

# COMMON PROFESSIONAL ADVISOR TRIPS PRT EXCLUSION ORDER

**By David W Marks QC, Inns of Court, Brisbane**

1. It must puzzle the Revenue when taxpayers send in an application for an exclusion from a payroll tax group, which is done entirely by one advisor to all entities. This almost always happens, but creates an immediate dissonance.
2. Though not the first case to consider commonality of professional advisors, *Latitude North Hotels Pty Ltd v Commissioner of State Revenue* [2021] QCAT 16 presents the issue in a stark way.
3. Advisors will now have to spend time distinguishing their case from the particular facts in *Latitude North Hotels*, because of what the Tribunal said at paragraphs 127-129:

*In my view, this sharing of a common professional advisor reflects in the carrying on of the businesses within the Opal Group as without it, entities may have been insolvent trading and may not have been able to continue to carry on business for lack of working capital ...*

*The use of a common professional accounting advisor in these circumstances weighs against the exercise of the discretion to make an exclusion order.*

4. The latter part of that passage, taken out of context, may incorrectly indicate that the mere fact of a common accountant would make de-grouping impossible. That is too narrow a view, as *Tasty Chicks* showed.
5. In *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2009) 77 ATR 394, [137], Gzell J found that the “retainer of the same external accountant” was “a matter of administrative convenience not demonstrating a lack of independence”.
6. Some care must be taken over *Tasty Chicks*, owing to the appellate history after that. But this finding survived the tortuous course of the appeals there. The Court of Appeal simply held that commonality of accounting advice was a (possibly) probative factor, and that the trial judge’s consideration of that factor was unexceptional.

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7. That is consistent with Bond J in *Scott and Bird v Commissioner of State Revenue (Qld)* (2016) 103 ATR 411, [74]-[75], who considered that the Commissioner could correctly consider the fact that “the same accounting firm had through all relevant periods acted as accountants for” various named entities involved.
  8. That it is a relevant factor does not answer the ultimate question of de-grouping in every case. Different judges will evaluate this factor in different ways, and the evaluation in each case will be fact sensitive.
  9. *Latitude North Hotels* involved a trusted accounting advisor who was ‘hands on’ in managing various entities. His work included a period of difficulty for the entity that ran a Cairns hotel, which ultimately closed. The rebalancing of finances within the ‘group’ seems to have been a key function.
  10. There was an interdependence of businesses, because of the flow of financial support through the group. Since the external accountant was involved in managing this aspect, that coloured evaluation of the commonality of accounting advice in this case.
  11. Nevertheless, the Revenue will be encouraged by this case to continue to point to the commonality of advisors of entities which seek exclusion orders.
  12. While it is not possible for taxpayers to undo the past, it may be that entities seeking exclusion orders should take independent advice, even if the various external advisors coordinate filing applications for exclusion. The applications for exclusion should perhaps be drawn more from the perspective of each individual applicant, and not be a common document.
  13. More to the point, if a group of associated entities considers that they may end up being treated as a payroll tax group, those entities which have some case for exclusion orders should act early to appoint separate accounting advisors.

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14. This does not mean that there will never be a family conversation about the direction of family finances, or that accountants will not pick up the phone to each other. In fact they will probably need to do in order to obtain information to enable filings to be undertaken.
  15. But without this level of precaution, it may be more difficult to overcome the impression that there is a level of dependence between entities, and that their businesses are not conducted substantially independently.
  16. It will not always be possible to brush off a common adviser, as a mere matter of convenience, as happened in *Tasty Chicks. Latitude North Hotels* is a good example of when this crosses the line.

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