IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S144 of 2016

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **VAUGHAN RUDD BLANK**
Appellant

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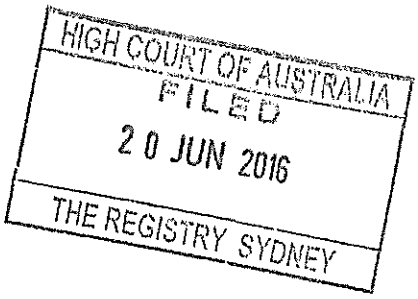
AND:



COMMISSIONER OF TAXATION
Respondent

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APPELLANT'S SUBMISSIONS

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Part I: Internet Certification

1. The appellant certifies that this submission is suitable for publication on the Internet.

Part II: Statement of issues

2. The appeal concerns the correct tax treatment in the 2007–10 income years of instalments of the amount of USD160,033,328.25 (the **Amount**) paid to, or at the direction of the appellant, by Glencore International AG (**GI**) following the execution of a Declaration of Assignment and General Release by the appellant on 15 March 2007 (the **Declaration**).

3. The Full Court of the Federal Court held by majority (Kenny and Robertson JJ, Pagone J dissenting) that the instalments were assessable under s 6-5 of the *Income Tax Assessment Act 1997* (**ITAA 1997**) as ordinary income being deferred compensation for services. The appellant submits that Pagone J correctly held that the instalments were not assessable as ordinary income, and that the appellant was instead assessable for a capital gain as a consequence of CGT Event C2 happening upon execution of the Declaration (ITAA 1997, s 104-25): Notice of Appeal (**NOA**), Grounds 1–3.

4. By notice of contention (**NOC**), the respondent (the **Commissioner**) contends that the Full Court erroneously failed to conclude (a) that the instalments were ordinary income in accordance with *FCT v Myer Emporium Ltd* (1987) 162 CLR 199 and (b) in relation to the instalments received in the 2007 and 2008 income years, the payments were eligible termination payments under s 27A(1) of the *Income Tax Assessment Act 1936* (**ITAA 1936**) or employment termination payments under s 82-130(1) of the ITAA 1997.[1] In relation to the first contention both the trial judge, Edmonds J, and Pagone J found against the Commissioner; Kenny and Robertson JJ did not address the issue. In relation to the second contention, Edmonds J found against the Commissioner; the members of the Full Court did not address this issue. For the reasons below, the appellant submits that the two contentions were rightly rejected in the courts below.

5. In addition to the NOC, by notice of cross-appeal (**NOCA**) the Commissioner seeks special leave to cross-appeal from the Full Court's dismissal of the Commissioner's cross-appeal in that court about the time of derivation of certain instalments which the appellant was entitled to receive in the 2007 income year but which were not paid or dealt with until the 2008 income year. The appellant submits that the Commissioner's proposed cross-appeal raises no issue of principle and that Edmonds J and all members of the Full Court were clearly correct to reject the Commissioner's argument.

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[1] The NOC does not contend that the instalments received in the 2009 and 2010 years were eligible/employment termination payments.

Accordingly, special leave to cross-appeal should be refused. The appellant will deal with the proposed cross-appeal on this ground in reply.

6. The final issue in the appeal is the quantum of the appellant's cost base for CGT purposes: see NOA, Ground 1; NOCA, Ground 3.

7. The legal issues addressed in these submissions may be summarised as follows:

   (a) Were the instalments of the Amount assessable as ordinary income either as (i) deferred compensation for services or (ii) in accordance with the principles in *FCT v Myer Emporium Ltd* (1987) 162 CLR 199? (**Ordinary income issue**)

   (b) If the answer to (a) is "No", were any payments received in the 2007 and 2008 income years assessable as eligible or employment termination payments? (**ETP issue**)

   (c) If the answer to (a) is "No", what was the cost base for the purpose of determining the appellant's capital gain? (**Cost base issue**)

8. For the reasons developed below, the appellant submits that those questions should be answered as follows: (a) No, (b) No, (c) $77 million.

Part III: Section 78B certification

9. The appellant certifies that he does not consider that notice is required to be given under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Citation of decisions below

10. The principal reasons of Edmonds J delivered on 21 February 2014 are reported as *Blank v Commissioner of Taxation* (2014) 95 ATR 1 (**TJ**). The trial judge's supplementary reasons delivered on 22 May 2014 may be cited as [2014] FCA 517.

11. The reasons of the Full Court (Kenny, Robertson and Pagone JJ) are reported as *Blank v Commissioner of Taxation* (2015) 329 ALR 213 (**RFC**).

Part V: Facts

12. The primary facts were not in dispute and based primarily on uncontested documents. They are summarised at TJ [11]–[46]. However, for the purposes of resolving the issues before the Court it is useful to refer to some of the key events and agreements.

13. Between November 1991 and 31 December 2006, the appellant was employed by GI or one of its wholly owned subsidiaries.[2]

14. GI was a company incorporated in Switzerland under the name Marc Rich & Co AG, which was changed to GI in 1994. At all material times, GI was a majority owned subsidiary of Glencore Holding AG (**GH**)[3] which held 85% of the shares in GI.[4] GH was the ultimate holding company of the Glencore group of companies (**Glencore Group**). Prior to 2002, the remaining 15% of the shares in GI were owned by an unrelated industrial company.[5] After 2002, the remaining 15% of the shares were owned by Glencore LTE AG.[6]

15. All of the shares in GH and Glencore LTE AG were owned by those employees of the Glencore Group who were invited and who agreed to participate in an "employee profit participation plan" operated by GI.[7] Employees were invited to participate on the basis that they were considered key to the success of the Glencore Group, having regard to their past performance, seniority and future potential.[8] In this way, the key employees of the Glencore Group were the indirect owners of the shares in GI:[9] see corporate structure diagram.[10] Employees' participation in a plan was in addition to their salary and any bonuses they may have been entitled to. In the case of the appellant, his salary and discretionary bonuses were substantial throughout the relevant period.

Ordinary profit participation plan

16. From about May 1994 until March 2007 (when the Declaration was executed) the appellant participated in what was known as the "ordinary profit participation plan" operated by GI. The appellant's participation was initially governed by two "stapled"[11] agreements: an agreement with GI entitled "Profit Participation Agreement" (**PPA 1993**) and an agreement with GH entitled "Shareholders' Agreement"

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2 TJ [11]–[12].

3 The company was incorporated in Switzerland under the name Newgen AG, which was changed to Glencore Holding AG in 1994.

4 TJ [13]; Affidavit of Andreas Hubmann sworn 25 June 2013 (**Hubmann**), [6].

5 GI Annual Report 2001, p 21; GI Annual Report 2002, p 21.

6 Hubmann, [6]–[7].

7 Hubmann, [8]–[9]; Offering Circular dated 12 June 2003 for notes to be issued by Glencore Capital Ltd and Glencore Finance (Europe) SA and listed on the Luxembourg Stock Exchange, p 57; Base Prospectus dated 8 August 2006 in relation to notes to be issued by Glencore Capital Ltd and Glencore Finance (Europe) SA and listed on the Luxembourg Stock Exchange, pp 70–71.

