

## Subdivision and sale of pre-CGT farm held to be on capital account

In April 2025, the Federal Court in in [Morton v FC of T \[2025\] FCA 336](#) held that a taxpayer who made a profit on the sale of a 10-acre farm which was developed and subdivided into 48 residential lots and 2 commercial lots derived the income on capital account. The farm was a pre-CGT asset. The Commissioner has since appealed to the Full Federal Court. Legislative references below are to the *Income Tax Assessment Act 1997* unless otherwise stated.

The taxpayer had owned a block of land called “Dave’s Block” since 1980 after he bought it from his father. In 2010, the taxpayer’s land was rezoned. Its value increased but it also resulted in increased rates and land taxes which affected the profitability of the farm. In 2012, the taxpayer entered into an agreement with a developer which included clauses to the effect that the owner wished to maximise the sale proceeds from the land and the developer would undertake the development works in return for a fee calculated as a percentage of proceeds on sale. The taxpayer was provided with monthly reports in relation to the development and appointed the developer under a power of attorney to do anything requisite or expedient for the development. A clause declared the agreement did not create a partnership, joint venture or employment relationship between the taxpayer and the developer. The taxpayer continued to farm the land until 2015 and did not play an active role in its development. Ultimately the lots were sold between February 2019 and July 2021.

In the single judge case in the Federal Court, the Commissioner argued the amounts were assessable in two alternative ways:

1. In developing, subdividing and selling the land, the taxpayer carried on a business such that the farm was trading stock and the amounts derived were assessable as income according to ordinary concepts for the purposes of section 6-5.
2. The amounts derived were assessable as statutory income under section 6-10 on the basis that the amounts were profit arising from the carrying on or carrying out of a profit-making undertaking or plan under section 15-5.

The taxpayer argued the sales proceeds were derived from realisation of a pre-CGT asset on capital account. The development, subdivision and sale of the land constituted no more than an enterprising means of achieving the best price when realising his capital asset.

Justice Wheelahan of the Federal Court found for the taxpayer, holding firstly that the taxpayer at no stage embarked on a business of developing land. The absence of repetition was a significant factor. Secondly, he held that the taxpayer never entered into a profit-making scheme. The taxpayer did not pursue a course of conduct calculated to achieve the maximum available proceeds at all costs but rather pursued one that minimised risk.

This case provides a useful example of how far a taxpayer can go in maximising sale proceeds from the sale of a capital asset without it being deemed to be on revenue account. Note, the case is subject to an appeal in the Full Federal Court.

## Unpaid Present Entitlements and Division 7A: Commissioner granted special leave to appeal to the High Court in Bendel

The Commissioner has been granted special leave to appeal to the High Court from the Full Federal Court decision in [Commissioner of Taxation v Bendel \[2025\] FCAFC 15](#). That case found that unpaid present entitlements owed by a trustee to a corporate beneficiary are not “loans” for the purposes of Division 7A, displacing the Commissioner’s long-standing position in [TD 2022/11](#). For further background on the case, see the 3 March 2025 edition of OmniTax [Tax News & Insights](#).

In addition, as noted in the 31 March 2025 edition of OmniTax [Tax News & Insights](#), the Commissioner released an Interim Decision Impact Statement confirming he will not revise his views until the appeal process is finalised. If the Commissioner is unsuccessful, it is possible there may be a legislative amendment to the current law. Private company beneficiaries of trusts should seek tax advice on the impact of this issue on their current distribution strategies and historical arrangements.

## Guideline on residency of foreign-incorporated companies updated

The ATO has updated its guidance on determining whether foreign-incorporated companies are resident under the central management and control test of company residency in section 6(1) of *Income Tax Assessment Act 1936*.

The update to *Practical Compliance Guideline PCG 2018/9* (at paragraph 5D) confirms that this guidance may assist public companies required to produce a Consolidated Entity Disclosure Statement (CEDS) in annual financial reports. As part of the Australian Government's focus on tax integrity and transparency, all public companies are required to include a CEDS in their annual financial reports. The CEDS requires disclosure of both the Australian and foreign tax residency position of the company and its subsidiaries in annual financial reports for each financial year commencing on or after 1 July 2023.

The update explains a company will not be considered 'low-risk' under PCG 2018/9 if the company self-assesses and reports as a non-resident for Australian tax purposes but has inconsistently reported as an Australian tax resident in the CEDS.

## Year end action items

Set out below is a selection of tax-related year-end action items that may be considered by taxpayers ahead of 30 June 2025:

### Trust-specific tips

- Trustee Determinations – ensure trustee determinations for trusts are executed by 30 June.
- Managed Investment Trust (MIT) testing – be sure to assess whether your trusts are eligible for MIT status.
- Losses – assess continued eligibility to utilise carried forward tax losses.
- Assess if there is a change of ownership or control such that current year loss rules potentially apply.
- Assess if sufficient cash is available for any obligatory post year end trust distributions. If not, assess if distributions can be reinvested and take account of the governance required to do so.
- Family trusts should ensure family trust elections are in place.

### Company-specific tips (includes public trading trusts)

- Losses – assess continued eligibility to utilise carried forward tax and capital losses.
- Assess if there is a change of ownership or control such that current year loss rules potentially apply.
- Ensure loans by private companies to shareholders or associates are repaid or are Division 7A compliant by tax return lodgement date.

### Individual-specific tips

- You can deduct concessional contributions to super in FY25 up to \$30,000. If your contributions (including contributions from your employer) in the financial year to date are less than this cap, you may consider a top-up contribution. Ensure the payment is made (and received by the fund) by 30 June.
- Consider making tax-deductible donations before 30 June.
- Consider paying your annual professional memberships before 30 June.
- Note that the \$1,000 instant tax deduction for work-related expenses without written evidence (such as receipts or invoices) is not law and currently not available for FY25. Instead, the \$300 threshold applies.

### General application

- General interest charge (GIC) and shortfall interest charge (SIC) is non-deductible for income years starting on or after 1 July 2025, so aim to eliminate or reduce exposure to GIC and SIC by 30 June 2025.
- Debt deductions – if thin capitalisation rules apply, consider deductibility and note the debt deduction creation rules apply for the first time for income years starting on or after 1 July 2024.
- Note, the superannuation guarantee rate increases to 12% from 1 July 2025.
- Consider taking advantage of the \$20,000 instant asset write-off (for eligible small businesses).
- Consider writing off bad debts (to be deductible a bad debt needs to be written off by financial year's end).
- Consider winding up dormant entities ahead of 30 June to minimise ongoing tax compliance costs.

## Contact

For more information and other updates, please visit our website at [www.omnitax.com.au](http://www.omnitax.com.au). Should you wish to discuss any matter or require any additional information, please email us on [contact@omnitax.com.au](mailto:contact@omnitax.com.au).