and the Higher Education Loan Programme (HELP). Debts deferred through the Open Learning Deferred Payment Scheme, Postgraduate Education Loan Scheme and Bridging for Overseas Trained Professionals Loan Scheme were included in an accumulated HECS debt and subject to the same repayment arrangements. The HECS-HELP program allows eligible students to defer their student contribution and repay it later through the taxation system.

Vocational education and training student loan debts (VET debts) have been separated from other forms of HELP debts and VET student loans have been established as a separate income-contingent loan, from 1 July 2019.

Students who elect to pay through the tax system will not have to make any repayments until their ''repayment income'' reaches a minimum level. Repayment income is the sum of the taxpayer's taxable income, total net investment loss, ie from financial investments (shares, interests in managed investment schemes (including forestry schemes), rights and options, and like investments), and from rental properties, reportable fringe benefits, exempt foreign employment income for the year, and reportable superannuation contributions (HESA s 154-5).

Once the minimum level of repayment income is reached, the amount of the repayment is set so that the higher the repayment income, the higher the level of repayments. From 1 January 2018, the index for amounts that are indexed annually under the *Higher Education Support Act 2003* has changed from the Higher Education Grants Index (HEGI) to the Consumer Price Index (CPI).

The government has proposed replacing the current repayment threshold and repayment rates with new ones, including a new minimum repayment threshold and repayment rate plus additional repayment thresholds and rates. The enacting Bill sets a new minimum repayment income for the 2018/19 income year of $41,999, with a subsequent announcement stating that this amount will instead be $45,000. A new table listing repayment income thresholds and the applicable rates for the compulsory repayment of HELP debts is proposed to start from 1% where the person's repayment income is more than the minimum repayment income, and range up to 10%. The Bill provides for a maximum threshold of $119,882 for the 2018/19 income year, with the subsequent announcement adjusting this amount to $131,989 with a 10% repayment rate.

From 1 July 2019, it is proposed that repayment thresholds including minimum repayment income will be indexed using the CPI rather than average weekly earnings.

Australians who have moved overseas for more than six months are required to pay back the same amount of their HELP debt as they would if they were residing in Australia. For these debtors, an obligation has been created to make repayments on their HELP debts based on their total Australian and foreign-sourced income, known as their worldwide income. From 1 January 2016, debtors going overseas for more than six months (183 days) are required to register with the ATO, while those already living overseas had until 1 July 2017 to register. Repayment obligations commenced from 1 July 2017, for income earned in the 2016/17 year.

Students may also be entitled to an income-contingent loan, the student start-up loan. There is a limit of two loans a year of $1,025 each (indexed from 2017). The loans are available on a voluntary basis, and are repayable under similar arrangements to HELP debts. Repayments of loans do not form part of deductible self-education expenses (¶16-450).

2018/19 HELP repayment thresholds and rates

The HELP repayment income thresholds and repayment rates for the **2018/19** income year are as follows:

2018/19 repayment income	Rate of repayment*
Below $51,957	Nil
$51,957–$57,729	2%
$57,730–$64,306	4%
$64,307–$70,881	4.5%
$70,882–$74,607	5%
$74,608–$80,197	5.5%
$80,198–$86,855	6%
$86,856–$91,425	6.5%
$91,426–$100,613	7%
$100,614–$107,213	7.5%
$107,214 and above	8%

* The repayment rate is applied to the repayment income.

A person with a spouse and/or dependant(s) is not liable to make repayments if no Medicare levy is payable on their taxable income for that income year or if the amount of levy payable on their taxable income is reduced (HESA s 154-1(2)). The Commissioner (or the AAT) has the discretion to amend a HELP assessment so as to reduce or defer an amount payable if he is of the opinion that payment of the assessed amount has or would cause serious hardship to the person, or there are other special reasons that make it fair and reasonable to amend the assessment (HESA s 154-50; *Case 12/2004*).

Higher education contributions cannot be claimed as a tax deduction, regardless of whether they are paid by the student, a parent, an employer or some other person, unless incurred in providing a fringe benefit (ITAA97 s 26-20).

A checklist summarising other tax measures relevant to students is at ¶44-140.

[FTR ¶865-050]

¶2-385 Tertiary Student Financial Supplement Scheme

Some tertiary students were eligible to receive a voluntary financial supplement (FS) under the *Student Assistance Act 1973* or the *Social Security Act 1991*. The FS was in the form of an interest-free private sector loan paid under the former Student Financial Supplement Scheme which closed on 31 December 2003. Five years after an FS contract was entered into, the Commonwealth purchased the relevant FS debt, and the borrower became liable to repay the indexed amount of the accumulated debt through the taxation system. Existing FS debts continue to be collected through the tax system. Annual repayments calculated as a percentage of the borrower's taxable income are required once a minimum level of taxable income is reached, the repayment rate increasing as taxable income increases.

Where a person owes both a HELP debt (¶2-380) and an FS debt, the required FS debt repayment is *in addition to* any required HELP repayment. FS debt repayments cannot be claimed as a tax deduction unless incurred in providing a fringe benefit (ITAA97 s 26-20).

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Taxation of Companies Generally

¶3-000 What is a company?

For tax purposes, a "company" is a body corporate or any other unincorporated association or body of persons, but does not include a partnership or a non-entity joint venture (ITAA97 s 995-1(1)). Although the definitions of "company" and "partnership" are mutually exclusive, most *limited partnerships* are taxed as companies (¶3-475). Most *unincorporated* clubs and associations fall outside the definition of "partnership", as they are not being conducted with a view to profit, and would thus be companies for tax purposes (¶3-800). *Incorporated* clubs and associations *are* companies within the usual concept of that term. Also, some public unit trusts are treated as if they were companies for tax purposes (¶6-280, ¶6-310).

A company is a separate legal entity, distinct from its shareholders (*Salomon*). A company comes into existence when it is registered and is taxable in its own right (ITAA97 s 4-1).

[FITR ¶763-000, ¶766-750]

¶3-010 Australian resident and foreign resident companies

As in the case of individuals, it must be determined whether a company is a resident of Australia for tax purposes (¶21-040). This is important because:

- generally, Australian resident companies are liable to tax on total income from sources both in and out of Australia, whereas foreign resident companies are liable only on Australian source income and other income that the Act specifically includes in their assessable income (ITAA97 s 6-5; 6-10)
- the imputation system (¶4-400) applies to dividends paid by Australian resident companies
- the consolidation regime (¶8-000) is available only to Australian resident entities
- various CGT roll-over provisions require the companies involved to be Australian residents (¶12-040)
- various anti-avoidance provisions apply depending on the residency status of the companies involved, eg thin capitalisation (¶22-700)
- special rules apply in determining income derived from foreign resident companies (¶21-110).

Australian branches of foreign resident companies

Under general law, a branch of a company is not a separate entity from the company itself and has the same residence status. However, a special tax regime provides limited separate entity treatment to Australian branches of foreign banks and foreign financial entities (ITAA36 Pt IIIB).

The tax treatment of an Australian company distribution received by the Australian branch of a non-resident company may also be different from the treatment accorded to such a distribution paid directly to the overseas company (¶4-840).

[FITR ¶18-200, ¶23-000]

¶3-015 Public and private companies

The public or private status of a company for tax purposes does not depend on its status for company law purposes. Many companies that are not private companies under the corporations law are private companies for tax law purposes. A company's status for tax purposes is determined for each separate income year.

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A public officer must be appointed within three months of the company commencing to carry on business in Australia or first deriving income in Australia. The public officer's name and address for service of notices must be given to the Commissioner at the place where the company's returns are lodged (¶24-080).

The public officer must be a natural person of at least 18 years of age who is capable of understanding the nature of the appointment. In addition, he/she must be "ordinarily resident" in Australia. If the company has its principal place of business or income-producing activity in a prescribed territory (ie Norfolk Island, Cocos (Keeling) Islands or Christmas Island), the public officer must be ordinarily resident either in that territory or Australia. This will also be the case if at least 50% of the company's income from Australia and its territories comes from a prescribed territory.

The public officer of a company is answerable for everything that is required to be done by the company for tax-related purposes and, if in default, is liable to the same penalties (ITAA36 s 252(1)(f)). The public officer is not, however, personally liable for payment of tax due by the company. Everything done by the public officer which he is required to do in his or her capacity is deemed to have been done by the company (ITAA36 s 252(1)(g)). For a decision in which this provision was considered, see *G E Capital Finance Australasia Pty Ltd*. The Commissioner has released an impact statement on this decision.

[FTR ¶781-420]

¶3-040 Liability of directors, etc

Although there must be a public officer, a notice or process may if the Commissioner thinks fit be given to, or served on, a company by giving the notice to, or serving the process on, a director, the secretary, another officer or an attorney or agent of the company (ITAA36 s 253). Note that there are special provisions that enable the Commissioner to recover from the directors of companies unpaid amounts under, for example, the PAYG withholding system (¶25-560). See also ¶29-710.

[FTR ¶781-520]

Company Returns

¶3-045 Company return required

The requirements for lodging returns are specified annually by Legislative Instrument (ITAA36 s 161: ¶24-010, ¶24-030).

Every Australian resident company that derives Australian source income or foreign income and every foreign resident company that derives Australian source income is required to lodge a return (an Australian resident non-profit company only has to lodge a return if its taxable income is more than $416) (¶44-020). Under the group consolidation regime, corporate groups may be allowed to consolidate their tax position and lodge a single tax return (¶8-010).

Where both a receiver/manager and a liquidator of a company have been appointed, the ATO will generally look to the liquidator to lodge the return (TD 94/68). A strata title body corporate is not required to lodge a return if all its income is mutual income, but a return is required if any of its income is derived from non-mutual sources, eg bank interest.

Although companies self-assess their liability for income tax (¶25-100), they are still required to lodge returns specifying the taxable income and the amount of tax payable on that income (ITAA36 s 161). Companies (including corporate limited partnerships (¶3-475) and trustees of corporate unit trusts and public trading trusts) are required to use the company return form. Records, statements and notices are generally not required to be lodged with the return, although they must be retained by taxpayers (¶24-030), and most written elections only have to be lodged when requested (¶24-040).

Companies (and partnerships and trusts) with international dealings that exceed certain thresholds must lodge additional documentation with their annual returns. This must be in the form of an International Dealings Schedule. Significant global entities (¶30-200) must also lodge annual statements of their global operations under the country-by-country (CbC) regime (¶22-630).

Reportable tax position schedule

If a company has been notified by the ATO to do so, it must lodge a reportable tax position (RTP) schedule unless: they have already applied to the ATO for a private ruling that covers the RTP, they have reported the RTP in their company tax return or the RTP is covered by an advance pricing arrangement (APA) or an application for an APA that has been accepted into the APA program.

An RTP is a position that is about as likely to be correct as incorrect (or is less likely to be correct than incorrect), a position in respect of which uncertainty about taxes payable or recoverable is recognised and/or disclosed in the taxpayer's or a related party's financial statements or a reportable transaction or event.

Due dates for lodgment of returns

For the due dates for lodgment of returns, see ¶24-060. A company that fails to lodge a return or otherwise fails to comply with a taxation law is liable for a fine or penalty tax (¶29-000).

Assessments

The Commissioner does not normally issue any formal notice of assessment to the company after lodgment of the return. Instead, the Commissioner is *deemed* to have made the assessment on the date the return is lodged, irrespective of whether the return is lodged on time, late or early (ITAA36 s 166A(2)).

[FTR ¶79-300, ¶79-310, ¶79-550]

¶3-048 Reconciliation statement

The net profit shown in a company's accounts does not necessarily correspond with its profit for tax purposes (ie its taxable income). An explanatory diagram showing the reconciliation of the net profit as per the profit and loss account with the net taxable income is given below.

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LCR 2018/D7 also considers the way the definition of base rate entity passive income operates where income passes through one or more partnerships or trusts.

Because of the uncertainty created by the delayed legislative clarification of the base rate entity concept, PCG 2018/8 explains the ATO's compliance and administrative approaches for corporate tax entities that have faced practical difficulties in determining their corporate tax rate in the 2015/16, 2016/17 and 2017/18 income years.

Special company rates

Special tax rates apply to PDFs (¶3-555) and to certain classes of taxable income of life insurance companies (¶3-490), credit unions (¶3-435), non-profit companies (¶3-470) and RSA providers (¶3-530).

For a table of company tax rates, see ¶42-025.

Payment of tax

Companies generally pay their tax under the PAYG system in either a single lump sum or in quarterly instalments (¶27-100 and following).

[FTR ¶976-700 – ¶976-825]

Company Loss Deductions

¶3-060 Deductibility of prior year losses

A company, like any other taxpayer, is entitled to carry forward losses incurred in one income year for deduction against its assessable income in subsequent years, subject to certain limitations (¶16-880). Prior year losses are deductible under ITAA97 Div 36 (s 36-1 to 36-45). The loss company and the claiming company must be the same entity (except in limited circumstances where the loss transfer rules (¶3-090) can be applied). For example, in *Case 52/96*, a golf club with prior year losses merged with a sports and social club and the new club continued the businesses of both, as a sports and social club. The AAT held that the golf club's prior year losses could not be claimed by the new club as the golf club had ceased to exist. See also ID 2003/1118.

To claim a deduction for prior year losses, a company must satisfy either a continuity of ownership test (¶3-105) or a same business test (¶3-120). The need for these additional tests arises because a company is a legal entity distinct and separate from its shareholders. Without statutory safeguards, a company with unrecouped prior year losses could be sold by its shareholders to a purchaser who could use these accumulated losses to shelter income so as to reduce its exposure to tax. See also TD 2005/34, which deals with profit washing schemes that seek to utilise tax losses of an unrelated entity.

Company can limit its loss deduction

Corporate tax entities (¶4-440) can limit the amount of available tax losses that they utilise in an income year (s 36-17). This option can prevent wastage of tax losses and enables a corporate tax entity with prior year losses to increase the amount of franking credits that it has available to pay franked dividends.

The rules governing the amount to be deducted are as follows:

(1) if the entity has no "net exempt income" (¶16-880), it may choose the amount (if any) of the tax loss that it wishes to deduct from its (otherwise) taxable income (s 36-17(2))

(2) if the entity has net exempt income and also has taxable income (before tax loss deductions), available tax losses must be offset against net exempt income. The entity may then choose the amount (if any) of the remaining tax loss that it wishes to deduct from its (otherwise) taxable income (s 36-17(3))

(3) if the entity has net exempt income and its assessable income is more than offset by its allowable deductions (except tax losses), the excess deductions are subtracted from the net exempt income and the loss brought forward is deducted from any net exempt income that remains. There is no choice in this situation (s 36-17(4))

(4) a choice made under (1) or (2) above must not create excess franking offsets (¶3-075) for the entity, and must be nil if the entity has excess franking offsets without deducting any tax loss (s 36-17(5); ID 2004/685). The reason for this restriction is that old losses could otherwise be "refreshed" by generating excess franking offsets that in turn would be converted to new tax losses (¶3-075).

The entity must state its choice under (1) or (2) above in its income tax return for the relevant income year (s 36-17(6)). However, where there is a recalculation in the amount of an entity's tax losses, assessable income, allowable deductions or net exempt income for the year, the entity will generally be able to change its choice (or make a choice where one was not originally available). The change must be communicated by written notice to the Commissioner and is subject to the time limits in ITAA36 s 170 (¶25-300) (s 36-17(10) to (13)). Corporate tax losses brought forward must be deducted in the order in which they were incurred (s 36-17(7)).