8 TJ [14]; Hubmann, [9].

9 Hubmann, [7].

10 Hubbman, Exhibit AH-1, tab 1.

11 The way the "stapling" was achieved is described in [25] below.

(**SA 1994**).[12] The PPA 1993 was amended in 1996 and replaced (prospectively) in October 1999 by a new profit participation agreement with GI (**PPA 1999**).

17. As recorded by Edmonds J, the terms of the PPA 1993, the PPA 1993 (as amended in 1996) and the PPA 1999 were substantially similar.[13] The PPA 1993 (as amended in 1996) and the PPA 1999 are almost identical. Since the bulk of the GS issued to the appellant were in the period from 1995 to 2002, it is convenient, as Edmonds J did, to focus attention on the PPA 1999.

18. Under the PPA 1999, the appellant was granted a "Profit Participation" which was defined as "a participation in the results[14] of GI, in the form of (a) Genussscheine (**GS**) as per section 657 of the Swiss Code of Obligations ... and (b) a contractual claim hereunder": cl A.1. To reflect an agreement between GI and the Swiss Federal Tax Administration (**FTA**), so long as the approval by the FTA was maintained, 55% of the Profit Participation was to be received as "profit distribution under his GS" and the balance was to be received as a contractual claim: see cll A.3.5, A.4. The appellant was granted the rights without undertaking any obligation in return for the grant.

19. Genussscheine (**GS**) are profit sharing certificates authorised by art 657 of the Swiss Code of Obligations which may be issued by a company in accordance with its articles of association. GS can only entitle their holders to a share in the disposable profits of the company, or in the proceeds of liquidation or the right to subscribe for new shares.[15] They do not confer voting rights or a membership interest in the company.[16] The expert evidence was to the effect that under Swiss law, GS confer rights on the holder which are treated as rights arising from a combination of a contractual obligation and an obligation created by Swiss corporate law.[17] The precise rights attaching to GS are determined having regard to the company's articles and any separate contractual agreement between the holder and the company.[18] Analogously to the traditional

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12 TJ [16]–[17]. The PPA 1993 may be found at [AB]. The SA 1994 may be found at [AB].

13 TJ [19]. There were two main differences between the PPA 1993 and the agreements after the 1996 amendment. First, prior to the 1996 amendment there was no two year vesting period for GS issued to the appellant: the 150 GS issued to the appellant prior to 1996 had no two year vesting period. Secondly, prior to the 1996 amendment there was no ability to assign GS and the rights under the PPA to a personal holding company with the consent of GI.

14 Clause A.1 of the PPA 1993 used the expression "future profits" rather than "results".

15 Expert Report of Prof Dr Peter Nobel dated 27 June 2013 (Ex 4), Annex C: Swiss Code of Obligations, art 657.

16 Expert Report of Prof Dr Peter Nobel dated 27 June 2013 (Ex 4), [87]–[89]; Expert Report of Prof Dr Hans Caspar von der Crone dated 2 September 2013 (Ex B), [24]–[26].

17 Expert Report of Prof Dr Hans Caspar von der Crone dated 2 September 2013 (Ex B), [25]; Expert Report of Prof Dr Peter Nobel dated 27 September 2013 (Ex 5), [48] and Annex F.

18 Expert Report of Prof Dr Hans Caspar von der Crone dated 2 September 2013 (Ex B), [24], [26]; Expert Report of Prof Dr Peter Nobel dated 27 September 2013 (Ex 5), [25], [48].

position of a shareholder in an Australian company in respect of dividends,[19] under Swiss law the enforceable claim of the holder of a GS to the disposable profit of the company is conditional on a decision by the general meeting of the company deciding to distribute profits.[20]

20. In the present case, under GI's articles GS granted, upon restitution of the GS to GI, "a claim to the cumulative portion of the balance sheet profit, to be determined by the general meeting of shareholders, during the period of ownership in the [GS] ... in proportion to the total number of [GS] effectively issued at any given time".[21] Clause A.3.1 of the PPA 1999 and cl C.2.3.1 of the SA 1994 contemplated that GH, as majority shareholder of GI, would take the necessary resolutions to provide for the profit distribution under the GS contemplated by the PPA 1999. See also PPA 1993, cl A.3.1.

21. Under the PPA 1999, the Profit Participation was determined as follows. With effect from 31 December each year, the appellant was allocated a portion of the net income of GI (on a consolidated basis) for that year in proportion to the number of GS held by the appellant to the total number of GS on issue: cll A.2.2, A.2.3. Correspondingly if there was a loss in any year his overall entitlement would be reduced accordingly.

22. The Profit Participation – both under the GS and under the contractual claim – accumulated annually over the period in which the appellant held the GS up to and including (a) the last day of the month in which notice of termination of employment was received (by either the appellant on the appellant's employer) or (b) in the case of death or permanent disability, the last day of the month in which either event occurred (**Notice Date**): cl A.2.4. Except in the case of death or permanent disability, only GS which had been allocated to the appellant for more than two years at the Notice Date were counted for the purposes of calculating the profit participation: cl A.2.3.

23. Provided that the appellant had returned all GS to GI and executed a declaration of assignment and general release in the form annexed to the agreement, then 30 days after the Notice Date (the **Due Date**) the appellant's profit participation became due as a debt bearing interest (cll A.5, A.7) which was to be paid in USD in 20 equal[22] quarterly instalments (cl A.6). 55% x 35% of each instalment was to be withheld and paid to the FTA on account of Swiss dividend withholding tax on the component distributed as profit under the GS: see Annex C.

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19 See *Bluebottle UK Ltd v DFCT* (2007) 232 CLR 598 at [19]–[20].

20 Expert Report of Prof Dr Peter Nobel dated 27 September 2013 (Ex 5), [25], [48] and Annex F.

21 Articles of Incorporation of Glencore International AG dated 28 November 2002 (English translation), art 8; Articles of Incorporation of Glencore International AG dated 25 January 2005 (English translation), art 8.

22 Only 75% of the first instalment was to be paid on the Due Date, with the balance of that instalment paid at the time of the second instalment: PPA 1999, cl A.6.2.

24. Generally, the appellant could not assign or alienate his GS or his contractual rights and claims under the PPA 1999. However, he could assign his rights and claims and the GS to a personal holding company, trust or foundation controlled by the appellant with the prior written approval of GI: cl C.2. The Swiss law evidence was that consent could not be unreasonably withheld.[23] GI could also offer to repurchase the appellant's GS prior to termination of employment on terms not more favourable than his profit participation, and from time to time GI entered into such arrangements with other employees: TJ [21(8)].

