

# client alert

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## Tax debt release on serious hardship grounds refused

In a recent case, the Administrative Appeals Tribunal (AAT) refused an individual's application to be released from his tax debt of \$58,000 on the grounds of serious hardship.

The AAT noted that no explanation was offered for the taxpayer's failure to meet his tax liabilities as they arose. The AAT said that instead of paying what it considered to be manageable tax assessments, the taxpayer "largely ignored his tax liabilities over the last five or six years, and has allowed the amounts due to accumulate with interest".

**TIP:** The Tax Commissioner has a discretion to release individuals from eligible tax debts. However, even if the Commissioner is satisfied that serious hardship would result from payment of the tax debt, he is not obliged to exercise the discretion in the taxpayer's favour.

Broadly, serious hardship is said to exist when payment of a tax debt would leave an individual unable to provide basic living necessities for themselves and their dependants. Ultimately, it is a question of fact whether payment of an eligible tax liability would result in serious hardship – and the onus is on the taxpayer to prove their case before a tribunal.

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## GST credits for property development project managers denied

Two taxpayers have been denied GST input tax credits they had claimed in respect of purported acquisitions made in relation to property developments. The Commissioner had refused the taxpayers' claims for input tax credits on the basis that neither taxpayer carried on an enterprise.

The AAT heard from the taxpayers that they were "principal contractors" in relation to the property developments. However, the AAT said that exactly what the "principal contractors" did in respect of the properties remained the subject of "quite profound mystery".

It said that an entity is not a "project manager" simply because someone says it is. Further, the AAT said that to carry on an enterprise, an entity must "do" something, and that in this case, the AAT was unable to identify the activity that the taxpayers were doing in respect of the properties.

**TIP:** This case demonstrates the need for multiple parties, and in particular related parties, who are involved in large property development projects to clearly articulate and document the role of each party and the agreements they have with each other, particularly if one party intends to seek GST input tax credits.

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## Individual working overseas not a tax resident

An individual has been successful before the AAT in arguing that he was not a "resident" of Australia for tax purposes for the 2009 and 2010 income years. This was despite being an Australian citizen, maintaining an Australian bank account for his salary, and retaining his house in Queensland.

During the years in question, the taxpayer had signed up with a company to work on a project in Saudi Arabia. The project was expected to last three years and the taxpayer had an expectation that upon completion of the project, he would move on to another project located in Saudi Arabia.

In making various findings of fact, the AAT largely accepted the taxpayer's evidence. It said that the taxpayer's presence in Saudi Arabia "was hardly casual or passing". The AAT accepted that the taxpayer had formed an intention to make Saudi Arabia his home for the duration of the project and beyond.

**TIP:** This case demonstrates that proving tax residency requires a detailed examination of various facts, and the weighing up of those facts, to come to a conclusion that an individual is (or is not) a tax resident. It also demonstrates the importance of having corroborating evidence to prove the taxpayer's case.

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## ATO debt collection approach under review

The Inspector-General of Taxation, Mr Ali Noroozi, has announced that he will review the ATO's approach to debt collection. To facilitate his review, Mr Noroozi has called for interested parties to submit comments. Public consultation closes on 18 July 2014.

"Despite the ATO's debt assistance programs, its approach to collecting taxes has been a persistent source of taxpayer complaint", Mr Noroozi said. He noted that the ATO's approach to collecting debts accounted for 23% of all ATO-related complaints received by the Commonwealth Ombudsman in 2012–2013.

Furthermore, Mr Noroozi said some stakeholders believe that the ATO has recently taken a firmer approach to debt collection despite continuing economic pressures, while others are of the view that the ATO allows debts to accumulate for too long before taking action.

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## New ATO approach to identifying SMSF risks

Trustees of self managed superannuation funds (SMSFs) need to be aware of how the ATO gathers information about them in order for the ATO to assess whether their SMSF poses a tax compliance risk, and how the ATO may respond if it perceives a risk.

The ATO has recently announced that it will take a new risk-based approach to how it treats auditor contravention reports (ACRs). This approach will be based on the overall risk posed by the SMSF. Using new risk models, the ATO will analyse multiple indicators of possible non-compliance, including regulatory and income tax matters, information from the SMSF annual return, ACRs and other data such as trustee and member records. The ATO will then use this information to determine appropriate actions to take regarding each SMSF.

The ATO has also reminded SMSF trustees that from 1 July 2014 it will have more flexibility in how it deals with SMSFs that breach the super law – including new powers to issue penalties. The ATO says that SMSF trustees should therefore rectify any contraventions of the law as soon as possible, or have plans in place by 1 July 2014 to do so.

**TIP:** While the new SMSF trustee penalties start from 1 July 2014, the ATO has noted that contraventions of the law (such as loans to members or relatives) that exist on 1 July 2014 will come under the new penalty regime.

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## New integrity rule targeting dividend washing

The government has proposed to amend the law to introduce an integrity rule that will curtail taxpayers' ability to obtain a tax benefit from "dividend washing".

Broadly, "dividend washing" is a scheme that allows a taxpayer to obtain multiple franking credits in respect of a single economic interest by selling the interest after an entitlement to a franked dividend has accrued and then immediately purchasing an equivalent interest with a further entitlement to a corresponding franked dividend. The amendments, once formally enacted, are proposed to apply with effect from 1 July 2013.

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## Administrator of deceased estate breached duty

The Supreme Court of Queensland has ruled that an administrator of a deceased estate breached her fiduciary duty by applying for her deceased son's superannuation benefits to be paid to her personally, rather than on behalf of his estate.

The Court had granted the woman Letters of Administration over her son's estate after he died, aged 40, intestate and without a spouse or children. However, she applied to her deceased son's superannuation funds for any death benefits to be paid to her personally.

The deceased's father (the woman's ex-husband) submitted that she had allowed a conflict of interest to occur by seeking the superannuation death benefits for herself personally. In finding against the woman, the Court ordered that she transfer all of the superannuation death benefits in dispute (approximately \$450,000) to the son's estate, where it would be shared equally with her former spouse under the rules of intestacy.

**Important:** Clients should not act solely on the basis of the material contained in Client Alert. Items herein are general comments only and do not constitute or convey advice per se. Also changes in legislation may occur quickly. We therefore recommend that our formal advice be sought before acting in any of the areas. Client Alert is issued as a helpful guide to clients and for their private information. Therefore it should be regarded as confidential and not be made available to any person without our prior approval.