Record retention

A taxpayer who has incurred a tax loss should retain records supporting that loss until the end of the statutory record retention period or the end of the statutory period for reviewing assessments for the income year in which the loss is fully deducted, whichever is later (TD 2007/2).

Related matters

The carry forward of *capital* losses is discussed at ¶11-080.

For the special rules applying to PDFs, see ¶3-555.

[FITR ¶85-000 – ¶85-230]

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¶3-065 Deductibility of current year losses

Current year losses

The current year loss rules (ITAA97 Subdiv 165-B: s 165-23 to 165-90) are designed to stop income derived by a company in one part of an income year when the company is owned by one set of shareholders from being offset by losses incurred by the company during another part of the income year when the company is owned by a different set of shareholders. This restricts the exploitation of current year loss companies for tax minimisation purposes.

Application of the current year loss rules

The current year loss rules are applied if:

- the company does not satisfy the continuity of ownership test (¶3-105, ¶3-130) or the same business test or proposed similar business test (¶3-120, ¶3-125) for the whole income year, or
- a person begins to control, or becomes able to control, the voting power in the company where one purpose of obtaining that control is to get a tax benefit or advantage for any person (s 165-40).

Effect of the current year loss rules

If these rules apply, current year losses are *not* taken into account in working out taxable income for an income year. Instead, s 165-65 applies for the purpose of working out the taxable income of the company for the income year and a tax *loss* is worked out by applying s 165-90.

The company calculates its taxable income in the following way.

Step 1: The income year is divided into periods (s 165-45), with each change in ownership or control a dividing point between periods.

Step 2: Each period is treated as if it were an income year, and the notional loss or taxable income is worked out for that period (s 165-50).

Step 3: The taxable income for the year of change is worked out by adding up: (a) each notional taxable income; and (b) any full year amounts (ie amounts of assessable income not taken into account at Step 2), *then* subtracting any full year deductions (ie deductions not taken into account at Step 2) (s 165-65). A notional loss is *not* taken into account when calculating taxable income, but counts towards the company's tax loss.

A company's tax loss is the total of each notional loss and excess full year deductions of particular kinds (s 165-70).

The effect of the current year loss rules is that a company may be treated as having both a taxable income and a tax loss for the same income year. In some circumstances, the tax loss may be offset against the company's taxable income in later income years.

Current year deductions

Special anti-avoidance rules relating to current year deductions aim to prevent the manipulation of deductions and income to produce a favourable tax result, while denying the benefit to continuing shareholders. ITAA97 Subdiv 175-B (s 175-20 to 175-35) covers three situations. These are:

(1) where income (called ''injected income'') is channelled into a company to get the benefit of a deduction incurred in the same income year

(2) where deductions are channelled through a company to shelter income derived by the company in the same income year

(3) where the company has entered into a scheme under which the company shelters income (because it has an ''available expense'') or takes the benefit of a deduction (because it has ''available income'') and, as a result, a person (other than the company) obtains a tax benefit.

Similar rules apply if capital gains are channelled into a company or if it has capital gains available for offset against deductions (¶11-090).

Current year deductions *may* be disallowed in any of the above situations. However, the deductions cannot be disallowed if the shareholders of the company obtain a tax benefit that is fair and reasonable, having regard to their shareholdings in the company.

Disallowed deductions may give rise to a tax loss that can be carried forward to offset against taxable income in later income years.

[FITR ¶180-500 – ¶180-680, ¶190-200 – ¶190-240]

¶3-075 Converting excess franking offsets to tax loss

A corporate tax entity's ''excess franking offsets'' are treated as a tax loss for the income year (ITAA97 s 36-55). As franking tax offsets are generally not refundable to corporate tax entities, these excess franking offsets could otherwise be lost.

Excess franking offsets

An entity that is a corporate tax entity at any time during an income year has ''excess franking offsets'' if the total non-refundable tax offsets to which it is entitled for the year under ITAA97 Div 207 (¶4-800) and Subdiv 210-H (¶3-555) exceeds the income tax that it would have to pay for that year if:

- it did not have those tax offsets, and
- it did not have any tax offsets that were subject to the tax offset carry forward rules (ITAA97 Div 65) or the refundable tax offset rules (¶15-010), but
- it had all its other tax offsets.

▶ Example 1

For the 2017/18 income year, ABC Company (which is not a base rate entity) has assessable income of $300, comprised of a fully-franked distribution of $210 and a (non-refundable) franking credit of $90. It has allowable deductions of $120, leaving taxable income of $180.

Its tax payable (ignoring the franking tax offset of $90) is $54 (ie $180 × 30%). Therefore, it has excess franking offsets of $36 (ie $90 – $54) for that year.

Amount of deemed tax loss

Excess franking offsets for the year are converted to a deemed tax loss using the method statement in s 36-55(2), as follows:

(1) work out the amount (if any) that would have been the entity's tax loss for that year, disregarding any net exempt income of the entity

(2) divide the entity's excess franking offsets for the income year by the entity's corporate tax rate for imputation purposes for that year

(3) add the results of steps (1) and (2)

(4) subtract the entity's net exempt income for the year. If the result is positive, the entity has a tax loss for the year of that amount. Otherwise, it has no tax loss for the year.

▶ Example 2

Following on from Example 1, assume that ABC Company has net exempt income of $20.

The result in step 1 is nil. The result in step 2 is $120 (ie $36 ÷ 0.30). The result in step 3 is also $120 (ie $0 + $120). The result is step 4 is $100 (ie $120 – $20).

ABC Company is therefore taken to have a tax loss of $100 for the income year.

[FITR ¶85-250]

¶3-090 Transfer of losses within a company group

As part of the introduction of the consolidation regime (¶8-000), the group loss transfer rules generally ceased to apply for income years that commence after 30 June 2003. However, group loss transfers continue to be available within company groups provided either the loss company or the income company is an Australian branch of a foreign bank or non-bank foreign financial entity. For information on the provisions, see the 2010 edition of the *Australian Master Tax Guide*.

Deductibility Tests for Losses and Bad Debts

¶3-105 Continuity of ownership test

A company cannot deduct a tax loss (ITAA97 s 165-10) unless either:

- it meets the conditions in ITAA97 s 165-12 (which is about the company maintaining the same owners), or
- it meets the conditions in ITAA97 s 165-13 (which is about the company carrying on the same business) (¶3-120).

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The tax free component cannot exceed the amount of the benefit. The balance of the superannuation benefit is the taxable component of the benefit.

If a fund member's benefits are transferred from the accumulation sub-fund to the pension sub-fund to facilitate the commencement of an account-based pension to the member, the transfer is not considered the payment of a superannuation lump sum and s 307-145 cannot be applied to increase the tax free component of that superannuation lump sum (ID 2009/125).

Modification for lump sums with an element untaxed in the fund

Where a taxpayer receives a superannuation lump sum benefit with an element untaxed in the fund, s 307-150(4) applies to the calculation of the tax free component of the superannuation lump sum to the extent that it is attributable to a superannuation interest that existed before 1 July 2007 if:

- it is not a roll-over superannuation benefit (¶14-450), or
- it is a roll-over superannuation benefit that includes an element untaxed in the fund, all or part of which will be included in the assessable income of the superannuation fund into which the benefit is paid.

Where the superannuation lump sum includes an element untaxed in the fund, s 307-150(3) increases the tax free component and decreases the element untaxed in the fund of the superannuation lump sum by the amount determined under s 307-150(4) (for an example, see ID 2011/64).

[AMSG ¶8-160; FITR ¶290-000; SLP ¶38-070ff]

¶14-140 Tax free component of a superannuation benefit

The tax free component of a "superannuation interest" (¶14-130) is so much of the value of the interest consisting of the contributions segment and the crystallised segment (ITAA97 s 307-210(1)). If a superannuation benefit is paid from the superannuation interest:

- the crystallised segment of the interest is reduced (but not below zero) by an amount equal to the tax free component of the benefit, and
- the contributions segment is reduced (but not below zero) by that remaining amount, thereby reducing tax free component of the interest by the amount of the benefit's tax free component (s 307-210(2)).

From 1 July 2015, the amount of the contributions segment and crystallised segment of an individual's superannuation interest is not limited to the overall value of the individual's superannuation interest at any particular time (see "Determining components under involuntary roll-over superannuation benefit").

Contributions segment

The "contributions segment" is made up of contributions made from 1 July 2007 that have *not* been included in the assessable income of the superannuation fund in which the superannuation interest is held (s 307-220(1)). These are generally non-concessional contributions (¶13-780).

In determining whether contributions are included in the contributions segment under s 307-220(1):

- disregard the taxable component of a roll-over superannuation benefit paid into the interest (any excess untaxed roll-over amount of the roll-over superannuation benefit is treated as part of the tax free component instead of the taxable component — see "Roll-over superannuation benefit paid into a superannuation interest" below)

- a superannuation plan that is a constitutionally protected superannuation fund is treated as if it were not such a fund
- disregard the tax free component of an involuntary roll-over superannuation benefit paid into the interest from another interest (the earlier interest), other than an earlier interest that was supporting a superannuation income stream immediately before that benefit was paid (for the amount included as a contribution, see "Determining components under involuntary roll-over superannuation benefit" below) (s 307-220(2)(a)).

Certain non-assessable contributions

The contributions segment does not include contributions that would otherwise be assessable contributions but are excluded due to the operation of s 295-180 (ie a contribution to a public sector fund where the trustee has exercised a choice with the agreement of the contributor to exclude the contribution from assessable contributions) or of Subdiv 295-D (ie where the assessable contributions are transferred to a PST or a life insurance company or are covered by pre-1 July 1988 funding credits: ¶13-125) (s 307-220(2)(b)).

Roll-over superannuation benefit paid into a superannuation interest

Roll-over superannuation benefits to a superannuation fund (other than those from an untaxed source to a taxed superannuation scheme) are not included in the recipient fund's assessable income (¶13-125) and are disregarded when determining whether they are included in the contributions segment. However, if the roll-over benefit includes amounts which exceed the untaxed plan cap amount ($1.480m in 2018/19: ¶14-240) and have been subject to excess untaxed roll-over tax (¶14-450), the excess untaxed roll-over amount of the roll-over benefit is treated as part of the tax free component, instead of the taxable component, of the benefit (s 307-220(2)(a)(i), (3)).

Roll-over benefit is a departing Australia superannuation payment

The rule in s 307-220(2)(a)(i) does not apply to a roll-over superannuation benefit that is a departing Australia superannuation payment (DASP) under s 20H(2), 20H(2AA) or 20H(2A) of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (¶14-340). In this case, the whole DASP is included in the contributions segment of the superannuation interest (ie as part of the tax free component) as the payment has never been included as assessable contributions (ITAA97 s 295-190(1A): ¶13-125). This treatment ensures that the amount of the payment which has been subject to DASP withholding tax (¶14-340) is not subject to further tax when paid as a superannuation benefit from the superannuation interest (s 307-220(4)).

KiwiSaver scheme transfers

An amount transferred from a KiwiSaver scheme to an Australian complying superannuation fund is included in the contributions segment of the member's superannuation interest in the fund if the amount is a New Zealand-sourced amount or the tax free component of an Australian-sourced amount (ITAA97 s 312-10(6)) (¶13-380).

Determining components under involuntary roll-over superannuation benefit

The proportioning rule discussed in ¶14-130 is designed to remove an individual's capacity to reduce his/her potential tax liability, through manipulation of the tax components of the individual's superannuation benefits, by determining the proportion of the tax free and taxable components of a superannuation benefit when a benefit is paid from a superannuation plan, including by way of a roll-over of the benefit.

Certain transfers between superannuation plans (a superannuation fund, ADF or RSA) are made without a specific request from or consent of an individual ("involuntary transfer"). These transfers are payments of superannuation benefits, and are also "roll-over superannuation benefits" if the transfer is between complying superannuation plans (¶14-450).

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A roll-over superannuation benefit is an "involuntary roll-over superannuation benefit" if it is an involuntary transfer of an individual's benefit under a successor fund arrangement, or where there is a compulsory transfer of the individual's accrued default amount to a MySuper product in another complying superannuation plan, or where a transfer is made to an eligible rollover fund (ITAA97 s 306-12).

So as not to disadvantage taxpayers when the proportioning rule applies to involuntary roll-overs, the amount of the contributions segment and crystallised segment of an individual's superannuation interest is no longer limited to the value of the individual's interest at any particular time from 1 July 2015. This means that where an individual's superannuation benefits are involuntarily transferred to a new superannuation plan, the individual will remain in the same taxation position as if the transfer had not occurred. In summary, if an involuntary roll-over superannuation benefit is paid from a superannuation interest in the original plan and:

- the interest in the original plan was *not* supporting an income stream, the contributions segment in the new plan will include an amount equal to the sum of the contributions and crystallised segments of the interest in the original plan (or a proportion thereof for the transfer of an accrued default amount that is only part of the value of the interest in the original plan) immediately before the involuntary roll-over superannuation benefit payment
- the interest in the original plan was supporting an income stream that began to be paid on or after 1 July 2007, the proportions of the tax free and taxable components of the income stream commenced in the new plan will be the same as the income stream in the original plan, and
- the interest in the original plan was supporting an income stream that began to be paid before 1 July 2007, the income stream commenced in the new plan will be treated in the same way as the income stream in the original plan (s 307-220(5); ITTPA s 307-125; 307-127).

Crystallised segment

The "crystallised segment" of a superannuation interest is calculated by assuming that an eligible termination payment (ETP) representing the full value of the superannuation interest is paid just before 1 July 2007 (s 307-225). This crystallised segment is a fixed amount which does not change when a superannuation benefit is paid after 1 July 2007, ie it will form a fixed part of the tax free component of the benefit at that time.

Calculation of crystallised segment

The crystallised segment of the superannuation interest is the total amount of the following components (within the meaning in ITAA36 former s 27A(1)) of the ETP:

- the concessional component
- the post-June 1994 invalidity component
- the undeducted contributions component (former ID 2008/100: recalculation for contribution deduction)
- the CGT exempt component, and
- the pre-July 83 component.

Briefly, the concessional component of an ETP means so much of the ETP that consists of, or is attributable to, a bona fide redundancy payment, an approved early retirement scheme payment or an invalidity payment made before 1 July 1994.

The post-June 1994 invalidity component is the part of the ETP that consists of, or is attributable to, an invalidity payment made on or after 1 July 1994.

The undeducted contributions component of an ETP is that part of the ETP consisting of contributions paid by the taxpayer, or by a person other than an employer of the taxpayer, to a superannuation fund where no deduction has been allowed for the contributions.

The CGT exempt component of an ETP refers to the exempt amount which was contributed to the superannuation fund under the small business retirement exemption in ITAA97 Subdiv 152-D. The amount of the CGT exempt component is:

- for a s 27A(1) para (a) ETP where the whole or a part of the ETP is taken to consist solely of a CGT exempt component — the amount of that component, or
- for a s 27A(1) para (jaa) ETP — the amount of the ETP.

The pre-July 83 component of an ETP arises where the eligible service period relating to the payment commenced before 1 July 1983. This component is calculated using the formula in ITAA36 former s 27AA(1)(d)(i) or (ii).

The value of these components is crystallised on 30 June 2007 based on the amount of the superannuation interest attributable to the component on that date. The ATO's "Superannuation crystallisation calculator" is available at www.ato.gov.au/Calculators-and-tools/Superannuation-crystallisation-calculator.