25. As noted in [16] above, the profit participation agreement and the shareholders' agreement were "stapled". Under the SA 1994, employees were entitled to be issued shares in GH from time to time at their par value of CHF 50 per share, provided that the employee had executed a profit participation agreement with GI: SA 1994, cll A.2, B.5. At the same time, the validity of the PPA 1993 was dependent on the employee having executed the shareholders' agreement and agreeing to subscribe (and pay the par value of CHF50 per share) for the same number of shares in GH as the number of GS issued to the employee under the PPA: PPA 1999, cl B.1. Further, upon death or termination of employment, GH had a call option by which it could require the employee to sell the shares in GH at their par value: SA 1994, cl D.4.1. In this way there was a precise correspondence between the number of GS issued by GI held by the appellant and the number of shares in GH held by the appellant.

26. From May 1994 to May 2002, the appellant was successively issued with 1,500 GS by GI and subscribed for an equal number of shares in GH: see TJ [23]–[26]. In practice, physical certificates for GS were not issued.[24]

27. The amount ultimately payable on disposal of his shares in GH and associated rights corresponded to the portion of the consolidated profit of GI attributable to his proportionate shareholding in the parent, GH. This is because GI had an issued capital of 150,000 shares of which 127,500 (85%) were held by GH and 22,500 (15%) were held by LTE. GI had also issued 150,000 GS to employees who were shareholders in those two companies. GH had an issued capital of 127,500 shares held by employees who held a corresponding number of GS issued by GI. Consequently, an employee's holding of shares in GH reflected the same proportionate interest in the profits of GI represented by the employee's holding of GS. The position was unchanged when the concept of PPU was introduced in the IPPA 2005.

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23 Expert Report of Prof Dr Peter Nobel dated 27 September 2013 (Ex 5), [77].

24 TJ [23]. The Commissioner sought to make something of this fact below. It is of no significance. For example, all shares traded on the ASX are settled electronically without physical certificates.

IPPA 2003

28. In around June 2003, the appellant executed an agreement entitled "Incentive Profit Participation Agreement" (**IPPA 2003**) with GI and Glencore AG, a wholly owned subsidiary of GI incorporated in Switzerland with an office in the United States.

29. Under the IPPA 2003, rather than the appellant being issued GS by GI, Glencore AG agreed to issue GS to GI, which GS would serve as "Phantom Units" for the purposes of calculating the appellant's Profit Participation under the IPPA 2003.[25] The appellant was stated to have no interest whatever in the GS issued by Glencore AG: cl A.1.2. However, the IPPA 2003 did not affect the PPA 1999 or regulate the GS previously issued by GI to the appellant.

30. Unlike the PPA 1993 and PPA 1999 which defined Profit Participation as a participation in the results/profits of GI, the IPPA 2003 defined Profit Participation as "deferred compensation which will be calculated on the basis of the results of GI" (cl A.1.1). However in substantive terms the IPPA 2003 was similar to the PPA 1999. A Phantom Unit under the IPPA 2003 was treated in a similar way to a GS issued under the PPA 1999 for the purposes of determining the appellant's Profit Participation and the other key provisions of the IPPA 2003 were essentially identical to the PPA 1999. It seems that the change in terminology between the two agreements was motivated by US tax considerations: see cl A.9.2.

31. In July 2003, the appellant was issued with 100 Phantom Units and purchased 100 shares in GH.

IPPA 2005 and SA 2005

32. In 2005, at a time when the appellant held directly 1,500 vested GS issued by GI and 100 "Phantom Units" (also issued by GI), the appellant entered into a new Shareholders' Agreement with GH (**SA 2005**) and a new "Incentive Profit Participation Agreement" (**IPPA 2005**).

33. The SA 2005 replaced the SA 1994 (see cl E.5) but was in relevantly identical terms.

34. The IPPA 2005 replaced "any prior oral or written agreement related to the PPU which are the subject matter this Agreement": cl C.7. PPU was defined in cl 17 of the Definitions to mean:

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[25] The GS were issued by Glencore AG under its articles of association: see Statuten der Glencore AG dated 25 August 2005 (and English transaction), art 6. Genussscheine is translated as "bonus papers" in this translation.

> "the number of GS actually issued and participating as of a respective date, whether issued by AG under the Plan and any Incentive Profit Participation Agreement (including this Agreement) and held by GI in accordance with the terms of the Plan and this Agreement *or GS issued by GI and held directly by Employees of GI or any of its subsidiaries pursuant to profit participation agreements.*" [emphasis added]

35. Thus, in addition to replacing the IPPA 2003 in relation to the appellant's 100 Phantom Units, the IPPA 2005 replaced the PPA 1999 as the contract regulating the appellant's existing 1,500 GS issued by GI. However, as the previous paragraph recognises, the IPPA 2005 did not cancel the appellant's existing GS issued by GI: see RFC [132]. Further, as a matter of substance, the rights under the IPPA 2005 attaching to PPUs which were GS issued by GI held directly by the appellant were the same as the rights under the PPA 1999 attaching to the GS: see IPPA 2005, cll A.2, A.4–A.7. The method of calculation of the amount payable to the appellant on surrender to GI remained the same.

Declaration

36. On 31 December 2006, the appellant's employment with GI's subsidiary, Glencore Australia Pty Ltd, was terminated by his resignation.

37. On 15 March 2008, the appellant executed the Declaration by which, in consideration for receipt of both the amount of USD160,033,328.25 to be paid by GI and the amount of CHF80,000 to be paid by GH, he (a) relinquished his "claim to payments with respect to the PPU and GS allocated in his name", (b) assigned "all GS, registered and/or held in his name together with all preferential and ancillary rights to GI, and irrevocably authorizes GI to take over the respective certificates" and (c) assigned "all his shares of GH" to GH: cl B.[26]

38. Paragraph B(b) of the Declaration was in addition to the pro forma declaration annexed to the IPPA 2005 and recognised the appellant's ownership of the 1,500 GS issued by GI.

Summary

39. In summary: (a) The shares and the bundles of associated rights (being the 1,500 GS and 100 Phantom Units and related contractual rights) that were granted to the appellant

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[26] Until a declaration was executed, an employee's accruing entitlement was shown in the shareholders' funds part of GI's balance sheet as retained earnings: see GI Annual Report 2001, p 19; GI Annual Report 2002, p 19; GI Annual Report 2003, p 19; GI Annual Report 2004, p 19. After the declaration was executed, the debt was recognised as a liability: see, eg, GI Annual Report 2004, p 38; Base Prospectus dated 20 December 2005 in relation to notes to be issued by Glencore Capital Ltd, p 1266; Base Prospectus dated 29 August 2007 in relation to notes to be issued by Glencore Finance (Europe) SA, p 70.

conferred an entitlement in the future to a share of the profits of the Glencore enterprise. This was specifically linked to the appellant's position as shareholder in GH through the stapling of the shares to the GS and the way the amount payable was calculated. The GS enabled the allocation to the appellant of a proportion of the consolidated annual profit proportionate to his shareholding, but correspondingly if there was a loss in any year his overall entitlement would be reduced accordingly. (b) The shares and associated rights were entirely separate from his salary and discretionary bonuses. The appellant undertook no obligation in return for the grant of the rights beyond the payment of 50 CHF per share. (c) While the rights were subject to a vesting period of two years, this did not apply in the case of death or permanent disability where the rights were immediately vested upon grant. (d) The consideration given by the appellant for the receipt of Amount was identified in cl B of the Declaration and was the disposal of the entire bundle of shares and associated rights granted to him over the period from 1994 to 2003, including his 1,600 shares in GH and the 1,500 GS issued to him by GI.

