

2203: SEPTEMBER 2021

Tony Westhuysen

Principal, Solutions in Taxation

INFORMATION EXCHANGE CORPORATION

L17, 40 Mount Street,
North Sydney NSW, 2060

E: admin@ifx.com

T: 61 2 9956 7775

W: www.ifx.com.au

ARCHIVE SEARCHING?

Use your username and
password to log onto
www.ifx.com.au to search our
archives and retrieve copies.

NEED TO ASK AN ADVISER?

Go to www.ifx.com.au
to connect.

Please call customer support
on 1300 360 905 if you have
any difficulties.

SUBSCRIBE TO THIS PUBLICATION

[Click here](#)

Can we help?

Call 1300 360 905
Email admin@aifx.com.au

IN THIS ISSUE

SECTION 1 – PROFESSIONAL DEVELOPMENTS.....	1
DANGERS FOR NON-RESIDENT BENEFICIARIES.....	1
¶3.1 The Usual Rule for Taxable Australian Property (TAP)	1
¶3.2 The ATO Assessment.....	1
¶3.3 The Problem.....	2
¶3.4 The Defence.....	2
¶3.5 The Decision.....	3
¶3.6 The Consequences.....	4
SECTION 2 – PROFESSIONAL CURRENCY	5
BILLS AND LEGISLATION.....	5
¶3.7 Change in R&D rates from 1 July 2021	5
CASES AND DECISIONS	6
¶3.8 Landlord ‘carrying on a business’ of renting properties	6
¶3.9 Unexplained cash deposits treated as assessable income	8
¶3.10 Company formed after 1 March 2020 did not qualify for JobKeeper payments	9
¶3.11 Cash flow boost denied as employer not required to withhold PAYG.....	10
¶3.12 Payment in settlement of court case an ETP.....	11
¶3.13 Payments were salary and not fringe benefits	13
¶3.14 Self-incrimination claim – High Court orders disclosure of information	13
¶3.15 AFS licensee liable for failing to supervise financial adviser	14
¶3.16 Tax agent’s registration cancelled for mishandling personal tax affairs	15
RULINGS AND GUIDELINES.....	17
¶3.17 Accommodation, food and drink expenses and allowances	17
¶3.18 ATO’s compliance approach: living away from home	18
¶3.19 Superannuation contribution caps: Compensation from financial service providers	19

Continued

2203: SEPTEMBER 2021

Tony Westhuysen

Principal, Solutions in Taxation

INFORMATION EXCHANGE CORPORATION

L17, 40 Mount Street,
North Sydney NSW, 2060

E: admin@ifx.com

T: 61 2 9956 7775

W: www.ifx.com.au

ARCHIVE SEARCHING?

Use your username and
password to log onto
www.ifx.com.au to search our
archives and retrieve copies.

NEED TO ASK AN ADVISER?

Go to www.ifx.com.au
to connect.

Please call customer support
on 1300 360 905 if you have
any difficulties.

SUBSCRIBE TO THIS PUBLICATION

[Click here](#)

Can we help?

Call 1300 360 905
Email admin@aifx.com.au

IN THIS ISSUE

¶3.20	TOFA: Tax implications of Inter-bank Offered Rate reform.....	19
¶3.21	Interest costs of holding vacant land.....	20
¶3.22	Addendum to TR 2004/4.....	21
STATE TAXES		22
SOUTH AUSTRALIA		22
¶3.23	Land used in a primary production business exempt	22
VICTORIA		23
¶3.24	Stamp duty: Interest on refunded duty	23
QUEENSLAND.....		24
¶3.25	SMSF investors: Property developer unsuccessful in fraud conviction appeal	24
Section 3 – Questions and Answers		25
¶3.26	Unfavourable allocation of purchase price across separate assets	25
¶3.27	Activities of pre-Aug 1999 unit trust.....	26
¶3.28	Obligations to reveal information about a trust.....	27
¶3.29	Employee entitlements	28
¶3.30	Accounting for GST.....	29
¶3.31	CGT small business concessions	30
¶3.32	Dealing with discretionary trust losses from deceased member	31
¶3.33	Determining whether ‘extra’ employer contribution is salary sacrifice.....	32
¶3.34	Deceased estate and Pre-CGT assets	33

SECTION 1 – PROFESSIONAL DEVELOPMENTS

DANGERS FOR NON-RESIDENT BENEFICIARIES

Earlier this year, the Full Federal Court handed down its decision on the taxpayers' appeals from the decisions in *Peter Greensill Family Co Pty Ltd (trustee) v FCT*¹ and *N & M Holdings Pty Ltd v FCT*². The decision of the Full Court dealt with both appeals together since the facts were largely common to both appeals. Both concerned distributions of capital gains made by the trustee of an Australian resident discretionary trust to non-resident beneficiaries. The gains arose from the sale of shares by the trustees.

¶3.1 The Usual Rule for Taxable Australian Property (TAP)

The usual rule for non-residents is that Australian capital gains made by non-resident taxpayers is not subject to Australian capital gains tax³ unless the property disposed of is 'taxable Australian property' as defined in Div 855 of the ITAA 97. Specifically, taxable Australian property includes:

- Australian real property, such as a house, apartment, commercial building or land
- any indirect interest in such property (e.g. through a property-holding company)
- mining, quarrying or prospecting rights in Australia
- a CGT asset used to carry on a business through a 'permanent establishment' in Australia⁴
- an option or right over any of the above – for example, a contract to purchase real property off the plan.

So, if a foreign resident taxpayer makes a gain from a CGT event happening to an Australian CGT asset, that gain or loss will be disregarded, provided the CGT asset is not TAP. On this basis, the trustee of an Australian discretionary family trust distributed a capital gain from the sale of shares that were not TAP to the foreign resident beneficiaries believing that the gain would be tax-free.

¶3.2 The ATO Assessment

The ATO issued assessments under s 98 of the ITAA³⁶ assessing the capital gains distributed to the beneficiaries as 'attributable gains' under Subdiv 115-C of the ITAA⁹⁷ and were therefore assessable to the trustee under s 98(2A) of the ITAA³⁶ (on behalf of the non-resident beneficiaries). Where the trustee derives net income in the trust estate, that income is either treated as trustee income (and subject to the top rate of tax) or beneficiary income, in which case, the beneficiary generally has a liability to account for income tax on that

¹ [2020] FCA 559

² [2020] FCA 1186

³ References to 'Australian capital gains tax' is not meant to imply a separate tax – in Australia, taxable capital gains are taxed in the same way as ordinary income, but the amount that is taxed is reduced by the various concessions available.

⁴ The term 'permanent establishment' is defined ins 6 of the ITAA³⁶, but (more importantly) is defined in each of the Double Tax Agreements that Australia has with our trading partner countries.