Separate arrangements reflecting the pre-1 July 2007 tax regime apply to superannuation benefits which have not been subject to contributions tax within the fund (s 307-150). In such a case, the pre-July 83 segment for an element untaxed in the fund is only calculated when a lump sum superannuation benefit is withdrawn from a superannuation plan or rolled over into a taxed superannuation scheme.

Tax free component of pre-1 July 2007 superannuation income streams

With some exceptions, ITTPA s 307-125 provides for the recipients of superannuation income streams existing as at 30 June 2007 to retain the pre-1 July 2007 tax-free deductible amount of their superannuation income stream as the tax free component of the benefit from 1 July 2007. The taxable component is the remainder of the benefit. The deductible amount is calculated under ITAA36 s 27H(2) (¶14-510). A recalculation of the tax free and taxable components will need to be made only when a trigger event happens (¶14-130).

[AMSG ¶8-170; FITR ¶290-000; SLP ¶38-150ff]

¶14-150 Taxable component of a superannuation benefit

The taxable component of a "superannuation interest" (¶14-130) is the total value of the interest less the tax free component (s 307-215). The component may consist of an element taxed in the fund and/or an element untaxed in the fund.

The taxable component will consist wholly of an element taxed in the fund except where specified by a provision in ITAA97 Subdiv 307-E (see "Element untaxed in the fund" below) (s 307-275).

Element taxed in the fund

For a taxed superannuation fund (generally private sector superannuation funds), the element taxed in the fund would normally be the total value of the superannuation interest less the tax free component.

The New Zealand-sourced amount and any tax-free Australian-sourced amount of an amount transferred from a KiwiSaver scheme to an Australian complying superannuation fund form part of the tax free component of a superannuation interest while the balance of the amount is included in the taxable component (ITAA97 s 312-10(6): ¶13-380).

If a superannuation benefit paid by the Commissioner under s 17(2AB), (2AC), 24G(3A), (3B) or (3C) of the *Superannuation (Unclaimed Money and Lost Members) Act 1999*, or under s 20H(2AA) of that Act in respect of a person who is not a former

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temporary resident, the taxable component of a superannuation benefit is nil (ITAA97 s 307-142(3B), (4)) (¶13-850). The element taxed in the fund is nil, if the superannuation benefit is paid under s 20H(2AA), ie interest on unclaimed money paid as a superannuation benefit (see below).

Element untaxed in the fund

The taxable component of a superannuation benefit that is a ''small superannuation account payment'' or a ''superannuation guarantee payment'' (¶14-100) contains wholly of an element untaxed in the fund (s 307-275(3)). These superannuation payments are made by the ATO directly and have not been subject to tax in the fund.

The superannuation benefit payments specified below have an element untaxed and/ or an element taxed in the fund as provided in ITAA97:

- benefits paid from a constitutionally protected fund. As these funds are exempt from tax on contributions or earnings, the taxable component will consist wholly of an element untaxed in the fund (s 307-280). The exception is where the benefit is a lump sum and is attributable to one or more roll-over superannuation benefits that contain or include an element taxed in the fund, in which case the taxable component will have a taxed element equal to the total of those taxed elements. If an income stream benefit is paid from a constitutionally protected fund at the time the income stream commenced, the taxable component will consist wholly of an element untaxed in the fund

- benefits paid from a public sector superannuation fund (not a constitutionally protected fund). If the benefit paid is not sourced to any extent from contributions made into a superannuation fund (or earnings on such contributions), the taxable component consists wholly of an element untaxed in the fund (s 307-295). If the benefit is partly sourced from contributions or earnings on contributions, the element taxed and the element untaxed in the fund of the taxable component are worked using the method statement in s 307-295(3). The regulations may specify additional circumstances in which the benefit paid from a public sector superannuation scheme will consist of an untaxed element (s 307-297)

- benefits paid from a public sector superannuation scheme which came into operation before 6 September 2006 where the trustee has given the member a written notice specifying an amount as an element untaxed (s 307-285). In this case, the taxable component consists of an element untaxed in the fund equal to the specified amount

- death benefit payments from a superannuation fund that has claimed a tax deduction for insurance premiums under ITAA97 s 295-465 or 295-470. In this case, the elements taxed and untaxed of a lump sum superannuation death benefit are worked out using the formula in s 307-290. This will effectively increase the untaxed element to reflect the insurance component of the benefit as the deductibility of the insurance premiums results in no contributions or earnings tax having been paid on this component of the death benefit (see below)

- unclaimed money payments by the ATO. These are payments made by the Commissioner under s 17(2), 20H(2), (2AA), (2A), (3) or 24G(2) of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (¶13-850). For these benefits, the elements taxed and untaxed in the fund of the taxable component are worked out as provided by s 307-300(2) to (4). As these payments are treated and taxed as if they are paid from a superannuation fund, the amount of the elements essentially reflect the amount of elements when they were paid to the ATO as unclaimed superannuation by the original superannuation funds (to the extent they are included in the Commissioner's payment) (s 307-300) (see below).

For the purposes of s 307-290, it is not necessary for a deduction to have been made in every income year for the life insurance linked to the member's superannuation interest. Nor is it necessary for a deduction to be, or have been, claimed for the particular year that the death benefit is payable. It is sufficient that a deduction for insurance premiums has been, or is to be claimed, in relation to the benefit in any year of income (ID 2010/76). Also, a deduction claimed under ITAA36 former s 279 or 279B is treated as a deduction under ITAA97 s 295-465 or 295-470 respectively (ITTPA s 307-290). Deductions for insurance premiums under these provisions are discussed in ¶13-150.

Interest on unclaimed money

Interest paid by the Commonwealth in respect of unclaimed superannuation is a tax free component of a superannuation benefit (except in relation to the unclaimed money of a former temporary resident) (ITAA97 s 307-142(2), (3B); 307-300(2), (3A)). As a consequence, the interest payment is non-assessable non-exempt income (ITAA97 s 301-30).

Departing Australia superannuation payments (DASPs) are taxed under special withholding tax arrangements which effectively recover the tax concessions that applied while the money was held in the Australian superannuation system (¶14-340). Any interest payable would have been calculated based on the pre-DASP tax amount without adjustment to remove the benefit of the superannuation tax concessions.

From 1 July 2013, interest on the unclaimed money of former temporary residents is a taxable component of a superannuation benefit that is untaxed in the fund (ITAA97 s 307-142(3C); 307-300(2), (3A)). This ensures that the interest payment is subject to DASP withholding tax as part of the element untaxed in the fund (¶14-340).

[AMSG ¶8-170; FITR ¶290-000; SLP ¶38-080ff]

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Taxation of Superannuation Member Benefits

¶14-200 Payments from a complying plan

The taxation treatment of a superannuation member benefit paid from a complying superannuation plan (other than those paid after the death of the member) is based on:

- the age of the benefit recipient
- whether the benefit is a lump sum or an income stream
- whether the benefit comprises a tax free component and/or a taxable component (¶14-140, ¶14-150), and
- whether the taxable component of the benefit includes an ''element taxed in the fund'' and/or an ''element untaxed in the fund'' (¶14-150).

The general rule is that a superannuation benefit paid to a person aged 60 and over as a superannuation lump sum or income stream benefit is not assessable income and not exempt income if the payer is a taxed source, ie the benefit does not have any element untaxed in the fund (¶14-220).

If the person is under 60 years of age, all of the above factors will be relevant to determine the tax treatment of the benefit. Superannuation lump sums are subject to an effective tax rate cap. This is given effect through a tax offset mechanism which reduces the ordinary tax rates as they are applied to that income so that the applicable effective marginal rate does not exceed a specified fixed tax rate (¶14-220, ¶14-240).

A ''complying superannuation plan'' means a complying superannuation fund, a public sector superannuation scheme that is a ''regulated superannuation fund'' or ''an exempt public sector superannuation scheme'' (as defined in the SISA), a complying ADF, or an RSA (ITAA97 s 995-1(1)).

Separate tax rules apply to superannuation death benefits paid from a complying plan (¶14-270), and to payments from non-complying plans (¶14-400, ¶14-420).

Under the constructive receipt rule, a superannuation benefit is treated as being made to, or received by, a person if it is made for the person's benefit, or is made to another person or entity at the person's direction or request (s 307-15).

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

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 excess transfer balance tax, but if they exceed the defined benefit income cap for the year, additional tax consequences apply (¶14-370).

Interaction with CGT and other tax rules

A payment from a superannuation fund (or an ADF or RSA) is the disposal of a right to an allowance, annuity or capital amount, or a right to an asset. Any capital gain or capital loss arising is disregarded, ie there are no CGT consequences for the member or RSA holder (ITAA97 s 118-305; 118-310: ¶11-880). For example, a superannuation lump sum payment is made to a taxpayer from his employer superannuation fund (CGT event C2 happening and the taxpayer's right to receive the payment ending). In this case, there are no CGT consequences for the taxpayer.

The CGT exemption is not available to a non-member who had previously paid to acquire the right or the payer superannuation fund, ADF or RSA, but is available to a legal personal representative of a deceased member or if a payment split under the family law happens to the member's benefit and a payment is made to the non-member spouse as a result (¶11-880).

A taxpayer is not entitled to a deduction under ITAA97 s 8-1(1) if an amount paid on withdrawal from a superannuation fund is less than the amount invested or contributed as the loss is capital in nature (ID 2003/194).

A non-resident who receives a payment from an Australian superannuation fund is assessable in Australia on that income (ITAA97 s 6-10(5): ¶21-000).

Medicare levy is levied and payable by an individual who is a resident of Australia at any time during the income year based on the individual's taxable income for the year, but no levy is payable on any portion of a superannuation benefit that is included in the individual's assessable income in respect of which a tax offset has reduced the primary rate of tax to 0% (ITAA36 s 251S(1A)).

[AMSG ¶8-200ff; FITR ¶290-000ff; SLP ¶38-150ff]

¶14-220 Taxation of benefits from a taxed source

The tax treatment of a superannuation benefit paid from a taxed source (ie where the benefit is an element taxed in the fund) depends on the age of the recipient (member), the amount of the payment (see "Low rate cap amount"), whether the benefit is paid as a lump sum or as an income stream, and whether the benefit contains a tax free and/or a taxable component (¶14-140, ¶14-150).

Medicare levy is added to whichever rate of tax (other than 0%) is applicable (ITAA36 s 251S(1A)).

Low rate cap amount

A benefit payment is compared to a low rate cap amount to determine its tax treatment.

The low rate cap amount is $205,000 in 2018/19 (ITAA97 s 307-345: see ¶42-250 for the cap amount in earlier years).

A member's low rate cap amount is a lifetime cap which is reduced for all superannuation lump sum payments received by the member (but not below zero) and is increased annually by the indexation amount (in increments of $5,000 rounded down) at the start of each income year (ITAA97 s 960-265 to 960-285).

Member aged 60 or over

If the member is 60 years or over when the superannuation benefit is received, the benefit is not assessable income and not exempt income (s 301-10). This applies to both superannuation lump sums and income streams.

Member over preservation age and under 60

If the member is under age 60 but has reached his/her "preservation age" (see below) when the benefit (whether a lump sum or an income stream) is received, the tax free component of the benefit is not assessable income and not exempt income (s 301-15).

Superannuation lump sum

The taxable component of a superannuation lump sum is assessable income (s 301-20(1)).

The member is entitled to a tax offset which ensures that the tax rate on the taxable component of the lump sum which is included in assessable income up to the low rate cap amount does not exceed 0%, and the tax rate on the amount exceeding the low rate cap amount does not exceed 15% (s 301-20(2) to (5)).

Superannuation income stream

The taxable component of a superannuation income stream benefit is assessable income and is taxed at marginal tax rates.

The member is entitled to a tax offset equal to 15% of the taxable component of the benefit (s 301-25).

Member below preservation age

If the member is under preservation age when the superannuation benefit is received, the tax free component of the benefit, whether a lump sum or an income stream, is not assessable income and not exempt income (s 301-30).

Superannuation lump sum

The taxable component of a superannuation lump sum is assessable income.

The member is entitled to a tax offset which ensures that the tax rate on the taxable component of the lump sum included in assessable income does not exceed 20% (s 301-35).

Superannuation income stream

The taxable component of a superannuation income stream is assessable income and is taxed at marginal tax rates.

If an income stream is also a disability superannuation benefit, the member is entitled to a tax offset equal to 15% of the taxable component (s 301-40).

Disability superannuation benefits

A superannuation benefit is a "disability superannuation benefit" if:

(a) the benefit is paid to a person because he/she suffers from ill-health (whether physical or mental), and

(b) two legally qualified medical practitioners have certified that, because of the ill-health, it is unlikely that the person can ever be gainfully employed in a capacity for which he/she is reasonably qualified because of education, experience or training (s 995-1(1)).

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The term "legally qualified medical practitioners" in the definition of disability superannuation benefit is not a defined term. The Commissioner relies on its ordinary meaning and takes the view that legally qualified medical practitioners are persons who have general or specialist registration with the Medical Board of Australia (ID 2015/11).

A medical certificate supplied by a person for a particular superannuation lump sum can satisfy the requirements of paragraph (b) of the definition (see above) and be used for later lump sums paid to the person by the same superannuation fund provided the superannuation lump sums are paid over a short period of time and there is no evidence to suggest that the person's circumstances have changed in some relevant way (ID 2015/19).

The tax free component of a disability superannuation benefit received as a lump sum may be increased to reflect the period where the member could have been expected to have been gainfully employed (s 307-145).

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

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, additional tax consequences apply (¶14-370).

Preservation age

A person's preservation age (as defined in the SISR) is based on the person's date of birth — see ¶42-250.

Other rules affecting superannuation benefits

Special rules apply where a superannuation member benefit is paid in breach of rules or is less than $200, or it arises from the commutation of an income stream by a dependant, or the recipient has a terminal medical condition, or the benefit is paid under an ATO release authority (¶14-300, ¶14-310).

¶14-240 Taxation of benefits from an untaxed source

The tax treatment of a superannuation benefit paid from an untaxed source (eg a public sector fund where the benefit includes an element taxed in the fund) depends on the age of the recipient (member), the payment amount (see "Untaxed plan cap amount"), whether the benefit is paid as a lump sum or as an income stream and whether the benefit contains a tax free or taxable component (¶14-140, ¶14-150).

Medicare levy is added to whichever rate of tax (other than 0%) is applicable (ITAA36 s 251S(1A)).

If a member receives a superannuation benefit that includes an element untaxed in the fund, the tax free component (if any) of the benefit is not assessable income and not exempt income (s 301-90). The element taxed in the fund (if any) of the benefit is taxed as discussed in ¶14-220 and the element untaxed in the fund is taxed as discussed below.

Untaxed plan cap amount

A benefit payment is compared to an untaxed plan cap amount to determine its tax treatment.

The untaxed plan cap amount is $1.480m in 2018/19 (ITAA97 s 307-350: see ¶42-250 for the cap amount in earlier years).

A member's untaxed plan cap amount is a lifetime cap which is reduced for previous superannuation lump sum payments received by the member (but not below zero) and increased annually by the indexation amount (in increments of $5,000 rounded down) at the start of each income year (ITAA97 s 960-265 to 960-285).