Part VI: Argument

A. Ordinary income issue

40. Section 6-5 of the ITTA 1997 includes in a taxpayer's assessable income "income according to ordinary concepts", which is called ***ordinary income***". As noted above, the Commissioner argues that the instalments received by the appellant were either (a) ordinary income as a reward for service or (b) ordinary income in accordance with *FCT v Myer Emporium* (1987) 163 CLR 199 (***Myer Emporium***). Both arguments should be rejected.

A.1. Reward for services (NOA, Grounds 1–2)

Relevant principles

41. What is encompassed by the concept of ordinary income must be determined in accordance with the ordinary concepts and usages of mankind. Relevantly for present purposes three propositions about the concept can be noted.

42. *First*, one of the recognized categories of ordinary income[27] is "all gains and profits derived from personal exertions, whether such gains and profits are fixed or fluctuating, certain or precarious, whatever may be the principle or basis of calculation".[28] As this

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27 The others are, in broad terms, gains from property, gains from business, certain periodical receipts and amounts received in substitution for income not received: RW Parsons, *Income Taxation in Australia* (LBC, 1985), Ch 2, propositions 11–15.

28 *A-G of British Columbia v Ostrum* [1904] AC 144 at 147.

statement of the principle recognises, in order to be income on this basis the gain or profit must be derived from personal exertion.[29] The same idea is sometimes expressed by saying the gain must be a product of an income earning activity on the taxpayer's part.[30] But as Professor Parsons pointed out, "the notion of product may be illustrated, it cannot be defined".[31] Further tests are required to identify when a receipt is properly seen as a product of, or from, an income earning activity, or something else. It is certainly well established that the mere fact that a receipt has some connection with an employment or the provision of services is not sufficient to make it ordinary income.

43. It is submitted that an amount received by an employee in a capacity other than as an employee (e.g. *qua* shareholder) cannot be income from personal exertion.[32] So for example, in *Hayes*, the taxpayer received a gift of shares while employed as secretary of the company concerned and its subsidiary, but Fullagar J said this was not sufficient to make the gift a product of that income earning activity because "it was not paid to him in any such capacity": 52.4, 57.5. In *Abbott v Philbin*,[33] *Donaldson v FCT*,[34] and *FCT v McArdle*[35] the receipt of shares (in the first two cases) or money (in the third) by the taxpayer might be said to be a product or incident of employment in the sense that it came about because of the employment relationship, but the receipt was held not to be income from personal exertion. This is to be explained on the basis that the receipt was in a capacity other than as employee – i.e. as holder of rights previously granted which were themselves the reward for services and therefore income: see *Abbott* at 379.5 per Lord Radcliffe.[36]

44. *Second*, an amount will only be ordinary income (as income from services or otherwise) if it is money or a non-cash benefit capable of being "turned to pecuniary account" (or in other words capable of being turned to monetary advantage).[37] However, in the case of benefits received in relation to the provision of services (whether as employee or

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29 Consistently with the "core concept" of income as a "gain derived from capital, from labor, or from both combined": *Eisner v Macomber* (1920) 252 US 189 at 206, quoted with approval in *FCT v Montgomery* (1999) 198 CLR 639 at [65].

30 *Hayes v FCT* (1956) 96 CLR 47 at 54.8, 58.1 (***Hayes***); *Scott v FCT* (1966) 117 CLR 514 at 527.5.

31 RW Parsons, *Income Taxation in Australia* (LBC, 1985), para 2.135.

32 The same principle applies to s 26(e) of the ITAA 1936: see *FCT v McArdle* (1988) 19 ATR 1901 at 1905.2 (FC).

33 [1961] AC 352 (***Abbott***).

34 [1974] 1 NSWLR 627 (***Donaldson***).

35 (1988) 19 ATR 1901 (FC) (***McArdle***).

36 See also *Bridges (Inspector of Taxes) v Hewitt* [1957] 1 WLR 674, the Court of Appeal decision in the case referred to at RFC [52], where Morris LJ said at 691 that the concept of "perquisites or profits" in the taxing provision at issue there and in *Abbott v Philbin* referred to "what is received by the holder of an office or employment in that capacity: to the holder of the office or employment as such". See also *McArdle v FCT* (1988) 79 ALR 637 at 656.8 (Fisher J).

37 *Tennant v Smith* [1892] AC 150, which has been accepted in Australia as reflecting the concept of income according to ordinary concepts: *FCT v Cooke v Sherden* (1980) 29 ALR 202 at 211–212 (FC).

otherwise) this restriction was overcome by s 26(e) of the ITAA 1936 (now s 15-2 of the ITAA 1997) which brings in as statutory income the value to the taxpayer of benefits allowed, given or granted to the taxpayer in relation directly or indirectly to any employment or services rendered by the taxpayer.[38] Further, s 26(e) and (now s 15-2) has its own derivation rule in the words "allowed, given or granted" in place of "derived" appearing in s 6-5(2).

45. *Third*, a gain from the realization of an asset where the gain does not arise in the conduct of a business (including an isolated business venture of the kind involved in *FCT v Whitfords Beach Pty Ltd* (1982) 150 CLR 355) is not income.[39]

10 *Application of principles*

46. In order to determine whether the payments received by the appellant were ordinary income it is necessary to start, as Pagone J did, by looking at what the appellant received when the shares and associated rights were initially granted. This is because whether a payment under an agreement is ordinary income depends on the whole of the circumstances which led to the payment and not simply on the terms of the agreement itself.[40]

47. Pagone J concluded that at the time of each grant of shares and associated rights the appellant derived a benefit which was assessable as ordinary income: RFC [138], [139].

48. The conclusion of Pagone J was plainly correct. The shares and associated rights
20 granted to the appellant were choses in action[41] which were capable of being turned to pecuniary account in the relevant sense – in *Abbott* the options were not capable of assignment but that did not deny that they were capable of being turned to pecuniary account. It was enough that the taxpayer could have found someone prepared to pay a substantial sum to be entitled to a transfer of the property arising on exercise of the option: Lord Reid in *Abbott* at 371.5. That is the case with the appellant's rights here. In any case he could assign them to a personal holding company which would allow him to turn them to pecuniary account.

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38 *McArdle* (1988) 19 ATR 1901 at 1902.7 (FC). The expression "value to the taxpayer" in s 26(e) and s 15-2 means what a prudent person in the position of the taxpayer would be willing to give for the rights rather than to fail to obtain them: *Donaldson* at 644E.

