

## November 2013

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# client alert

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### Residency requirement for CGT home exemption failed

The Administrative Appeals Tribunal (AAT) has denied an individual's claim that an exemption from capital gains tax (CGT) should apply to a property that he and his ex-de facto partner had sold. The individual had purchased land in 2002 with his then partner, and construction of a house on the land commenced in April 2004. However, the couple ended their relationship in September 2004.

Despite this, the individual argued that they had moved into the house in around May or June 2005 to meet the requirements under the law to sell the property without being subject to CGT. The AAT found that the evidence before it failed to establish that the house became the individual's main residence "as soon as practicable" after construction was completed, and failed to establish that the house continued to be his main residence for at least three months after that. In this case, both requirements had to be met in order for the exemption to apply.

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### Parent liable to CGT on half-share of townhouse

An individual has been unsuccessful before the AAT in arguing that he should not have to pay CGT on the sale of a townhouse he owned jointly with his son because, he argued, he was only holding his interest in the property to protect his inexperienced son from selling it on a whim.

The individual had purchased the property for his adult son to live in and transferred the property to himself and his son as joint tenants. After living in the townhouse for a few years, the son moved out to another property. The townhouse was then sold and all of the funds were used to pay down the mortgage on a new property. The individual argued that he received

no proceeds from the sale and that he held his interest in the property in trust for his son, or alternatively, that an exemption under the CGT law should apply. The AAT did not accept the arguments and held that as a joint tenant, the individual was liable to CGT on 50 per cent of the net capital gain on the sale.

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### Penalty for unsubstantiated work-related deduction claims

The AAT has recently affirmed a decision of the Tax Commissioner to impose a penalty on an individual equal to 50 per cent of the tax shortfall amount arising from deduction claims for work-related expenses that were unsubstantiated.

The individual worked as a cars salesman and in his 2011–2012 tax return made various claims for work-related expenses amounting to around \$34,300. The Tax Commissioner determined that most of the claims were unsubstantiated and imposed a penalty of around \$6,100, representing 50 per cent of the tax shortfall. The Commissioner also told the AAT that the individual had made similar claims in previous years.

The individual did not dispute that the claims were unsubstantiated, but argued that the penalty was severe and that he was unable to pay an outstanding portion of the penalty of \$1,400. The AAT noted, among other things, that the individual did not retain invoices or receipts, or provide satisfactory evidence to substantiate the claims. The AAT was of the view that the individual's conduct was more serious than mere failure to take reasonable care, and held that the penalty imposed was appropriate.

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### No enterprise, so GST credits refused

The AAT has refused an individual's claim for input tax credits as it found no evidence that the individual was

carrying on an "enterprise". The individual claimed that before she was required to serve a term of imprisonment, she had tried to start a "services business". She claimed that she had purchased, among other things, two motor vehicles, various office equipment, and business promotional materials. The individual made claims for input tax credits totalling almost \$74,000 in respect of the various purchases over four years. However, the individual said the attempts to start the business did not succeed and straddled her term of imprisonment. The individual also claimed that any records she had of the purchases were lost or destroyed, or that she had not been asked to produce documentation by the Tax Commissioner.

The AAT said the individual was given various opportunities to produce documents to back her claims before the hearing; however, it noted that her evidence, being mostly personal testimony, did not satisfy the burden of proof that the Commissioner's assessment denying the input tax credits was excessive. The AAT found that there was no "enterprise" for the purposes of the GST law and that the decision to deny the input tax credits was correct.

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## Special GST clause in contract unclear

A company (a trustee of a family trust) that had sold a property to an individual has been unsuccessful before the Victorian Supreme Court in a matter concerning whether the individual was required to pay GST in addition to the purchase price on the property.

The purchase price was set out in the Particulars of Sale in the contract as \$2,250,000. The Supreme Court reviewed the contract, and in particular, a "special condition" dealing with GST. While the Court accepted that the commercial aim of the special clause may have been to allocate responsibility for any GST liability attached to the sale of the property, it considered that the contract said nothing about whether the purchase price in the Particulars of Sale was actually intended to include GST. Further, it could not discern from the special clause any particular contractual intention of the parties. In conclusion, the Court held that the special clause should be removed from the contract. As a result, it said the \$2,250,000 amount in the Particulars of Sale should be understood to be inclusive of any GST payable on the sale.

**TIP:** This case highlights the importance of ensuring that a contract for the sale of property clearly specifies whether the sale is subject to GST and whether the price is GST-inclusive or GST-exclusive.

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## Plumbers were full-time casuals, not contractors

The AAT has found that individuals working for a plumbing business were employees of the business

and that the business was required to provide superannuation contributions for them. The business argued that the workers were independent contractors and that there was no superannuation requirement.

After reviewing the individuals' relationship with the business, the AAT was of the view that, effectively, the workers were full-time casuals paid on an hourly rate and not eligible for holiday or sick leave. The AAT considered various factors, including that the individuals all had the same contract (with the same terms) with the business. The AAT said one would expect independent contractors to have differing terms, but the fact that their contracts were the same was "extraordinary". Another key factor was that the hourly rates charged by the workers to customers were largely set by the business. Overall, the AAT concluded that the workers were employees and affirmed the requirement to pay superannuation.

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## ATO warns of schemes to access additional franking credits

The ATO has cautioned taxpayers against trading shares on a special market operated by the Australian Securities Exchange (ASX) with the sole purpose of obtaining additional franking credits. The ATO says these arrangements involve a taxpayer selling shares in a company on the ordinary market after a franked dividend has been announced, and retaining the franked dividends. Then, within days, the taxpayer buys back a similar parcel of shares in the same company on the special market, which also has franked dividends. The ATO says the transactions could constitute "dividend washing" and that the taxpayer could face penalties under the law.

**TIP:** Dividend washing occurs where shareholders seek to claim two sets of franking credits on what is effectively the same parcel of shares. Taxpayers who are unsure about their own circumstances should seek independent advice or apply for an ATO private ruling.

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## ATO focuses on dodgy financial products

The ATO has highlighted areas of concern in relation to certain financial products, particularly a small number of financial products that may offer the promise of tax benefits that may not actually be available to some or all investors who invest in the product.

Key factors that draw the ATO's attention include suggestions that the investor could obtain tax advantages (that most taxpayers would not in fact receive in their individual circumstances), or that the tax law's anti-avoidance provisions may not apply.

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