A separate untaxed plan cap amount applies for each superannuation plan that pays a member a lump sum benefit that includes an element untaxed in the fund. If a member receives one or more superannuation member benefit that includes an element untaxed in the fund from a superannuation plan at a time, the untaxed plan cap amount is reduced after that time as follows:

(i) by the untaxed element amount of the lump sum benefit or benefits — if the total of the elements untaxed in the fund is below the member's untaxed plan cap amount at that time, or

(ii) to nil — in other cases (s 307-350(2)).

Member aged 60 or over — lump sum benefit

If the member is 60 years or over when receiving a superannuation lump sum benefit that contains an element untaxed in the fund, that amount is assessable income (s 301-95).

The member is entitled to a tax offset which ensures that the tax rate applicable to the element untaxed in the fund, up to the untaxed plan cap amount, does not exceed 15%. The remainder of the element untaxed in the fund is taxed at the top marginal rate (45%).

▶ Example 1

Janet, who is a member of a public sector superannuation fund, receives a superannuation lump sum of $500,000 from the fund when she is 60 years old. The lump sum comprises a tax free component of $100,000 and a taxable component made up of an element taxed in the fund of $100,000 and an element untaxed in the fund of $300,000.

The tax free component and the element taxed in the fund of the lump sum benefit are not subject to tax (as Janet is 60 years of age: ¶14-220).

The element untaxed in the fund of the benefit is included in Janet's assessable income. As the untaxed plan cap amount is not exceeded, the untaxed element is taxed at her marginal tax rates up to a maximum rate of 15% (plus the Medicare levy).

Member aged 60 or over — income stream benefit

If a member is 60 years or over when receiving a superannuation income stream benefit, the element untaxed in the fund of the benefit is assessable income and subject to marginal tax rates. The member is entitled to a tax offset equal to 10% of the element untaxed in the fund of the benefit (s 301-100).

▶ Example 2

Tina, who is 62 years of age, receives a superannuation income stream of $56,000 a year.

The income stream, which had commenced before 1 July 2007, comprised a deductible (tax-free) amount of $6,000 for contributions made from post-tax income and a taxable component made up of an element untaxed in the fund of $50,000.

Tina will continue to receive the deductible amount of $6,000 as the tax free component, but is assessed on the remaining taxable component of $50,000 at marginal rates (plus Medicare levy). A tax offset of 10% of $50,000 (ie $5,000) is available to Tina.

Member over preservation age and under 60 — lump sum

If a member has reached his/her "preservation age" (¶14-220) but is below age 60 when receiving a superannuation lump sum benefit, the element untaxed in the fund is assessable income and is subject to tax at the following rates (s 301-105):

- on the amount up to the low rate cap amount ($205,000 in 2018/19: ¶14-220) — up to a maximum rate of 15%
- on the amount up to the untaxed plan cap amount for each superannuation plan (excluding any low rate cap amount) — up to a maximum rate of 30%, and

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- a relationship as a couple between two adults who meet the eligibility criteria mentioned in s 5 of the *Relationships Act 2011* (Qld) for entry into a registered relationship
- a relationship as a couple between two adults who meet the eligibility criteria mentioned in s 5 of the *Relationships Register Act 2016* (SA) (Acts Interpretation (Registered Relationships) Regulations 2008, reg 3).

Child

A death benefits dependant of a person who has died includes a child who is aged less than 18 of the deceased person (s 302-195(1)(b)). Each of the following is a "child" of an individual:

- the individual's adopted child, stepchild or ex-nuptial child
- a child of the individual's spouse, and
- a child of the individual within the meaning of the *Family Law Act 1975* (FLA) (ITAA97 s 995-1(1); SISA s 10(1)).

A person ceases to be a "stepchild" for the purposes of being a "dependant" of a superannuation fund member under SISR reg 6.22 when the legal marriage of their natural parent to the member ends (ID 2011/77: meaning of "stepchild").

A "child" under the Family Law Act has its ordinary meaning and includes:

- a person born to a woman as the result of an artificial conception procedure while that woman was married to or was a de facto partner of another person (whether of the same or opposite sex) (FLA s 60HB), and
- a person who is a child of a person because of a state or territory court order made under a state or territory law prescribed for the purposes of s 60HB giving effect to a surrogacy agreement.

The above definitions mean that a same-sex partner of an individual and the children of a same-sex couple can be a death benefits dependant, regardless of whether he/she satisfies the interdependency criteria (see below). For example, this will enable the surviving member of the couple to receive the deceased member's superannuation benefits as a reversionary pension, or alternatively receive a superannuation lump sum death benefit tax-free. Similarly, when an individual in a same-sex relationship dies, a child of that relationship who is under 18 years of age can be a death benefits dependant and will be taxed concessionally on any superannuation death benefits received (¶14-280).

Two principles are set out in ITAA97 Subdiv 960-J to clarify family relationships. The first ensures that the same tax consequences, as from a marriage, flow from the relationship between two people who are an unmarried couple (whether of the same or different sex), provided their relationship is registered under particular state or territory laws (see above) or they live together on a genuine domestic basis in a relationship as a couple. The second ensures that anyone who is an individual's child (as defined for tax purposes) is treated in the same way as if he/she were the individual's natural child (ITAA97 s 960-252). Both principles extend to tracing other family relationships beyond the couple, their children and parents, eg to determine if a person is a relative (ITAA97 s 960-255).

▶ Example

George and Mandy are not legally married, but live together on a genuine domestic basis in a relationship as a couple. The income tax Acts treat them as part of each other's family.

Mandy's stepfather Frank has a sister Angela. The income tax Acts apply as if Angela were Mandy's aunt because Mandy is defined to be Frank's child. That is, Mandy's relationship to Angela is determined on the basis that Mandy is Frank's natural child.

Interdependency relationship

Two persons (whether or not related by family) have an "interdependency relationship" if they have a close personal relationship, live together, and one or each of them provides the other with financial support and domestic support and personal care (ITAA97 s 302-200(1)). Examples of these relationships are where two elderly sisters reside together and provide financial and other support for each other, an adult child who resides with and cares for an elderly parent, and same-sex couples who reside together (ID 2005/143: mother of deceased taxpayer).

Two persons who have a close personal relationship (whether or not related by family), but do not satisfy the other requirements above because either or both of them suffer from a physical, intellectual or psychiatric disability (eg a person with a disability who lives in an institution), also have an interdependency relationship (s 302-200(2)).

ITR97 reg 302-200.02 specifies the matters that are, or are not, to be taken into account in determining under s 302-200(1) or (2) whether two persons have an interdependency relationship or had an interdependency relationship immediately before the death of one of them.

Two people do not have an interdependency relationship if one of them provides domestic support and personal care to the other under an employment contract or a contract for services, or on behalf of another person or organisation such as a government agency, a body corporate or a benevolent or charitable organisation (reg 302-200.02(5)). This does not affect people who otherwise meet the definition of "interdependency relationship" but who receive a carer's allowance or similar payment from a government or other organisation.

Financial dependant of the deceased person

A person who is financially dependent on a deceased person is a death benefits dependant (s 302-195(1)(d)).

The determination of financial support is a question of fact. The AAT has stated that the financial contribution by the deceased must be examined to determine whether it is "necessary and relied on" to maintain a person's normal standard of living, and that the financial contribution does not necessarily have to be more than 50% before it can be said that there is substantial support by the deceased (*Malek*). In that case, it was shown that the financial support which a mother had received from her deceased son had been significant (mortgage repayments, maintenance and other expenses of the unit in which the mother lived) and she was a financial dependant of her deceased son (see also *Case 2/2016*: a parent and deceased child and interdependency relationship).

A taxpayer over the age of 18 who was living at home with his parent and was receiving Youth Allowance payments from Centrelink at the time of the parent's death was considered a death benefits dependant. The Youth Allowance payments received were calculated at a lower "at home" rate as opposed to the higher "independent" rate, which indicated that the taxpayer was substantially financially dependent. A comparison of the level of financial support provided by the parent with that provided by the Youth Allowance payments also indicated financial dependence on the parent (ID 2014/6).

Other death benefits dependants

An individual who receives a superannuation lump sum because of the death of another person who "died in the line of duty" as a Defence Force member, an Australian federal, state or territory police force member or a protective service officer is treated as a death benefits dependant of the deceased person (ITAA97 s 302-195(2)). The circumstances in which a person has "died in the line of duty" are set out in ITR97 reg 302-195 and 302-195A.

[AMSG ¶8-300ff; FITR ¶291-000; SLP ¶38-260ff]

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¶14-280 Taxation of superannuation death benefits

The taxation treatment of a superannuation death benefit (¶14-120) depends on whether it is a lump sum or an income stream and whether payment is made to a death benefits dependant (¶14-270) of the deceased.

Payments to a dependant — lump sum

A superannuation lump sum death benefit paid to a death benefits dependant of the deceased is not assessable income and not exempt income (s 302-60).

Also, a superannuation lump sum from the commutation of a superannuation income stream is not assessable income and not exempt income in certain circumstances (s 303-5: ¶14-310).

Payments to a dependant — income stream

A superannuation income stream benefit (¶14-120) paid to a dependant is not assessable income and not exempt income if either or both the deceased was aged 60 or more at the time of death and the dependant was aged 60 or more at the time of receiving the benefit (s 302-65).

A superannuation income stream benefit is taxed as follows if both the dependant and the deceased are under age 60 at the time of the death:

- the tax free component (¶14-140) of the income stream is not assessable income and not exempt income (s 302-70)
- the element taxed in the fund of the taxable component (¶14-150) is assessable income, but the dependant is entitled to a tax offset equal to 15% of the element taxed in the fund (s 302-75), and
- when the recipient turns 60, the income stream becomes not assessable income and not exempt income (s 302-65).

Element untaxed in the fund

Where the taxable component of a superannuation income stream benefit includes an element untaxed in the fund (¶14-150):

- the tax free component is not assessable income and not exempt income
- the element taxed in the fund is treated in the same way as the taxable component of a superannuation income stream benefit under s 302-65 (ie not assessable income and not exempt income if either the deceased or the dependant is aged 60 or more, see above), or under s 302-75 (ie as assessable income but with a tax offset equal to 15% of the taxable component, see above), and
- the element untaxed in the fund is treated, depending on the age of the deceased and the dependant, as follows:
  - (i) if either the deceased was aged at least 60 at the time of death or the dependant was aged at least 60 at the time of receiving the benefit, the dependant is entitled to a tax offset of 10% of the element untaxed in the fund, or
  - (ii) if neither was age 60, the element untaxed in the fund is included in the dependant's assessable income, and the dependant will receive a tax offset of 10% only when he/she attains age 60 (s 302-80; 302-85; 302-90).

Payments to a non-dependant — lump sum

The tax free component of a superannuation lump sum paid to a non-dependant is not assessable income and not exempt income (s 302-140). The taxable component of the lump sum is included in assessable income and taxed at marginal rates. A tax offset applies to ensure that the tax rate on the element taxed in the fund does not exceed 15% and the tax rate on the element untaxed in the fund does not exceed 30% (s 302-145).

From 1 July 2007, a person who is not a dependant of the deceased can only receive a superannuation lump sum, not a superannuation income stream benefit (SISR reg 6.21(2A)).

A recipient of a death benefit income stream which commenced before 1 July 2007 is taxed in the same way as payments made to dependants (see above).

Payments to the trustee of deceased estate

A superannuation death benefit paid to the trustee of a deceased estate in that capacity is subject to tax in the following manner:

- to the extent that one or more beneficiaries of the estate who were death benefits dependants of the deceased have benefited, or may be expected to benefit, from the superannuation death benefit — the benefit is treated as if it were paid to a death benefits dependant of the deceased
- to the extent that one or more beneficiaries of the estate who were not death benefits dependants of the deceased have benefited, or may be expected to benefit, from the superannuation death benefit — the benefit is treated as if it were paid to a non-dependant of the deceased, and
- the benefit is taken to be income to which no beneficiary is presently entitled (s 302-10).

The trustee of the deceased estate may, therefore, be liable to tax on the above basis and will be required to withhold any tax payable from the superannuation death benefit received (ITAA36 s 101A(3); *Fyffe v Fyffe*).

An income stream, arising from a family law payment split, that is paid to a deceased estate from an exempt public sector superannuation scheme (EPSSS) is treated as a superannuation lump sum death benefit under ITAA97 s 307-65, and a family law superannuation payment under ITAA97 s 307-5(7) (¶14-120). As an EPSSS is not a regulated superannuation fund, the income stream payments from the EPSSS cannot be superannuation income stream benefits because the SISR pension standards as discussed in ¶14-125 are not met. An EPSSS is nevertheless a complying superannuation plan for income tax purposes (ITAA97 s 995-1(1): definition of "complying superannuation plan") and the income stream payments to the deceased estate are subject to tax in the hands of the trust estate under s 302-10 as noted above (ID 2014/2).

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

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 excess transfer balance tax, but additional tax consequences apply if the income streams exceed the defined benefit income cap for the year (¶14-370).

[AMSG ¶8-300ff; FITR ¶291-000; SLP ¶38-270ff]

Other Superannuation Benefits

¶14-300 Benefits paid in breach of rules

The rules for the taxation of superannuation member benefits and death benefits in Div 301 and 302 (¶14-200, ¶14-280) do not apply to the receipt of superannuation benefits in breach of certain legislative requirements. These cases arise where a person receives a benefit from a complying superannuation fund or previously complying fund, an ADF or an RSA and:

- the fund has not complied with the sole purpose test in s 62 of the SISA, or

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Sharing economy

Defining the sharing economy is difficult because the term encompasses a large number of modes of operation. The sharing economy can be defined very broadly as new kinds of economic and social interactions facilitated by the internet. Alternative terms for describing the same or similar concepts include: the collaborative economy or collaborative consumption, the access economy and the on-demand economy. Examples of businesses participating in the sharing economy are: eBay, Uber, Airbnb, Etsy, and Airtasker.

The ATO describes the sharing economy as buyers (users) and sellers (providers) connected through a facilitator who usually operates an app or a website. The sale of goods and services via the sharing or collaborative economy is growing at a phenomenal rate, raising challenges for collection of tax revenues. Tax issues for participants in the sharing economy include:

- if a business is being carried on, whether an ABN is needed (¶33-105) and whether the person should register for GST (¶34-100) and lodge activity statements (¶24-240)
- whether the price of the goods or services provided includes GST (¶34-110)
- if tax invoices are needed for sales (¶34-140)
- if assessable income has been earned (¶2-135)
- whether GST credits and income tax deductions can be claimed for expenses (¶34-110)
- how sharing economy activities added together impact GST and income tax (¶10-105) obligations.

Black economy

The black economy (or cash economy) is the part of a country's economic activity which is unrecorded and untaxed by its government. It is not a new problem but accelerating technological change presents governments and revenue authorities with new challenges and opportunities for dealing with it.

In December 2016, the government announced the formation of the Black Economy Taskforce and described the problem as:

> "... people who operate entirely outside the tax system or who are known to the tax system but deliberately understate their income or overstate their expenses. Black economy participants evade taxes and may also be over-claiming welfare and other government benefits."

Measures that have been implemented include:

- increased funding in 2018 for ATO audit activity including mobile strike teams, and a Black Economy Hotline (Tel 1800 807 875)
- new offences to deter the production, use and distribution of electronic sales suppression tools to manipulate or falsify electronic point of sale records. A new tobacco offence regime for illicit tobacco (¶29-700)
- the taxable payment reporting system (TPRS) has been extended to include the road freight, security and information technology sectors from 1 July 2019 (¶33-200), and
- after 1 July 2019, businesses are not able to claim deductions for payments to employees or certain payments to contractors where they have not met PAYG obligations.