39 RW Parsons, *Income Taxation in Australia* (LBC, 1985), Ch 2, proposition 10; eg *McArdle* (1988) 19 ATR 1901 at 1909.8 (FC). Where the purchase price is payable by instalments spread over a period, the instalments are not income: *Egerton Warburton v DFCT* (1934) 51 CLR 568 at 573.

40 *Squatting Investment Co Ltd v FCT* (1953) 86 CLR 570 at 627–8; *Federal Coke Co Pty Ltd v FCT* (1977) 15 ALR 449 at 457, 472; *Allied Mills Industries Pty Ltd v FCT* (1989) 20 FCR 288 at 309; *Reuter v FCT* (1993) 27 ATR 256 at 261.

41 The shares and associated rights were presently existing choses in action (and not mere expectancies) analogous to the taxpayer's contractual right to royalties in *Shepherd v FCT* (1965) 113 CLR 365.

49. More importantly, it follows from *Donaldson* and *McArdle* that the value of the benefit of the rights was assessable under former s 26(e) or s 15-2 at the time of grant. Those sections do not require the benefit to be capable of being turned to pecuniary account (see [44] above). The question is whether the benefit has a value to the taxpayer, in the sense that the taxpayer would pay something to have the rights. The uncontroverted expert valuation evidence was that the rights had value to the appellant on grant.[42] The majority do not give any reasons why s 26(e) or s 15-2 did not apply on grant.

50. Moving to the exercise of the rights in 2007, Pagone J concluded that the exercise of the rights by the appellant involved no further derivation by him of income according to ordinary concepts. This was because the appellant merely exploited the bundle of rights which he acquired at the earlier time – he thereby enjoyed the fruits of what he received upon the grant of the bundle of rights: see RFC [139]. In essence, the payments were not income because they were not received by the appellant in the capacity of an employee but rather from exploitation of rights arising from his position as a shareholder: RFC [130], [135]–[136]. The fact that the appellant had a separate contract of employment under which he received remuneration which has not been suggested to be inadequate, and that the payments were not made by the employer but by a third party (GI) are also relevant considerations against the characterisation of the payments as ordinary income: *Hayes* at 52.5 and 57.4.

51. Pagone J's approach derives support, as his Honour says, from *Abbott*. The reason why the taxpayer there did not derive a gain which was income according to ordinary concepts when he exercised the option previously granted to him was that the gain accrued to him as the holder of the options, not as an employee. Lord Radcliffe (at 379.5) said that the shares were an advantage which accrued to Mr Abbott "as the holder of a legal right which he had obtained in an earlier year and which he exercised as option holder against the company."

52. It was this aspect of the decision in *Abbott* which was relied upon by the courts in *Donaldson* and *McArdle* to reach the conclusion that the profit arising on the exercise of rights previously granted to an employee was not income according to ordinary concepts. The distinction as Sir Nigel Bowen pointed out in *Donaldson* (at 643F) is between the enjoyment of the rights and the enjoyment of the fruit of the rights.

53. In summary, the correct approach to the determination of the character of the Amount was that taken by Pagone J who concluded that:

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[42] Expert Report prepared by Mr Wayne Lonergan dated 29 November 2013 (Ex 8), [13]–[21]; 03/12/12, T:114.44–115.3 (Lonergan).

(a) The appellant received progressively over the period from 1994 to 2003 a bundle of interconnected rights (which included items of a proprietary nature, such as shares and GS) conferring on him an entitlement in the future to share in profits of the Glencore enterprise specifically linked to his position as a shareholder: RFC [130].

(b) Each successive grant of these rights was of an income nature (as the reward for his services) and assessable at the time of receipt: RFC [138]–[139].

(c) The Amount was consideration for the disposal of the entire bundle of rights he had accrued up to 2007, and represented the enjoyment of the fruits of the rights granted at the earlier time and not deferred compensation for services: RFC [135]–[136], [139].

Reasoning of Kenny and Robertson JJ

54. The majority (Kenny and Robertson JJ) concluded that the payment of the Amount was income according to ordinary concepts as deferred compensation for services: RFC [85]. The key part of the majority's reasoning is found at RFC [81]–[85] and in essence involved the following propositions:

(1) The GS, Phantom Units and PPU's issued progressively to the appellant under the PPA 1993, PPA 1999, IPPA 2003, and IPPA 2005 gave rise to contractual rights which served only as mechanisms for calculating the amount to be paid on termination of the appellant's employment being an amount representing his share of profits to that time: RFC [82]–[83].

(2) It follows from (1) that the "actual benefit" conferred on the appellant by the successive grant rights under those agreements was the payment of the profit share: RFC [84].

(3) As a consequence the description of the payment in the recitals to the IPPA 2005 (and a statement to similar effect in the IPPA 2003) as "deferred compensation" was not merely a label but an apt description of the character of the payment: RFC [84].

(4) *Abbott*, *Donaldson*, *McArdle* and *FCT v McNeil*[43] were distinguishable on the basis that they were essentially concerned with non-pecuniary gain: RFC [85].

55. It is submitted that Kenny and Robertson JJ erred in seeking to identify the character of the Amount in this way.

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43 (2007) 229 CLR 656 (*McNeil*).

56. The first proposition is an incomplete statement of what the appellant received on the successive grants of rights under the profit participation arrangements over the period from 1994 to 2003. As Pagone J pointed out at RFC [130], the appellant received over that period a bundle of interconnected rights involving an entitlement to receive in the future a share of the profits of the Glencore enterprise which was specifically linked to his position as a shareholder of GH. This linkage arose through the "stapling" of the shares to the associated rights and the way the amount ultimately payable was calculated. The GS enabled the allocation to the appellant of a proportion of the consolidated annual profit proportionate to his shareholding, but correspondingly if there was a loss in any year his overall entitlement would be reduced accordingly.

57. The second proposition at [54] above elides the distinction between the grant of a right to receive money (or other property) and the receipt of the money (or other property) on exercise of the right. It is submitted that there are two benefits – the right itself and the money (or other property) received when the right is exercised.[44] Where such a right is granted to an employee, the mere fact that the benefit conferred by the right is the receipt in the future of money (or other property) does not mean that, in all circumstances, the remuneration for services is the money (or other property) obtained pursuant to the right, rather than the right itself.

58. An example is the grant of an option over unissued shares granted to an employee by the employer (or an associate of the employer). The option is a right to receive property (i.e. shares) from the company which issues the option. Both the option and the shares issued on exercise are benefits obtained by the employee. In *Abbott*,[45] *Donaldson*[46] and *McArdle*[47] it was accepted that the option was a benefit which was subject to tax at the time of grant rather than on vesting or exercise – in *Abbott* as ordinary income and in *Donaldson* and *McArdle* pursuant to s 26(e) of the ITAA 1936. Another example is this Court's decision in *McNeil*[48] which referred to *Abbott* apparently approvingly, but without any detailed consideration of that case.