Measures in Bill form or that have been proposed include:

- a new, strengthened regulatory framework for the Australian Business Number (ABN) system (¶33-100) in 2018/19 (consultation paper, July 2018)
- a cash payment limit of $10,000 would apply to payments made to businesses for goods and services from 1 July 2020 (2018/19 Federal Budget). The government issued a consultation paper on the proposal in May 2018
- draft legislation containing measures to combat illegal phoenix activity (¶41-900), including:
  - new phoenix company offences to prohibit creditor-defeating dispositions of company property, penalise participants or facilitators, and allow liquidators and ASIC to recover property
  - preventing directors from improperly backdating resignations or ceasing to be a director, leaving the company with no directors
  - making company directors personally liable for their company's GST liabilities and greater ATO data gathering powers
  - withholding ATO tax refunds when a taxpayer fails to lodge a return or provide other information affecting the refund.
- draft legislation released in October 2018 to establish the legal framework for Director Identification Numbers (DIN). The draft measures set out who will be required to obtain a DIN, the obligations associated with a DIN and the consequences of not meeting the obligations
- an announcement by government in November 2018 of consultation on a range of tougher measures targeting black economy activity including:
  - new black economy offences and penalties
  - designating the ATO as a criminal law enforcement agency and giving it access to telecommunications metadata, and
  - new ATO powers to compel information from third parties, such as bank information.

Cryptocurrencies

Revenue authorities are concerned that cryptocurrencies like Bitcoin present opportunities for tax evasion, money laundering and other undesirable activities.

Bitcoin allows users to transfer money on the internet without using a bank, credit card issuer or other third party. The network is controlled by those using it, on a platform of encrypted software, ensuring security and anonymity. Bitcoin transactions are recorded publicly and permanently on a register called the Blockchain, which means anyone can see the balance and transactions of any bitcoin address. However, the identity of the user behind a transaction is not easily revealed.

The ATO and other agencies like AUSTRAC and ASIC are concerned by the ability of participants to conduct transactions anonymously. It is possible to use Bitcoin and other cryptocurrencies in a similar way to using foreign bank accounts to facilitate tax evasion. Transactions using cryptocurrencies present difficult tax compliance and record-keeping challenges. In March 2018, the ATO launched a community consultation to help it understand practical issues.

For information about current tax rules for recognising cryptocurrency transactions, see ¶10-030 and ¶23-070.

[FTR ¶79-560, ¶958-010; FITR ¶19-545, ¶620-220, ¶620-223]

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General Anti-avoidance Provisions

¶30-110 Introduction to Pt IVA

The general income tax anti-avoidance provisions appear in ITAA36 Pt IVA. They supplement the numerous anti-avoidance rules directed at particular types of arrangements which appear elsewhere in the Act. Part IVA is also referred to by the acronyms GAAP (general anti-avoidance provision) and GAAR (general anti-avoidance rule).

Part IVA is a provision of "last resort", so it does not apply unless the taxpayer's claim is otherwise allowable. For example, it will not apply if a claimed deduction is not allowable in any event under the general deduction provisions, or if the transaction is set aside by some other specific anti-avoidance measure. Nor need it apply where a commercially unrealistic transaction is entered into solely to generate tax deductions, and is not effective for tax purposes in any event (*Fletcher*: ¶16-010).

The Commissioner also will not need to rely on Pt IVA if the transaction is a sham, and not intended to have legal effect, as that transaction will be inherently ineffective (*Jaques*; *Hancock*; *Richard Walter*). However, when a transaction is evidenced by apparently valid documents it would be necessary to establish, to the satisfaction of the court, that those documents were not in fact acted upon or were a mere facade or cloak for some other transaction before the court could conclude that the transaction evidenced by the documents was a sham (*Normandy Finance*).

Part IVA strengthened

The government amended Pt IVA in 2013 to remedy deficiencies in s 177C (tax benefits) and s 177D, as revealed by a number of Full Federal Court decisions, including *RCI* in 2011 (¶30-160) and *Futuris* in 2012 (¶30-160). Part IVA was amended to make it more effective against tax avoidance schemes carried out as part of broader commercial transactions. The amendments apply in relation to schemes that were entered into, or that started to be carried out, on or after 16 November 2012.

Multinational tax avoidance measures

The government has enacted a number of measures to address multinational tax avoidance, including:

- the doubling of administrative penalties that can be applied to large multinational companies entering tax avoidance or profit shifting schemes (¶29-180)
- the multinational anti-avoidance law (MAAL) which targets multinational entities using artificial or contrived arrangements to avoid the attribution of business profits to a taxable permanent establishment in Australia (¶30-200), and
- the diverted profits tax (DPT: ¶30-205).

These measures apply to "significant global entities" (¶30-200).

Fiscal nullity doctrine

The High Court has held that the doctrine of fiscal nullity, developed by the UK courts to strike down artificial tax avoidance arrangements, does not apply in Australia because of the general anti-avoidance provisions contained in Pt IVA (*John*).

Criminal sanctions for tax fraud or evasion

The *Crimes (Taxation Offences) Act 1980* (Taxation Offences Act) creates a number of criminal offences relating to the fraudulent evasion of various federal taxes — specifically income tax, GST-related taxes, FBT, petroleum resource rent tax and the superannuation guarantee charge. The Act is directed against stripping arrangements which are designed to render a company or trust incapable of paying tax.

In relation to income tax, the Act makes it an offence to enter into an arrangement with a purpose of securing that a company or trust will be, or will be likely to be, unable to pay income tax that is then payable (Taxation Offences Act s 5), or that will or may reasonably be expected to become payable in the future. It is also an offence to aid, abet, counsel or procure another person to enter such an arrangement (Taxation Offences Act s 6; 7). The maximum penalty is 10 years' gaol, a fine of $210,000 (1,000 penalty units: ¶29-000) or both. The person convicted may also be ordered to pay some or all of the tax involved (Taxation Offences Act s 9; 12). The Act operates in a similar way in relation to the other taxes within its scope.

Note that the directors of a company may be personally liable to pay compensation for tax liabilities arising from participation in tax avoidance schemes or tax evasion. In *BCI Finances Pty Ltd (in liq) v Binetter (No 4)*, the Federal Court found that directors of companies involved in tax evasion schemes had sufficient knowledge of and involvement in the schemes to support a finding that they had breached their statutory and common law duties as directors of the companies. The liquidators of the companies succeeded in claims against directors, based on rights to equitable compensation.

[FTR ¶81-150, ¶942-005]

¶30-120 Scope of Pt IVA

ITAA36 Pt IVA (s 177A to 177F) applies to schemes entered into with the sole or dominant purpose of obtaining a tax benefit. The operation of Pt IVA is not limited by any other provision of ITAA36, ITAA97 or by any provision of the *International Tax Agreements Act 1953*.

When Pt IVA was enacted, the then Treasurer said that:

- "arrangements of a normal business or family kind, including those of a tax planning nature", would be beyond its scope
- Pt IVA is designed to operate against "blatant, artificial, or contrived arrangements, but not cast unnecessary inhibitions on normal commercial transactions by which taxpayers legitimately take advantage of opportunities available for the arrangement of their affairs".

Despite these statements, the language used in the provisions is extremely wide. However, since the practical application of Pt IVA depends on the Commissioner making a determination in accordance with the powers conferred under s 177F, it is reasonable to expect that the ATO will only exercise these powers where it considers that a scheme is blatant, artificial or contrived, although it is somewhat uncertain which schemes would be treated as falling within that description. It is also worth noting that in recent years the original function of Pt IVA as a general anti-avoidance regime has been significantly expanded by the enactment of provisions designed to combat more specific arrangements, such as those involving withholding tax (¶30-160) and franking credit trading (¶30-195).

Part IVA specifically does *not* affect tax benefits under the income equalisation deposit or farm management deposit schemes.

Part IVA is intended to apply to trusts and trustees even though in certain circumstances they may not technically be "taxpayers" (*Grollo Nominees*). It may also apply to some schemes involving the group consolidation provisions (¶8-950).

Part IVA may also apply to treaty shopping schemes (TD 2010/20). Treaty shopping refers to the structuring of an arrangement in a manner that attracts the operation of a tax treaty between Australia and another country to obtain a particular benefit or advantage.

Guidelines for ATO staff in dealing with the application of Pt IVA are contained in PS LA 2005/24. In addition, PS LA 2008/6 provides guidelines for dealing with taxpayers who have committed fraud or evasion. See also ¶30-170.

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The ATO has published a practical guide outlining the basic principles of how and when Pt IVA applies to tax schemes. The guide, *Part IVA: the general anti-avoidance rule for income tax — basic principles about how and when it applies* (2005), is available on the ATO website. A fact sheet entitled *Recognising, rejecting and reporting tax avoidance schemes* (2013) is also available on the ATO website.

Effect of applying Pt IVA

Where Pt IVA applies, the Commissioner may cancel the relevant tax benefit (¶30-180) and, in addition, impose penalty tax (¶29-180).

[FTR ¶81-190]

¶30-130 Does Pt IVA apply?

Section 177D determines when Pt IVA applies to a scheme. Separate rules apply to some other specific schemes or benefits (eg franking credit schemes: ¶30-195). The conditions for the application of s 177D are as follows:

- there is a scheme (¶30-140)
- there is a tax benefit (¶30-160)
- it must be possible to conclude that a participant in the scheme did so for the purpose (determined objectively) of enabling one or more taxpayers to obtain a tax benefit in connection with the scheme (¶30-170).

Part IVA applies if the conditions of s 177D are met. However, consequences flow from the application of Pt IVA only if and when the Commissioner makes a determination under s 177F to cancel tax benefits (¶30-180).

[FTR ¶81-195]

¶30-140 Is there a scheme?

To work out if Pt IVA applies, it is necessary to identify a "scheme" as defined in ITAA36 s 177A. A "scheme" means any agreement, arrangement, understanding, promise or undertaking — whether express or implied and whether legally enforceable or not — and any scheme, plan, proposal, course of action or course of conduct (ITAA36 s 177A). Anything done either alone or in association with another or others may constitute a scheme.

Schemes involving franking credit trading and dividend streaming, or franking credits and consolidation, are separately defined in s 177EA (¶30-195) and 177EB, respectively. The Pt IVA consequences of those kinds of schemes are set out in those sections.

The role of artificial entities and their controllers may call for particular consideration. Where a company is concerned, the company itself will probably be a party, its purpose being determined by the collective purpose of its directors (or sometimes the shareholders). However, the directors individually may also be parties, if not otherwise than as a result of their involvement as directors. The role played by directors in discussions of the arrangement should be carefully considered.

A similar question may arise in relation to advisers, particularly when the client of the adviser is relatively unsophisticated and relies heavily on the skill and comprehension of the adviser. In such circumstances, the adviser may well be a party to the scheme.

The simple disposition of an income-producing asset by a natural person to a wholly-owned private company is not an arrangement to which ITAA36 Pt IVA will be applied. However, where there are other associated transactions, transfers or arrangements (whether antecedent or subsequent), the application of Pt IVA may need to be considered in that broader context (TD 95/4).

In any particular situation, it is likely that there will be a number of schemes that can be identified. For example, there may be a scheme involving a large number of the steps that were actually taken, and another scheme involving a fewer number of those steps. In *Peabody*, the High Court said that a set of circumstances will not constitute a scheme if they are incapable of standing on their own without being robbed of all practical meaning, although whether this is still the case as a result of the subsequent High Court decision in *Hart* (¶30-170) is uncertain. Unfortunately, there was no clear precedent arising from the three separate judgments in *Hart* as to the definition of "scheme", as noted by Hill J at first instance in *Macquarie Finance*.

On appeal to a court against a Pt IVA determination, the Commissioner is entitled to put his case in alternative ways. If, within a wider scheme which has been identified, the Commissioner also seeks to rely on a sub-scheme as meeting the requirements of Pt IVA, the Commissioner may rely on it as well as the wider scheme. The ability to isolate sub-schemes to which Pt IVA can apply may make it easier to assert that a scheme was entered into for the sole or dominant purpose of obtaining a tax benefit.

In *British American Tobacco Australia Services Limited*, the Full Federal Court held the relevant scheme included the transfer of assets between related companies, the making of a CGT roll-over election by the first company and sale of the assets outside of the group by the second company which used significant capital losses to offset the capital gain. The effect of the scheme was to reduce tax by shifting a profit into a related company that could offset tax losses against it on ultimate sale. The court rejected an argument that the scheme was limited to the making of the CGT roll-over election as it would have opened the possibility that Pt IVA did not apply by virtue of s 177C(2A).

[FTR ¶81-200, ¶81-303]

¶30-160 Was a tax benefit obtained?

There must be a "tax benefit" in connection with a scheme for Pt IVA to apply (s 177D). Establishing a tax benefit is a two-step enquiry (s 177C). First, a taxpayer must have achieved at least one of the following beneficial outcomes from the scheme:

- an amount is not included in assessable income (s 177C(1)(a))
- a deduction is allowable (s 177C(1)(b))
- a capital loss is incurred by the taxpayer (s 177C(1)(ba))
- a foreign income tax offset is allowable (s 177C(1)(bb)), or
- withholding tax is not payable on an amount (s 177C(1)(bc)).

Second, it must be established that the beneficial tax outcome would not have happened, or it is reasonable to expect that it would not have happened, if the scheme had not been entered into or carried out. So, for example, a tax benefit may be obtained by a taxpayer if an amount is not included in the taxpayer's assessable income which would have been or might reasonably be expected to have been included if the scheme had not been entered into or carried out (ITAA36 s 177C(1)(a)).

The prediction about events which would have taken place if the relevant scheme had not been entered into or carried out is known as the alternative postulate or the counterfactual. The prediction must be sufficiently reliable for it to be regarded as reasonable (*Peabody*).

Before the amendments to Pt IVA that apply on and from 16 November 2012 (¶30-110), the courts had interpreted the requirements in s 177C(1) that a tax effect "would have" or "might reasonably be expected" to have happened, as a composite phrase representing a range of certainty or likelihood of the alternative postulate. However, the amendments applying on and from 16 November 2012 are intended to have the effect that the "would have" and "might reasonably be expected to have" limbs in

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the paragraphs of s 177C(1) are *alternative bases* upon which the existence of a tax benefit can be established. Further, there are rules for working out when and how a tax benefit is established under the two limbs (s 177CB).

The "would have" limb

A decision, for example, that an amount ''would have'' been included in assessable income if the scheme had not been entered into or carried out, must be made solely on the basis of a postulate comprising all of the events or circumstances that actually happened or existed, other than those that form part of the scheme (s 177CB(2)). This is described in the relevant explanatory memorandum (EM) as the ''annihilation approach''. When postulating what would have occurred in the absence of the scheme, the scheme must be assumed not to have happened, ie it must be ''annihilated'' or extinguished. Cases that appear to have been decided on the basis of this approach to the first limb include the Full Federal Court decisions *Puzey* (2003) and *Sleight* (2004).

The "might reasonably be expected to have" limb

A decision, for example, that a deduction ''might reasonably be expected not to have been allowable'' if the scheme had not been entered into or carried out, must be made on the basis of a postulate that is a reasonable alternative to the scheme (s 177CB(3)). Whether a postulate is a reasonable alternative to a scheme must be worked out having particular regard to the substance of the scheme and its results and consequences for the taxpayer, and disregarding any potential tax results and consequences.

This is referred to in the relevant EM as the ''reconstruction approach''. The EM states that a reconstruction approach is a way to identify a tax benefit in relation to a scheme that also achieves substantive non-tax results and consequences. In these cases, simply annihilating the scheme would be inconsistent with the non-tax results and consequences sought by the participants in the scheme.

▶ **Example 1** (based on the EM to the amending Bill)

Mr and Mrs H want to borrow money to acquire both a family home and a holiday house that they plan to rent to holidaymakers. They borrow the money under an arrangement in which the repayments are applied exclusively to the borrowing in relation to the family home. The result is that the deductible interest payments are increased for the holiday home borrowing and the non-deductible interest payments for the family home borrowing are minimised.

Merely annihilating the scheme would not leave a sensible result because there would be no borrowing at all, so some reconstruction is necessary. It is therefore necessary to consider what might reasonably be expected to have happened if the scheme had not been entered into. A reasonable alternative in this case might be that Mr and Mrs H took out two loans, one for each of the homes they wished to acquire, each of which was entered into on normal commercial terms.

Examining the substance of a scheme requires a consideration of its commercial and economic substance as distinct from its legal form or shape. Where a scheme forms part of a broader commercial transaction, a postulate would be a reasonable alternative to the scheme if it performed the same role in relation to the broader transaction as the scheme itself performs, disregarding its tax effects. If a scheme is integral to a broader transaction in the sense that it is intertwined with it and facilitates it in some way, then it would be reasonable for an alternative postulate to involve a reconstruction of the broader transaction, so long as that produces the same non-tax results and consequences as were in fact achieved by the broader transaction.

▶ **Example 2** (based on the EM to the amending Bill)

Assume that in order for Kerry to secure a tax deduction for borrowing money to invest in an offshore company (Offshore Co) it is necessary for her to interpose a resident Australian company. She does this by using the borrowed funds to buy shares in an Australian shelf company (Oz Co). In turn, Oz Co buys ordinary shares in Offshore Co. Oz Co performs no other role.

The Commissioner makes a Pt IVA determination on the basis that the interposition of Oz Co is a scheme to which Pt IVA applies. Objectively viewed, the interposition of Oz Co achieves two effects. One is securing a deduction for interest on the borrowing, and the other is the acquisition of shares in Offshore Co.

A correct alternative postulate should be another way in which Kerry could reasonably be expected to have acquired ordinary shares in Offshore Co. An alternative postulate that involved Kerry lending the borrowed monies to Offshore Co would achieve a different effect. So too would be a postulate that involved Kerry investing the borrowed monies in a completely different company.

Potential tax liabilities are not to be taken into account in assessing the likelihood or reasonableness of any alternative postulate. As a result, an alternative course of action cannot be rejected on the basis that the tax costs involved in undertaking it would have caused the parties to do nothing, including deferring or abandoning a wider transaction of which the scheme was a part (see, eg *RCI*).

A tax benefit may arise if the effect of a scheme is that an amount is assessable under a different provision, or is differently characterised, thus altering its tax treatment (IT 2456).

Exclusion for tax benefits arising from making agreements, choices, etc

Tax benefits obtained as a result of the making of an agreement, choice, declaration, election, selection, notification or option which is expressly provided for in ITAA36 or ITAA97 are not caught by Pt IVA, provided the relevant scheme was not entered into for the purpose of creating the preconditions necessary for making the relevant agreement, choice, etc (s 177C(2)). Thus, the mere fact that a taxpayer takes advantage of the option in ITAA97 s 70-45 for valuing trading stock on hand at the end of a year at cost price, market selling price or replacement price will not attract Pt IVA.

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There is an exception to this where the tax benefit consists of the incurring of a capital loss. In this case, the exemption does not apply if the loss is attributable to an agreement etc, to roll over an asset under the group company provisions, or to transfer a group company loss, and this forms part of a wider scheme.

In one case, a taxpayer argued that ITAA36 offered him a choice of conducting his affairs either as an employee or as a consultant to a family company/family trust. The AAT held that the fact that ITAA36 recognises entities such as trusts does not mean that the choice of the trust mechanism for income-splitting was ''expressly provided for'' (*Case W58*).

Cases about tax benefits

The cases about tax benefits in the following commentary were decided based on Pt IVA before it was amended with effect from 16 November 2012 (¶30-110).

In *Peabody* (1994), the High Court set out what is required, when considering what might ''reasonably be expected'' to have happened in the absence of a Pt IVA scheme. A reasonable expectation requires more than a possibility and the prediction must be ''sufficiently reliable for it to be regarded as reasonable''. In *Peabody*, Pt IVA did not apply. The Commissioner could not establish an alternative postulate under which the taxpayer would have received the amount on which she was assessed if the scheme in question had not been implemented.

In *Spotless* (1996), the High Court held that Pt IVA applied to a scheme to invest surplus funds in the Cook Islands to derive interest income that would have been exempt from Australian income tax. It found that if the scheme had not been entered into, the ''reasonable expectation'' was that an amount would have been included in the taxpayer's assessable income as a result of investing the funds in Australia. The Commissioner identified the tax benefit as the actual amount of overseas interest, less withholding tax, rather than the higher amount of ''notional'' Australian interest. It

appears that the court considered the notional amount more accurately reflected the tax benefit but it ruled that the Commissioner's quantification was not adverse to the taxpayer and there was no alteration of the amount.

In a number of recent cases, the taxpayer has successfully challenged the application of Pt IVA on the basis that the Commissioner could not establish the existence (and/or the amount) of a tax benefit by reference to a reasonable alternative postulate. The cases, including *AXA Asia Pacific Holdings* (2010), *RCI* (2011) and *Futuris* (2012), prompted the amendments to Pt IVA that apply on and from 16 November 2012 (¶30-110). The Commissioner believes that the introduction of s 177CB into Pt IVA has significantly altered the framework of the tax benefit test in s 177C(1), to the extent that cases such as *AXA* should be treated with extreme caution when applied to the current version of Pt IVA (ATO *Decision Impact Statement on FCT v AXA*).

RCI was a company involved in a complicated restructure of the international James Hardie group. The Commissioner identified a scheme for Pt IVA purposes under which the market value of shares held by RCI were reduced by the payment of a dividend. As a result, on a later transfer of the shares, the capital gain was less than it would otherwise have been in the absence of the scheme. The Full Federal Court found that there was no tax benefit because RCI would not have transferred the shares and participated in the restructure if the costs of doing so, including the tax costs, were unacceptably high. It was a reasonable alternative postulate that RCI would have done nothing, meaning that no amount would have been included in its assessable income.

In *Futuris* (2012), the Commissioner unsuccessfully tried to apply Pt IVA to a series of steps that occurred in anticipation of the sale of the Futuris group's building products division. The scheme had the effect of reducing the amount of net capital gain assessable. The Full Federal Court accepted that Futuris could not have been expected to carry out the float in the way postulated by the Commissioner because it would have generated significant tax costs and was not commercially feasible. Futuris produced expert evidence of what its commercial options were if it had not entered the scheme. It discharged its onus of proving the amended assessment excessive by putting forward a credible alternative postulate to the Commissioner's counterfactual.

In the course of litigation that led to *Futuris* (2012), the Federal Court refused Futuris' application for the Commissioner to provide particulars as to what the taxpayer might have done had it not entered the scheme, as that was not consistent with the taxpayer's burden of proving the Pt IVA assessment excessive (*Futuris* (2009)).

AXA Asia Pacific Holdings (2010) concerned the sale by the taxpayer of a wholly owned subsidiary to a third party and the effectiveness of CGT rollover relief. The Full Federal Court held that no tax benefit arose because the Commissioner's alternatives to the scheme were not reasonable.

By contrast, Pt IVA applied to the taxpayer in a case involving the disposal of assets to a third party in a way that minimised CGT (*British American Tobacco Australia*). The scheme involved an internal sale of assets within the group and a CGT rollover before sale to the third party. The Full Federal Court accepted the reasonableness of the Commissioner's alternative hypothesis which was a direct sale of assets by the taxpayer to the third party, generating an assessable capital gain.

In *Lenzo* (2008), a case involving an investment by an individual in a forestry managed investment scheme, the Full Federal Court held that a taxpayer can satisfy the onus of showing that he/she has not obtained a tax benefit in connection with a scheme if: (a) he/she would have undertaken or might reasonably be expected to have undertaken a particular activity in lieu of the scheme; and (b) the activity would or might reasonably be expected to have resulted in an allowable deduction of the same kind as the deduction claimed by the taxpayer in consequence of the scheme.

Part IVA applied to deny deductions for payments made to an ''employee welfare fund'' established by an employer for the benefit of employees (*Trail Bros Steel & Plastics Pty Ltd*). An employer stopped making contributions to a self managed superannuation fund on behalf of the employees and instead made payments to the fund, after a change in the law limiting the amount of deductible contributions that could be made to a superannuation fund. The Full Federal Court affirmed the Commissioner's Pt IVA determination, disallowing deductions for the substituted payments. The court did not accept the taxpayer's contention that if the scheme had not been entered into and the payments had not been made to the fund, the taxpayer would have made deductible payments to its employees in some other way.

However, the court considered that, if the scheme had not been carried out, it was reasonable to conclude the employer would have made deductible payments up to the amount of deductible contributions that could have been made to a superannuation fund. In that case, the *amount* of the tax benefit was not the full amount of the deduction claimed but the difference between it and the deductible superannuation contributions.

In *Grollo Nominees*, the Full Federal Court ruled that Pt IVA can apply to a trustee although the relevant tax benefit accrued to beneficiaries of the trust.

[FTR ¶81-210, ¶81-330]

¶30-170 What was the dominant purpose?

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In order for the general anti-avoidance provisions to apply, it must be able to be concluded that at least one person who entered into or carried out the scheme did so for the sole or dominant purpose of obtaining a tax benefit (ITAA36 s 177A(5); 177D). In determining this, the Commissioner must take into account the following eight matters listed in s 177D(2):

(a) the manner in which the scheme was entered into or carried out

(b) the form and substance of the scheme

(c) the time at which the scheme was entered into and the length of the period during which it was carried out

(d) the income tax result that, but for Pt IVA, would be achieved by the scheme

(e) any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme

(f) any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, being a change that has resulted, will result, or may reasonably be expected to result, from the scheme

(g) any other consequence for the relevant taxpayer, or for any person referred to in (f), of the scheme having been entered into or carried out

(h) the nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in (f).

Relevant cases

Each of the eight matters involves an objective finding of fact (*Spotless*). The parties' subjective intentions are certainly not decisive. In fact, it may well be that they are irrelevant (*CC (NSW) Pty Ltd (in liq)*; *Eastern Nitrogen*; *Vincent*).

Although each of the eight matters must be considered, it is not necessary that they be unbundled from a global consideration of purpose and ''slavishly ticked off'' (*Consolidated Press Holdings*).

There was no "objectively ascertainable business purpose" served by the payment of the fee. The court was in no doubt that the function of the fee was to generate a statutory deduction for an expense that appeared genuine but was actually a contrivance.

Part IVA applied to a complex set of cross-border financing transactions, resulting in the cancellation of foreign tax credits claimed by the taxpayer (*Citigroup*, Full Federal Court). Citigroup, in partnership with a subsidiary company, subscribed for bonds issued in Hong Kong and immediately sold the interest and principal entitlements under the bonds. Hong Kong tax was paid on the gross proceeds on the sale of the coupons. In Australia, Citigroup returned the Hong Kong profit in the year the bonds were purchased as assessable income and claimed foreign tax credits for the Hong Kong tax paid. The court held Citigroup's dominant purpose was to obtain the foreign tax credits in Australia.

Splitting personal exertion income

Part IVA has been applied to various arrangements involving the splitting of personal exertion income. Although specific statutory limitations have applied since 1 July 2000 (¶30-600), Pt IVA continues to have potential application (¶30-690).

Application of Pt IVA: Commissioner's view

The Commissioner has issued extensive guidance and opinion on the application of Pt IVA to specific transactions. The following information is organised under the broad categories of schemes benefiting individuals, loans, leasing and other financial transactions and companies, shares and other securities.

Schemes benefiting individuals

Part IVA may be applied to schemes involving the creation of tax benefits for employees, including: fringe benefits such as cars provided by service or service/administration companies for the private use of employees (IT 2494); an employee benefit trust arrangement, where bonus units are issued to employees and neither ITAA97 s 6-5 nor s 15-2 apply (TR 2010/6); an employee savings plan, where an employer contributes what would otherwise be salary or wages to a benefits trust and the employee receives bonus units (TD 2010/10); and a salary deferral arrangement as described in TD 2010/11.

Schemes involving professionals and their legal structures include: service arrangements with unusual features (eg the service fees are excessive (TR 2006/2)); a professional person's practice company makes no attempt to distribute income or it holds unacceptable investments (IT 2503); schemes involving professional services providers earning personal services income who enter into a partnership with unrelated taxpayers. Income is re-characterised as partnership income to enable the taxpayer to split the income with a spouse or related party (TD 2002/24); schemes to claim deductions for purported partnership losses claimed to have been incurred as a result of entering into prepaid service warrant arrangements (TD 2003/9). The ATO has published a guide on its website *Your service entity arrangements* to assist professional firms in determining whether fees paid under their service arrangements are tax deductible.

Schemes involving individuals in business include: incentives given to enter into a lease of business premises (IT 2631: ¶10-116, ¶16-650); large deductions claimed for internet marketing expenses paid to tax-haven based marketers (TD 2002/23; ¶16-725); and deductions claimed by a retailer for volume allowances contributed to a mutual association (TR 2004/5).

Trusts may be used as a vehicle for delivering tax benefits of the following kinds: a deduction for interest claimed as part of an uncommercial trust arrangement (TD 2009/17); capital gains streamed to a beneficiary where there is a deliberate mismatch between trust income entitlements and amounts actually taxable (TA 2013/1); and deductions claimed under certain home loan unit trust arrangements (TR 2002/18). The

arrangement in TR 2002/18 involves borrowing to acquire units in a unit trust that acquires a private residence and leases it to the taxpayer. The unit trust claims deductions for property outgoings and the taxpayer claims deductions for interest on borrowings.

Professional firms and Pt IVA

Until 14 December 2017, the ATO website contained materials and guidelines, titled *Assessing the risk: allocation of profits within professional firms*, to help taxpayers assess the risk of Pt IVA applying to the allocation of profits from a professional firm carried on through a partnership, trust or company. As a result of a review of the guidelines, the ATO has advised that they do not apply after 13 December 2017 and they will be revised and replaced after consultation with stakeholders in 2018.

The withdrawn guidelines set out how the ATO would assess the risk of Pt IVA applying to allocation of profits within a professional firm, from 30 June 2015. In particular, the ATO had formed the view that Pt IVA could apply to an Everett assignment (¶5-160), unless certain benchmarks were met for it to be rated low risk.

The ATO believes that the guidance material is being misinterpreted in relation to arrangements that go beyond its scope. It has also identified arrangements exhibiting high risk factors not specifically addressed within the materials, including the use of related party financing and SMSFs.

Arrangements entered into before 14 December 2017 which comply with the guidelines and do not exhibit high risk factors will not be reviewed but such arrangements exhibiting any of the high risk factors may be subject to review. Individual professional practitioners contemplating entering into new arrangements from 14 December 2017 are invited to contact the ATO.