59. It is submitted that Pagone J was correct in concluding that the options at issue in *Abbott* are similar to the rights conferred on the appellant in the present case: RFC [133], contra RFC [85]. In *Abbott* the options were non-transferrable and were expressed to expire after 10 years or the earlier of death or retirement of the employee. Hence the "actual benefit" conferred by the option was the acquisition of shares on

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44 As recognised in *Shepherd v FCT* (1965) 113 CLR 365

45 [1961] AC 352 at 365–7, 372, and 377. *Abbott* has been recently affirmed by *Grays Timber Products Ltd v RCC* [2010] 1 WLR 497 at [5].

46 [1974] 1 NSWLR 627 at 642–3.

47 (1988) 19 ATR 1901 at 1909.5.

48 (2007) 229 CLR 656 at [27] and [51].

exercise of the option. However, notwithstanding this, it was held that the option, rather than the shares issued on exercise, were the "profit or perquisite" of the taxpayer's office of employment and therefore ordinary income. Nor is it correct to say, as suggested at RFC [91] that *Abbott* turns on the wording of Schedule E of the *Income Tax Act 1952* (UK) because that provision merely restates the ordinary concept of income (see [42] above).

60. The third proposition at [54] above is incorrect for several reasons. *First*, to say that the actual benefit conferred by a right is the money or property which will be realised from the right does not, of itself, determine whether it is the right or the product of the right which is the compensation for services. This is illustrated by *Abbott*, *Donaldson*, *McArdle* and *McNeil*. It is submitted that Pagone J was correct to conclude at RFC [138] that the successive grants of the bundle of rights (shares in GH, GS and Phantom Units) over the period from 1994 to 2003 was the reward for service.

61. *Secondly*, when a taxpayer provides consideration for a receipt of money, the consideration will ordinarily supply the touchstone for ascertaining whether the receipt is on revenue account or not, because it establishes the matter in respect of which the moneys are received.[49] Here, the consideration for the receipt of the Amount is identified in cl B of the Declaration, as pointed out by Pagone J at RFC [135]–[136]. The consideration was the disposal of an entire bundle of rights acquired by the appellant over the period from 1994 to 2003, including his shares in GH and the 1,500 GS issued to him by GI: RFC [132]. It follows, as Pagone J found, that the true character of the payment of the Amount is not remuneration for past services, but consideration for the disposal of a bundle of rights and is therefore a capital receipt: cf *McArdle* at 1909.8.

62. This conclusion is not affected by the recital to the IPPA 2005 referred to at RFC [81] for a number of reasons. First, a recital to the IPPA 2005 cannot control the characterisation of the payment of the Amount as it is for the Court to determine what the Amount was paid for.[50] Second, at the time the IPPA 2005 was entered into, the appellant had already been granted 1,500 GS. The recital appearing in the IPPA 2005 referred to at RFC [81], and the similar statement in the recitals to the IPPA 2003, did not appear in the PPA 1993 or the PPA 1999 which were the agreements governing the 1,500 GS issued to the appellant from 1994 up to 2002. A recital in a later agreement

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49 *Federal Coke Co Pty Ltd v FCT* (1977) 15 ALR 449 at 472–3 per Brennan J: *Allied Mills Industries Pty Ltd v FCT* (1989) 20 FCR 288 at 309.6; *Murdoch v FCT* [2008] FCAFC 86 at [12].

50 *Federal Coke Co Pty Ltd v FCT* (1977) 15 ALR 449 at 457-458 per Bowen CJ. Further, as a mere recital it gives way to the operative clauses of the agreement none of which provide that the grant of rights is in consideration for future services: *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 at 73.3.

cannot determine the consideration for which those grants were made. Third, the recital to the IPPA 2005 (and the equivalent statement in the IPPA 2003) is equivocal – it can be read as simply describing the grant of the rights under the agreement as being deferred compensation, not a payment subsequently made.

63. The fourth proposition at [54] above is incorrect and, as explained by Pagone J, is inconsistent with this Court's decision in *McNeil:* see RFC [135]–[139]. The majority mistakenly relied on *McNeil* as a case concerning non-pecuniary gain. However, as Pagone J noted at RFC [136]–[139], and the facts of *McNeil* make clear (see (2007) 229 CLR 656 at [10]–[11]), when Mrs McNeil was granted her "sell-back rights" she was in fact only granted a right to receive money in the future. This is comparable to the appellant's position. Yet, in contrast to the result in this case, this Court held that income was derived at the time of the grant of the right, not when Mrs McNeil in fact received a payment. Rather than supporting the majority's reasoning, *McNeil* is authority directly contrary to the majority's approach.

64. There are two key differences between the approach taken by Pagone J from that of the majority of the Full Court of the Federal Court.

65. *First*, Pagone J emphasised the link between the entitlement to profit share under the IPPA 2005 and the holding of shares in GH. The majority did not accept that the stapling of the rights under the relevant agreements was relevant: RFC [90]. It is submitted that the approach of Pagone J is preferable because it recognises the true nature of the rights acquired by the appellant over the period 1994 to 2003 and the consideration he gave under the Declaration for receipt of the Amount.

66. *Secondly*, the majority considered that the successive grant of rights to the appellant over the period 1994 to 2003 could not be brought to tax at the time of grant because they were not rights which could be turned to pecuniary account in the relevant sense: RFC [76], [89]. The majority's only reasoning for this conclusion at [89] is to refer back to the primary judge's reasons, but there is no part of the primary judge's reasoning where he says that the rights granted could not be turned to pecuniary account.

67. As noted earlier, the successive grants of rights were capable of being turned to account in the relevant sense and further, the majority overlooks the scope of s 26(e) of the ITAA 1936 and its successor s 15-2 of the ITAA 1997, both of which bring to tax the value to the taxpayer of a benefit granted in connection with his or her employment regardless of whether the benefit can be turned to pecuniary account (see [44] above).

The evidence established that the rights granted to the appellant over 1994 to 2003 had value to him at the time of grant.[51]

68. The conclusion of the majority raises the prospect of double taxation: the benefit of the grant of the rights is assessable at the time of grant as ordinary income or under s 26(e) or s 15-2, and on exercise as ordinary income.[52] As Dixon J said "no interpretation of a taxing Act should be adopted which results in the imposition of double taxation unless the intention to do so is clear beyond any doubt".[53]

A.2. *Myer Emporium* (NOC, Ground 1)

69. The Commissioner's argument that the instalments were ordinary income in accordance with *Myer Emporium* was correctly rejected by both Edmonds J (see TJ [93]) and Pagone J (see RFC [140]).

70. The Commissioner relies on what is known as the "first strand" of the reasoning in *Myer Emporium*, which is that a receipt from a transaction involving the acquisition of property may be business income, notwithstanding that the transaction is outside the ordinary course of business and is not an incident of the business, where the taxpayer conducting a business (including an isolated business venture) enters into the transaction with a profit-making purpose and that purpose is the very means giving rise to the profit.