Loans, leasing and other financial transactions

Part IVA may be applied to loan and financing schemes including: margin lending arrangements (IT 2513) or certain financing unit trust arrangements (IT 2512: ¶10-465); arrangements designed to provide a non-resident beneficiary with an entitlement to interest income earned by a resident trust estate from associates (IT 2344; IT 2466); an "investment loan interest payment arrangement" where the subjective purpose is "to pay off a home loan sooner" (TD 2012/1); and schemes under which an Australian lender seeks to convert otherwise assessable interest income from a non-resident borrower into non-assessable non-exempt dividends (TD 2011/22).

Leasing schemes that may be attacked by Pt IVA include: certain forms of leveraged leasing (IT 2051) or equity leasing (IT 2169); cross border equipment leasing arrangements structured to avoid withholding tax on royalty or interest payments (TR 98/21); and sale and leaseback arrangements where appropriate values are not used, eg in respect of the sale price of the asset, the lease payments, the residual value of the asset or any balancing adjustments (TR 2006/13: ¶23-240).

Part IVA may apply to arrangements where life policy premiums are paid by an employer on behalf of an employee with the expectation that the employee will obtain the amounts paid as premiums shortly after they are paid (TD 92/164); and where premiums are paid under arrangements known as "financial insurance" and "financial reinsurance" (TR 96/2).

Financial transactions that have tax-driven features to which Pt IVA may apply include: an asymmetric swap scheme — typically two swap transactions entered into between an Australian resident company and an unrelated non-resident counterparty (TD 2010/12); a non-arm's length disposal of a traditional security (eg an assignment to a related party) (TR 96/14); and wash sale arrangements used to minimise CGT (TR 2008/1: ¶11-250).

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¶30-190 Dividend stripping

ITAA36 Pt IVA contains a provision which is specifically directed at "dividend stripping" schemes. This provision applies where:

(1) as a result of a dividend stripping scheme, any property of the company is disposed of

(2) the Commissioner is of the opinion that the disposal of the property represents, wholly or in part, a distribution of profits (whether of the current, a past or a future accounting period) of the company, and

(3) if the profits represented by the disposal of the property had been paid as a dividend immediately before the scheme was entered into, it would be reasonable to expect that this would result in an amount being included in a taxpayer's assessable income (ITAA36 s 177E).

Where these conditions are satisfied, the scheme is taken to be a scheme to which Pt IVA applies. The taxpayer who would have been assessable on the payment of the notional dividend referred to in (3) above is taken to have obtained a tax benefit in connection with the scheme that is referable to the notional amount not being included in assessable income. The amount of the tax benefit is the notional amount.

The Commissioner may then make a determination to cancel the tax benefit in whole or in part and also, if the circumstances are appropriate, a determination to effect any compensating adjustment or adjustments that may be necessary (¶30-180).

Section 177E applies only to schemes that have the dominant purpose of tax avoidance. Ordinarily, this purpose is to enable the vendor shareholders to receive profits of the company in a substantially (if not entirely) tax-free form, thus avoiding tax that could be payable if the company's profits were paid as dividends to shareholders. Therefore, it did not apply where the dominant purpose was to carry out a complex corporate reorganisation, the sale of the shares was only incidental, and significant *assessable* capital gains were received (*Consolidated Press Holdings*).

The section applies not only to schemes "by way of or in the nature of" dividend stripping, but also to schemes that have "substantially the effect" of dividend stripping (see *Lawrence* and the article in CCH *Tax Week* ¶35_2_2009 (2009)). This is intended to catch schemes where the distribution by the company is not in the form of dividends, eg where an irrecoverable loan is made to associates of the purchaser.

An example of a dividend stripping scheme for the purposes of s 177E is given in TD 2014/1. Broadly, the arrangement involves accessing the tax-paid profits of a private company using dividend access shares, in a way that transfers the economic benefit of the company's profits to the original shareholder and his/her associates in a tax-free or substantially tax-free form.

[FTR ¶81-360]

¶30-195 Franking credit schemes

ITAA36 Pt IVA is also attracted where a scheme involving a disposition of shares is entered into with a purpose of enabling the taxpayer to obtain a franking credit benefit (ITAA36 s 177EA). Unlike the general provisions of Pt IVA, this provision does not depend on the formal identification of a "tax benefit in connection with" a scheme. It applies where:

- there is a disposal of shares or an interest in shares
- a franked dividend is paid

- the shareholder would or could reasonably be expected to receive franking credit benefits from the dividend, and
- having regard to specified circumstances, it would be concluded that a purpose of at least one of the participants was to obtain a franking credit benefit. It is not necessary that this purpose is the dominant purpose, but it is not sufficient that it is merely incidental.

In these circumstances, the Commissioner has a choice as to whether to debit the company's franking account or deny the franking credit benefit to the recipient of the dividend. This provision applies to dividends and distributions paid after 7.30 pm on 13 May 1997. It operates in association with other rules that are designed for companies preferentially streaming dividends to advantage certain shareholders (¶4-920). It also potentially applies to any scheme involving the issue of certain types of convertible notes (TR 2009/3).

The issue in *Mills* was whether there was a non-incidental purpose of enabling investors in stapled securities issued by a bank to obtain imputation benefits in the form of franked dividends. The High Court held that while there was a purpose of enabling taxpayers who became holders of the securities to obtain franking credits, that purpose was incidental to the Bank's purpose of raising capital. Therefore, s 177EA did not apply. The High Court reached a different conclusion to the Federal Court judge at first instance and the majority decision of the Full Federal Court.

The fact that the parties to a scheme made investment management decisions on a proper commercial basis and to achieve long-term commercial objectives did not mean that s 177EA could not apply (*Electricity Supply Industry Superannuation (Qld)*).

The Commissioner believes that s 177EA will generally apply to a dividend washing scheme of the kind described in TD 2014/10. Dividend washing occurs when a shareholder who places a relatively high value on franking credits (such as a superannuation fund or an income tax exempt not-for-profit entity) enters a series of transactions with a shareholder who places a lower value on franking credits (such as a non-resident), resulting in a transfer of the value of franking credits from the latter to the former.

An integrity rule in the imputation provisions limits, from 1 July 2013, an entity's ability to obtain the benefits of any additional franking credits received as a result of dividend washing (ITAA97 s 207-157: ¶4-975). In March 2016, the ATO stated that the application of s 207-157 to distributions on or after 1 July 2013 is expected to relieve the Commissioner from making determinations under s 177EA to target dividend washing (ATO statement on *Norman Superannuation Fund*). The AAT confirmed that a dividend washing scheme that took place after 1 July 2013 was caught both by s 207-157 and 177EA (*Lynton*).

The ATO has warned that s 177EA may apply to a scheme in which a private company with accumulated profits channels franked dividends to a self managed superannuation fund (TA 2015/1). Section 177EA may also apply to arrangements where a company raises new capital to fund the payment of franked dividends (TA 2015/2).

Franking credit schemes and consolidated groups

On the introduction of the consolidation regime (¶8-000), a specific anti-avoidance rule was targeted at schemes entered into with a purpose of enabling franking credits to be transferred from a subsidiary to a head company on consolidation (s 177EB).

Section 177EB applies to schemes entered into on or after 1 July 2002. It supplements the general franking credit trading rules in s 177EA by applying to the specific circumstances of the consolidation of a company within a corporate group. Section 177EB does not limit s 177EA, nor does s 177EA limit s 177EB (s 177EB(2)).

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- Directors must ensure that, where the company has made PAYG deductions (eg from employees' wages), or become liable for superannuation guarantee charge, the company remits the instalments or SGC to the ATO within the prescribed time or make alternative arrangements. In default, each director becomes personally liable for a penalty equal to the unpaid amount (¶25-560). Directors should also ensure payments are made for PAYG withholding to the ATO to ensure tax deductions are available for the company's salary and wages (¶26-620).
- A director may be personally liable for a special "PAYG withholding non-compliance tax" where the company has withheld PAYG amounts from payments made to the director, but failed to pay its total withheld amounts to the Commissioner. Corresponding rules may also apply to associates of directors in certain circumstances (¶25-560).
- Where an offence is committed by the company, the directors may also be liable for a range of associated offences, including aiding and abetting, inciting or urging the commission of an offence, or conspiracy to defraud (¶29-700).
- Where a "taxation offence" is committed by the company, directors will also be treated as having committed the offence unless they can show that they were not involved with it. The court may also make reparation orders against the directors (¶29-710).
- A director who is appointed as the public officer of the company is responsible for the performance by the company of its tax obligations, and also bears personal liability in certain circumstances. Even if the director is not the public officer, the Commissioner may serve a notice on the director requiring him/her to ensure that the relevant company obligations are carried out (¶3-030).
- In the absence of a tax sharing arrangement, directors of a company which is part of a consolidated group may find that the company may be liable for the tax liabilities of other companies in the group (¶8-000).
- Directors may be liable under the "bottom of the harbour" legislation, and for a range of other offences such as making false and misleading statements, or hindering taxation officers (¶29-700).
- The state of mind of a company will normally be taken to be the state of mind of its directors and managers. In the case of taxation offences, the intentions of the employees who commit the relevant acts may be attributed to the company (¶29-710).
- For the purpose of assessing penalty tax, a disclosure made by a director of a private company after the ATO has already made contact with the company will not be regarded as a voluntary disclosure (¶29-710).

¶44-130 Natural disasters tax checklist

Loss or damage: general

- Premiums paid for insurance cover for business losses are normally deductible (¶16-550).
- Insurance payouts for loss of profits are assessable (¶10-170).
- Destroyed trading stock can be valued at nil. Payouts for loss of trading stock are assessable (¶9-240, ¶10-170).
- Payouts for loss of depreciating assets normally give rise to balancing adjustments, but a roll-over may be available where a replacement asset is acquired (¶17-720).
- Special depreciation rules apply on the loss of business cars (¶17-665).

- Where capital works are destroyed, there may be a balancing deduction based on the amount of undeducted construction expenditure. Payouts for loss of capital improvements reduce the balancing deduction otherwise arising (¶20-530).

Loss or damage: CGT

- CGT exclusions apply to the loss of trading stock and depreciating assets (¶11-700).
- Capital losses on collectibles acquired for $500 or less are disregarded (¶11-390, ¶11-640).
- Capital losses on personal use assets are disregarded (¶11-400, ¶11-640).
- Capital losses on cars or motor cycles are disregarded (¶11-640).
- The loss or destruction of an individual's main residence does not give rise to a capital loss. Special rules apply where there is a subsequent sale of the property (¶11-730).
- If an asset or part of an asset is totally lost or destroyed, and an exemption does not apply, CGT may apply but certain gains may be rolled-over (¶11-250, ¶12-260).
- If an asset is permanently damaged, CGT does not apply but insurance proceeds may reduce the cost base (¶11-550).

Repairs, prevention and other costs

- The cost of repairs to business property is deductible (¶16-700). If the expenditure is on capital improvements, it will instead be taken into account for the purpose of determining the cost under the depreciation (¶17-105), capital works (¶20-510) or CGT rules (¶11-550).
- Demolition costs would normally be capital (¶16-060).
- A three-year write-off applies for capital expenditure on a wide range of water facilities for the purpose of conserving or conveying water. This would include the cost of installing an extra pump for an in-ground swimming pool where the pump is to be used solely for fire fighting purposes (¶18-080).
- Rural businesses can claim an outright deduction for capital expenditure on landcare operations (¶18-100).
- Rural businesses can claim an outright deduction on construction and installation of fodder storage assets for their own business livestock. To get the outright deduction, the fodder storage asset must be installed ready for use on or after 19 August 2018 (¶18-085).
- An outright deduction can be claimed for expenditure on business-related environmental protection activity (¶19-110).
- An outright deduction is allowable for expenditure on rehabilitation of mining sites (¶19-100).
- The cost of replacing plants in an existing plantation because of storm damage would normally be deductible outright (¶18-070).
- A deduction is allowed for capital business expenditure on the establishment of trees in "carbon sink" forests established for the purpose of sequestering carbon from the atmosphere (¶19-120).
- Expenses of closing down a business would normally not be deductible, but may qualify for a write-off over five years (¶16-156).

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Other special rules for primary producers

- A concessional rule applies where drought, fire or flood causes there to be an advanced shearing by a primary producer carrying on a sheep grazing business (¶18-140).
- If the taxpayer's assessable income would otherwise include a disaster-related insurance recovery for the loss of livestock, the taxpayer can elect to spread the amount of the recovery in equal instalments over five years. The same applies to insurance recoveries for the loss of trees by fire (¶18-150).
- Special concessions apply if there has been a forced sale or death of livestock due to destruction of pasture or fodder due to drought, fire or flood (¶18-160).
- Averaging rules may apply where there are fluctuations of primary production income from year to year (¶18-200).
- Withdrawals of Farm Management Deposits may be made without tax penalty even though they occur within 12 months, provided that there are exceptional circumstances (¶18-290).

Grants and assistance

- One-off governmental grants to assist with living expenses may be tax free, but some grants made to businesses may be assessable (¶10-195, ¶10-197).
- Gifts to charitable funds to assist persons in necessitous circumstances are deductible, and payments from such funds would not normally be assessable (¶10-070, ¶16-950).
- Donations to disaster relief funds may be deductible (¶16-950).
- Gifts of goods and services by businesses to victims of disasters may be deductible as marketing expenses (¶16-152).
- Income earned from employment in the operations of a developing country relief fund or a public disaster relief fund qualifies under the exemption for foreign employment income (¶10-860).

Records and substantiation

- Concessional rules apply where substantiation records of work and travel claims have been lost as a result of circumstances outside the taxpayer's control (¶16-340).
- Bank fees for replacing business records are deductible (¶16-152).
- The ATO may be able to assist in reconstructing destroyed tax records (¶9-045).

Other hardship concessions

- An exception to the non-commercial loss rules may apply where there are special circumstances, including natural disasters (¶16-020).
- Early release of superannuation benefits may be possible in cases of severe financial hardship (¶13-025).
- Hardship resulting from natural disasters may be a factor in obtaining an extension of time to pay tax or lodge returns, a release from payment, relief from interest or penalties, and fast tracking of refunds (¶25-450, ¶29-400, ¶29-530).
- The financial effects of a natural disaster may be taken into account in determining whether an entity satisfies the "small business entity" income tests for obtaining tax concessions (¶7-050).

GST aspects

- A natural disaster may mean that a business is no longer a "going concern" that is eligible for GST-free status on sale (¶34-240).
- Charities can elect to have fundraising events treated as input taxed (¶34-170).
- The prospect of factors such as drought or fire may be taken into account in determining whether a business satisfies the income test for the "small business entity" GST concessions (¶34-270).
- An input tax credit on business items that you have acquired is not affected if the items are subsequently destroyed (¶34-100).
- If the business is reimbursed for its losses under an insurance policy, the settlement will not be subject to GST, provided that the insurance company was notified of the input tax credit entitlement for the premium (¶34-210).
- GST does not apply where unconditional gifts are made to victims of natural disasters (¶34-160).
- The Commissioner can waive or modify the formal requirements for tax invoices or adjustment notes in special circumstances such as natural disasters (¶34-140).

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¶44-140 Students' tax checklist

Remuneration and benefits

- Commonwealth government education or training payments made for students aged 16 or over, such as Austudy, ABSTUDY or youth allowance, are generally assessable, though exemptions apply to certain supplementary payments (¶10-195, ¶10-700).
- Payments for students under Commonwealth assistance schemes for secondary education, or for education of isolated children, are exempt (¶10-700).
- A Commonwealth Trade Learning Scholarship is exempt (¶10-700).
- Certain apprenticeship bonus payments are wholly or partly exempt (¶10-700).
- Other scholarships, bursaries or other educational allowances derived by a student of any age receiving full-time education at a school, college or university are exempt, unless otherwise specified (¶10-740).
- Concessional tax treatment may apply to certain educational scholarship plans offered by friendly societies (¶3-470).
- A university does not have an obligation to make superannuation guarantee contributions in relation to scholarship payments made to students where the scholarship is funded by an industry-based organisation (¶39-024).
- An ordinary allowance received by a student from his or her parents would not normally be assessable unless it is a distribution from a family trust or is a wage received as a salaried employee (¶10-010).
- Payments received by visiting students from overseas for their maintenance, education or training are typically exempt from Australian tax where they're visiting solely for educational or training purposes and a Double Tax Agreement is in force (¶22-150).
- Certain international scholarships are exempt (¶10-700).
- Benefits relating to placement in an approved student exchange program may be exempt from FBT (¶35-645).

- A death benefit termination payment or superannuation death benefit paid to a financially dependant student may be eligible for concessional tax treatment (¶14-270, ¶14-680).

HELP and Financial Supplement repayments

- The Higher Education Loan Programme (HELP) offers loans to assist students to pay their higher education fees and to study overseas. The obligation to make repayments of HELP debt apply once repayment income reaches a minimum level. This is extended to debtors living overseas from 1 July 2017 (¶2-380).
- The PAYG rules apply to debts due under HELP and debts still due under the former Financial Supplement (FS) scheme. Variation of PAYG instalments may be appropriate once the debt is repaid (¶27-100, ¶27-280).
- Certain superannuation contributions may be treated as income for the purpose of determining liability to make HELP or FS repayments (¶13-730).

Deductions and offsets

- Education expenses may be deductible where they have the required connection with the production of assessable income. The expenses may include tuition fees, textbooks, student union fees, student services and amenities fees and travel and living expenses incurred in attending conferences, seminars and educational institutions. However, self-education expenses are no longer deductible against government assistance payments (¶16-450).

Liability, rates and thresholds

- An international student who is a non-resident of Australia is not eligible for the tax-free threshold, and must lodge an Australian tax return if they derive any Australian assessable income in the income year. However, students who are studying a course in Australia of a greater duration than six months may be treated as residents for tax purposes. In years in which they are residents for only part of the income year, the tax-free threshold will be apportioned. A short term vocational experience student would not normally be a resident (¶2-130, ¶21-010).
- Students under 18 years may be subject to the special tax rates applying under the minors' income rules (¶2-170).
- A person who is in full-time education at a school, college or university and is under 25 years can qualify as a dependant for the purpose of calculating a taxpayer's liability or exemption from the Medicare levy or the Medicare levy surcharge (¶2-310).

Other aspects

- Quotation of a TFN may be a precondition to enrolling in a higher education institution or in an Open Learning course (¶33-000).
- Secondary school students may use a simplified method of obtaining a Tax File Number by applying under the ATO's Secondary Schools TFN program (¶33-000). Overseas students whose course of study is six months or longer can apply online.
- Most educational services are GST-free (¶34-165).

¶44-145 Indigenous taxpayers tax checklist

This checklist sets out those tax-related measures that specifically apply to indigenous taxpayers or that may be particularly relevant to them.

- Aboriginal housing associations and land councils may qualify as public benevolent institutions, so gifts to them may be tax deductible (¶16-950) and payroll tax exemptions may apply (¶36-060).

- Mining payments made to Aboriginal people and distributing groups relating to the use of Aboriginal land for mining and exploration are subject to mining withholding tax, but are otherwise tax-exempt (¶10-895, ¶19-006).
- PAYG withholding may be required when making payments to indigenous artists where that artist is in business and does not quote an ABN. However, rates may be varied to nil where there is a payment for artistic works where the artist qualifies for a special Zone A rebate and does not quote an ABN (¶26-220).
- PAYG withholding may apply to payments for tutorial services provided for the Indigenous Tutorial Assistance Scheme and specified interpretation and translation services (¶26-150).
- Retrospective tax exemption may apply to native title benefits accruing to indigenous people and associated bodies (¶19-006).
- Payments under the ABSTUDY scheme are assessable if made to students aged 16 or over (¶10-700), but may qualify for the beneficiary rebate (¶15-315). Supplementary amounts are exempt (¶10-700, ¶10-885).
- A special "Application for TFN" form (¶3-000) is available for Aboriginal or Torres Strait Islanders, with an expanded range of persons able to provide proof of identity.
- A beneficiary tax rebate applies to a range of assessable social security benefits and allowances, including ABSTUDY, the Assistance for Isolated Children Scheme and Community Development Employment Projects (¶15-315).
- Specified payments made to students awarded an Indigenous Training and Recruitment Initiatives (INTRAIN) Scholarship are tax exempt (CR 2011/37).
- A tax offset applies to investors providing low cost housing under the National Rental Affordability Scheme (¶20-605).
- Resale royalty payments received by an artist under the Resale Royalty Right for Visual Artists scheme are normally assessable (¶10-510).
- Assistance in preparation of tax returns may be available under the ATO's Tax Help program or from the ATO Indigenous Helpline (phone: 13 10 30).
- Tax offsets ("zone rebates") are available for individuals who are residents of specified isolated areas (¶15-160).
- Various FBT concessions apply for fringe benefits provided to employees working in remote areas (¶35-650).

¶44-150 Sickness, injury and disability tax checklist

Medical expenses

- Medical expenses are normally not tax deductible (or depreciable) unless there is something peculiar to the taxpayer's income-earning activities that requires the expenditure to be incurred (¶16-175, ¶16-190, ¶17-010).
- A deduction is available for the cost of protective clothing. Sun protection equipment may also be deductible for outdoor workers (¶16-180).
- The cost of repairs made to control health risks may be deductible as environmental protection expenditure (¶19-110).
- An employer may be able to claim a deduction for medical expenses incurred in connection with its employees, provided that the necessary connection with the interests of the business can be shown (¶16-520).

- Providing benefits to employees by paying or reimbursing their expenses may expose the employer to fringe benefits tax (FBT). However, there are a number of medical and health-related FBT exemptions (¶35-645).
- In certain very limited circumstances, a resident taxpayer whose net medical expenses exceed a certain threshold may claim a tax offset of the excess ¶15-320. If the expenses are also tax deductible, it may be that both the deduction and the offset could be claimed (¶15-325, ¶16-100).
- Most supplies of health and medical services are GST-free (¶34-165).
- Supplies of cars to disabled veterans and other disabled persons may be GST-free (¶34-220).

Insurance, compensation and social security

- Lump sum compensation payments for personal injuries are assessable if they are solely for loss of earnings, but not if they are for loss of earning capacity (¶10-185).
- Certain annuities and lump sums provided to personal injury victims under "structured settlements" are tax exempt (¶10-185).
- Periodical payments for loss of wages, such as workers compensation, are assessable (¶10-180).
- A capital gains tax exemption applies to various personal injury compensation awards (¶11-650).
- Periodical payments under a personal accident, income protection or disability insurance policy would normally be assessable, and premiums deductible, where the payments take the place of lost earnings (¶10-210, ¶16-560).
- Ordinary health insurance contributions would normally not be deductible, but a tax offset may be available in some situations (¶15-330).
- Various social security and related benefits may be payable where a person is sick or disabled (¶10-195).
- Tax and CGT exemptions apply to certain foreign wounds and disability pensions, persecution compensation and military injury payments (¶10-200 – ¶10-204, ¶10-780, ¶11-650).

Superannuation and termination payments

- In certain cases, people can get early access to their superannuation benefits on medical grounds (¶13-025).
- Certain carers or care recipients qualify as "dependants" who may be eligible to receive superannuation death benefits (¶14-270).
- Where a superannuation lump sum payment includes a disability benefit, a portion of the payment may be tax-free (¶14-130, ¶14-220).
- Where a lump sum employment termination payment includes a disability benefit, a portion of the payment may be tax-free (¶14-640).
- Certain personal injury contributions are excluded from the non-concessional contributions cap (¶13-780).
- A person entitled to a disability pension from a superannuation fund may qualify for a tax offset (¶14-220).
- The legal personal representative of a mentally incapacitated member of a self managed superannuation fund may take the member's place as a trustee (¶13-060).

Other exemptions, concessions and special rules

- Exemptions from the penal "minors' tax" apply where the minor is disabled (¶2-170).
- Periods of sick leave do not affect a person's continuity of foreign employment for the purpose of determining eligibility for the limited exemption on the foreign earnings (¶10-860).
- Full or partial exemption from the Medicare levy may apply to people entitled to concessional medical treatment (¶2-340).
- An individual who is permanently incapacitated may qualify for the small business 15-year asset CGT exemption (¶7-165).
- Ill-health may sometimes be taken into account in applying for deferment of payment or relief from various tax penalties (¶29-400).
- The illness of a director may constitute a defence against personal liability for the company's failure to account for PAYG instalments (¶25-560).
- The illness of a taxpayer may constitute special circumstances that enable the taxpayer to avoid the application of the non-commercial business rules (¶16-020).
- The Commissioner may release a taxpayer from tax liabilities where collection of the tax will cause serious hardship (¶25-450).
- A taxpayer may be able to claim a dependant (invalid and carer) offset in certain circumstances (¶15-100).
- Gifts to public funds established for the relief of persons in necessitous circumstances are tax deductible. So are gifts to certain bodies for public health purposes (¶16-950).
- Where the only source of income of a presently entitled but mentally incapacitated trust beneficiary is a distribution from that trust, the beneficiary is not required to lodge a tax return (¶6-120).

¶44-155 Marriage breakdown tax checklist

Disposals and transactions

- CGT consequences may arise where there is a division of assets or property between the spouses as a result of a marriage breakdown (¶11-000).
- Amounts paid as part of a settlement on the breakdown of a marriage or relationship may be exempt (¶11-670).
- In certain circumstances, a CGT roll-over applies where assets are transferred between spouses as a result of the breakdown of a marriage or relationship (¶12-460).
- The roll-over also applies where the assets are transferred by a company or trust. Special rules apply where the roll-over involves a CFC or certain non-resident trusts (¶12-470).
- Where the roll-over applies, balancing adjustment relief is also allowed for depreciation purposes (¶7-250, ¶17-710).
- Where the roll-over applies, eligibility for the main residence exemption is based on the way in which both spouses used the dwelling during their combined period of ownership (¶11-750).

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- Where the roll-over applies, the 12-month period for determining eligibility for discounted capital gains is based on the combined period of ownership of each spouse (¶11-033).
- In determining eligibility for the CGT exemption applying to the disposal of a main residence, special attention should be paid to: (1) the rule requiring that the vendor be a natural person; (2) the rules governing the situation where spouses have different residences at the same time; and (3) the rules applying where one party leaves the former residence to live elsewhere (¶11-730, ¶11-740, ¶11-750).
- CGT roll-over relief is available where as a result of a marriage breakdown there is an ''in specie'' transfer of assets from a small superannuation fund to another complying superannuation fund (¶12-480).
- A marriage breakdown roll-over need not prevent compliance with the 15 years continuous ownership test for the purpose of the small business CGT exemption (¶7-165).
- The CGT provisions do not apply if the original beneficial owner of a life policy disposes of it. Similarly, a transferee who receives it as part of a settlement, and who provides no consideration, will be exempt from CGT on a subsequent disposal (¶11-880).
- Concessions apply to certain divisions of superannuation on a marriage breakdown (¶11-880).
- Special CGT consequences may arise where a debt is forgiven (¶11-270).
- If a loan to a spouse is forgiven by a family company, the Commissioner may seek to treat it as a deemed dividend. Failing that, if the spouse is an employee of the company, the forgiveness could potentially be treated as a debt waiver fringe benefit under the FBT rules (¶4-200, ¶35-310).
- Depreciation balancing adjustments may be rolled over in certain circumstances (¶17-710).
- Trading stock is not normally subject to the CGT rules. However, if the transferor spouse is in business and an item of trading stock is transferred as part of a property settlement, the value of that asset must be included in the transferor's assessable income. Correspondingly, the transferee spouse is taken to have purchased the asset for the same value (¶9-290, ¶11-700).
- Special considerations may apply where the asset is trading stock of a spousal partnership (¶9-295).
- A capital loss may arise if assets are sold or misappropriated by an estranged spouse without the taxpayer's consent (¶11-270).
- Where there is a change in the ownership of shares in a private company, this may affect the ability of the company to recoup prior year tax losses under the ''continuity of ownership'' test. It may also result in the value of the shares being treated as an assessable dividend (¶4-200, ¶11-350, ¶12-870).
- Trust distributions to former spouses, and to widows or widowers of family group members with new spouses, may be exempt from family trust distribution tax (¶6-266).

Maintenance

- Maintenance payments may be tax exempt (¶10-855).
- Maintenance payments would normally not be tax deductible as no connection with income earning activities could be shown (¶16-520).

- The higher rates applicable to the unearned income of minors do not apply to income derived by the minor from the investment of property transferred to the minor as a result of a family breakdown (¶2-180).
- The Commissioner may elect not to impose tax at punitive rates on trusts consisting of property received in certain family breakdown situations, even though there is no beneficiary presently entitled (¶6-230).

Costs and other matters

- Legal and accounting fees relating to a divorce or property settlement would generally not be tax deductible, except insofar as they are paid for tax advice. However, the fees relating to property matters, whether those matters are disputed or not, may form part of the costs of acquisition and disposal for CGT purposes (¶11-550, ¶16-840).
- Non-capital expenses relating to the management of a taxpayer's tax affairs or compliance with tax obligations may be tax deductible (¶16-850).
- Admissions made in affidavits as to a taxpayer's assets and income given in Family Court proceedings may be open to inspection by the ATO. They may therefore be used as the basis for a default tax assessment and can be presented as evidence in court proceedings involving that assessment (¶25-220).
- Marriage breakdown may alter a spouse's treatment as an affiliate in determining whether the small business concessions turnover or asset tests have been satisfied (¶7-050).
- A person required to attend and give evidence to the Commissioner cannot refuse to answer questions about their partner on the grounds of a claimed ''spousal privilege'' (¶25-240).
- GST considerations would not normally arise on asset disposals as a result of marriage breakdown as the vendor will not normally be registered, and the disposal will not normally be in the course of carrying on an enterprise (¶34-100).
- General professional fees for work done in relation to family court proceedings are subject to GST (¶34-105).
- Various duty exemptions or concessions apply to transactions associated with marriage breakdown (¶37-020).

¶44-160 Age thresholds tax checklist

This checklist sets out, in chronological order, the respective ages at which various tax concessions, restrictions or other rules start or cease to apply.

When a person is born:

- the person becomes a potential taxpayer (or dependant)
- the birth may entitle the eligible care giver to claim the tax-free Family Tax Benefit and/or the assessable parental leave payment (¶2-133)
- if the person is a dependant of the taxpayer, expenses for disability aids in relation to the person may be taken into account in calculating the taxpayer's medical expenses offset (¶15-320, ¶15-325)
- the person may qualify as a dependant for the purposes of calculating the taxpayer's entitlement to specified concessional offsets (¶15-327)

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