71. That this strand only applies where a taxpayer in conducting a business or an isolated business venture is made clear both by the facts and reasoning in *Myer Emporium* (see 163 CLR at 205, 209.9–210.3, 210.5, 211.1, 212.7, 215.5–216.3) and the cases relied upon in that case (*FCT v Whitfords Beach Pty Ltd* (1982) 150 CLR 355; *Californian Copper Syndicate v Harris* (1905) 5 TC 159). It is also clear from the later decision of this Court in *FCT v Montgomery* (1999) 198 CLR 639 at [68] and [113] that the first strand of *Myer* is concerned with a profit from "a singular transaction in business" and not one from "no more than a singular transaction of purchase and resale of property". As both Edmonds J and Pagone J correctly held, the taxpayer was not conducting any business to which the *Myer Emporium* principle could apply.

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51 Expert report of Wayne Lonergan dated 29 November 2013, [13]–[15].

52 If the taxpayer is an employee, the grant of the benefit may be a fringe benefit on which the employer is subject to tax under the fringe benefits tax legislation, rather than the employee due to s 23L of the ITAA 1936, but the potential for double taxation remains particularly as the fringe benefits tax is applicable only to benefits provided to employees.

53 *Executor Trustee and Agency Co of South Australia Ltd v FCT* (1932) 48 CLR 26 at 44.

B. ETP issue (NOC, Ground 2)

72. In the event that the Court upholds the appellant's appeal in relation to ordinary income, the Commission contends in the alternative that:

(a) payments received by the appellant in the 2007 income year were "eligible termination payments" within s 27A(1) of the ITAA 1936 (now repealed) and therefore assessable to the appellant pursuant to s 27B of the ITAA 1936 (now repealed); and

(b) payments received by the appellant in the 2008 income year were "employment termination payments" within the meaning of s 82-130(1) of the ITAA 1997, with the result that the taxable component (see s 82-145) is assessable to the appellant under s 82-10(2) of the ITAA 1997.

These contentions cannot succeed and were rightly rejected by the primary judge: see TJ [105].

73. As both Edmonds J and the Full Court held, the appellant did not receive, either actually or constructively, any payments in the 2007 income year. Hence, s 27B(1) of the ITAA 1936 could not apply.

74. In an event, in order for payments to be an eligible or employment termination payment it is necessary for the payments to be received "in consequence of" the termination of the taxpayer's employment: see ITAA 1936, s 27A(1) ("eligible termination payment") and ITAA 1997, s 82-130(1)(a)(i) ("employment termination payment").

75. The meaning of the phrase "in consequence of" termination of employment was considered by this Court in *Reseck v FCT* (1975) 133 CLR 45 and by the Full Federal Court in a number of cases, principally *McIntosh v FCT* (1979) 25 ALR 557, *Dibb v FCT* (2004) 136 FCR 388 and *Forrest v FCT* (2010) 78 ATR 417. The up-shot of the authorities is that:

(a) It is not sufficient that termination of employment is an occasion by reference to which an amount becomes payable.[54] In other words, it is not sufficient that termination of employment be a "but for" cause for the payment.[55]

(b) Termination of employment must be the operative or effective cause of the payment.[56]

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54 See TJ [105]; *Dibb v FCT* (2004) 136 FCR 388 at [15]–[16] (FC); *FCT v Pitcher* (2005) 146 FCR 344; *Forrest v FCT* (2010) 78 ATR 417 at [79]–[82] (FC).

55 *Paklan Pty Ltd (in liq) v FCT* (1983) 67 FLR 328 (FC) at 347–348; *Forrest v FCT* (2010) 78 ATR 417 at [91] (FC).

76. In the present case, on any view the payments could not satisfy these criteria:

(a) If, as the appellant has submitted above in relation to the ordinary income argument, the payments were the proceeds of the realisation of benefits granted as a reward for services in earlier years, then it cannot be said that the termination of employment was an effective or operative cause of the payment. Any other conclusion would lead to the potential for double taxation. Termination of employment was merely an occasion which provided an opportunity for the appellant to realise the earlier granted benefits: see TJ [105]. That is demonstrated by at least two matters: (a) if the appellant had gone to work for another of GI's subsidiaries, he would not have received the payments; (b) the IPPA 2005 explicitly contemplated payment prior to termination of employment, which on the evidence occurred on a number of occasions.[57]

(b) If, on the other hand, the Commissioner is correct in relation to the ordinary income issue then the payments are received as a reward for prior service, and termination of employment is not the operative or effective cause of the payment.

77. Thus, the payments could not be ETPs. The insuperable logical difficulties facing the Commissioner's argument may explain why Pagone J did not deal with this issue.

C. Cost base issue (NOA, Ground 3; NOCA, Ground 3)

78. If it is concluded that the payments were neither ordinary income nor ETPs, then both parties accept that the appellant is assessable for a capital gain arising by reason of CGT Event C2 occuring on 15 March 2007 when the appellant executed the Declaration. Nor it is in dispute that the cost base was the market value of the appellant's rights at the time he became an Australian resident on 2 January 2002: ITAA 1997, s 855-45(2). However, the quantum of the market value remains in dispute.

79. The Commissioner's proposed cross-appeal seeks to re-agitate a question of valuation methodology which the Commissioner lost before Edmonds J. Edmonds J rejected the methodology adopted by the Commissioner's expert at trial (Mr Samuel) as being inconsistent with the concept of market value set out in *Spencer v The Commonwealth*[58] and later decisions. In short, Mr Samuel's valuation was not an assessment of market value. In the Full Court, Pagone J agreed with Edmonds J on this point. Kenny and Roberston JJ did not consider the issue.

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56 *Paklan Pty Ltd (in liq) v FCT* (1983) 67 FLR 328 (FC).
57 Hubmann, [17]–[20].
58 (1907) 5 CLR 418 at 441.

80. The appellant submits that the Commissioner's proposed cross-appeal on this ground should be refused special leave. As Pagone J noted, the point of difference is the extent to which a valuation of the appellant's rights at 2 January 2002 should assume that the hypothetical purchaser would secure reasonable terms and conditions to ensure that the appellant could continue in employment for some future period: RFC [144]. The authorities cited by Edmonds J and Pagone J plainly establish that it is appropriate to have regard to reasonable terms and conditions in valuing the asset. On that basis, Edmonds J and Pagone J were clearly correct to reject Mr Samuel's methodology. The Commissioner's cross-appeal involves the application of settled principles to the facts.

10 81. If that issue of methodology is resolved against the Commissioner, it is not clear whether there is any real dispute about the quantum of the cost base. The primary judge reasons tentatively suggest a likely market value between AUD77 million and AUD103 million: see TJ [110]–[111]. Pagone J held that AUD77 million was an appropriate figure: see RFC [145]. That figure, which is at the bottom of the trial judge's range, is the one which the appellant seeks in this Court.

82. However, if there is a real dispute about the quantum (apart from the methodological dispute identified on the Commissioner's proposed cross-appeal), the appropriate course may be for this Court to remit the determination to the Full Court.

Part VII: Relevant legislative provisions

20 83. The relevant legislative provisions are set out in the Annexure.

Part VIII: Orders

84. The orders sought by the appellant in relation to his appeal are set out in the notice of appeal. In relation to the Commissioner's proposed cross-appeal, special leave to appeal should be refused with costs. Alternatively, if special leave to appeal is granted, the cross-appeal should be dismissed with costs.

Part IX: Estimate of time

85. The appellant estimates that he will require 2 ½ hours for oral argument.

Dated: 20 June 2016

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S144 of 2016

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: VAUGHAN RUDD BLANK
Appellant

10

AND:

COMMISSIONER OF TAXATION
Respondent

20

ANNEXURE OF LEGISLATIVE MATERIALS

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Income Tax Assessment Act 1997

No. 38, 1997 as amended

Compilation start date: 11 July 2013

Includes amendments up to: Act No. 124, 2013

This compilation has been split into 11 volumes

Each volume has its own contents

Prepared by the Office of Parliamentary Counsel, Canberra

(2) Some ordinary income, and some statutory income, is exempt income.

(3) Exempt income is not assessable income.

(4) Some ordinary income, and some statutory income, is neither assessable income nor exempt income.

For the effect of the GST in working out assessable income, see Division 17.

(5) An amount of ordinary income or statutory income can have only one status (that is, assessable income, exempt income or non-assessable non-exempt income) in the hands of a particular entity.

Operative provisions

6-5 Income according to ordinary concepts (*ordinary income*)

(1) Your ***assessable income*** includes income according to ordinary concepts, which is called ***ordinary income.***

Note: Some of the provisions about assessable income listed in section 10-5 may affect the treatment of ordinary income.

(2) If you are an Australian resident, your assessable income includes the *ordinary income you *derived directly or indirectly from all sources, whether in or out of Australia, during the income year.

(3) If you are a foreign resident, your assessable income includes:
(a) the *ordinary income you *derived directly or indirectly from all *Australian sources during the income year; and
(b) other *ordinary income that a provision includes in your assessable income for the income year on some basis other than having an *Australian source.

(4) In working out whether you have ***derived*** an amount of *ordinary income, and (if so) when you ***derived*** it, you are taken to have received the amount as soon as it is applied or dealt with in any way on your behalf or as you direct.

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Operative provisions

15-2 Allowances and other things provided in respect of employment or services

(1) Your assessable income includes the value to you of all allowances, gratuities, compensation, benefits, bonuses and premiums *provided to you in respect of, or for or in relation directly or indirectly to, any employment of or services rendered by you (including any service as a member of the Defence Force).

(2) This is so whether the things were *provided in money or in any other form.

(3) However, the value of the following are not included in your assessable income under this section:

(a) a *superannuation lump sum or an *employment termination payment;

(b) an *unused annual leave payment or an *unused long service leave payment;

(c) a *dividend or *non-share dividend;

(d) an amount that is assessable as *ordinary income under section 6-5;

(e) *ESS interests to which Subdivision 83A-B or 83A-C (about employee share schemes) applies.

Note: Section 23L of the *Income Tax Assessment Act 1936* provides that fringe benefits are non-assessable non-exempt income.

15-3 Return to work payments

Your assessable income includes an amount you receive under an *arrangement that an entity enters into for a purpose of inducing you to resume working for, or providing services to, any entity.

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Income Tax Assessment Act 1936

Act No. 27 of 1936 as amended

This compilation was prepared on 12 July 2006
taking into account amendments up to Act No. 80 of 2006

Volume 1 includes:	Table of Contents Sections 1 – 26BC

The text of any of those amendments not in force on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Volume 2 includes:	Table of Contents Sections 26C – 51AEB
Volume 3 includes:	Table of Contents Sections 51AEC – 78B
Volume 4 includes:	Table of Contents Sections 79A – 94G
Volume 5 includes:	Table of Contents Sections 94H – 109ZE
Volume 6 includes:	Table of Contents Sections 117 – 124KA
Volume 7 includes:	Table of Contents Sections 124L – 148
Volume 8 includes:	Table of Contents Sections 149 – 160APHNA

Limits on application of section 26

Item	Paragraph of section 26	What the paragraph does not apply to	Provision of *Income Tax Assessment Act 1997* that applies instead
	26(j)	Amount received in the 1997-98 year of income or a later year of income (regardless of when the loss occurred, or the loss or outgoing was incurred, that led to payment of the amount)	• section 15-30 (for loss of assessable income) • Subdivision 20-A (for deductible loss or outgoing) • section 70-115 (for loss of trading stock)
	26(ja)	Amount received in the 1997-98 year of income or a later year of income	none
	26(jb)	Amount of interest paid or applied in the 1997-98 year of income or a later year of income (regardless of when the interest became payable)	section 15-35
	26(k)	Amount received in the 1997-98 year of income or a later year of income (regardless of when the loss occurred)	Subdivision 20-A
	26(l)	Amount received in the 1997-98 year of income or a later year of income	section 15-25

26 Certain items of assessable income

Subject to section 25B, the assessable income of a taxpayer shall include:

(b) beneficial interests in income derived under any will, settlement, deed of gift or instrument of trust, not being:

(i) amounts that are included in the assessable income of a beneficiary of a trust estate in pursuance of section 97 or 99B; or

(ii) amounts in respect of which a trustee of a trust estate is assessed and liable to pay tax in pursuance of section 98, 99 or 99A; or

(iii) amounts on which ultimate beneficiary non-disclosure tax is payable under Division 6D; and

(e) the value to the taxpayer of all allowances, gratuities, compensations, benefits, bonuses and premiums allowed, given or granted to him in respect of, or for or in relation directly or indirectly to, any employment of or services rendered by him, whether so allowed, given or granted in money, goods, land, meals, sustenance, the use of premises or quarters or otherwise, not being:

(i) an eligible termination payment within the meaning of Subdivision AA;

(ii) an amount to which section 26AC or 26AD applies;

(iii) an amount that, under any provision of this Act, is deemed to be a dividend or non-share dividend paid to the recipient;

(iv) a fringe benefit within the meaning of the *Fringe Benefits Tax Assessment Act 1986;* or

(v) a benefit that, but for paragraph (g) of the definition of ***fringe benefit*** in subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986,* would be a fringe benefit within the meaning of that Act; and

(eaa) in a case where the taxpayer is provided with a benefit that, but for section 22 of the *Fringe Benefits Tax Assessment Act 1986,* would be an expense payment fringe benefit within the meaning of that Act-the amount of the reimbursement referred to in that section; and

(ea) the value to any taxpayer who is a member of the Defence Force of all allowances given or granted in respect of his service as such a member, whether so given or granted in money, goods, meals, sustenance, the use of premises or quarters, or otherwise, not being:

(i) a fringe benefit withip the meaning of the *Fringe Benefits Tax Assessment Act 1986;* or

(ii) a benefit that, but for paragraph (g) of the definition of ***fringe benefit*** in subsection 136(I) of the *Fringe Benefits Tax Assessment Act 1986,* would be a fringe benefit within the meaning of that Act; and