IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S144 of 2016

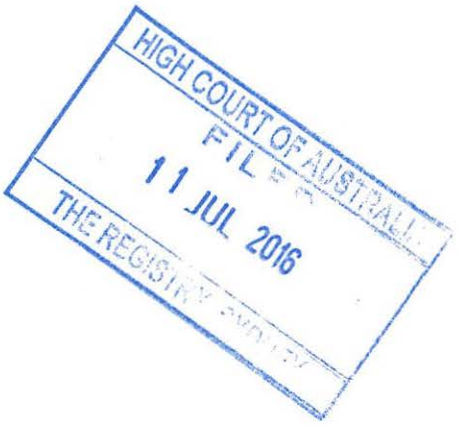
BETWEEN:

VAUGHAN RUDD BLANK
Appellant

and

COMMISSIONER OF TAXATION
Respondent

RESPONDENT'S SUBMISSIONS



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Part I: Internet

1. This submission is in a form suitable for publication on the internet.

Part II: Issues

2. Whether, as the primary judge and the majority of the Full Court held, US$160,033,328.25 (**Amount**) received by the Appellant following his resignation from Glencore Australia Pty Limited (**GA**) on 31 December 2006 pursuant to the profit participation plan (**PPP**) of Glencore International AG (**GI**) was income according to ordinary concepts because it was deferred compensation for services rendered by the Appellant and, therefore, was part of the Appellant's assessable income pursuant to s 6-5 of the *Income Tax Assessment Act 1997* (Cth) (**1997 Act**) ([2014] FCA 87; (2014) 95 ATR 1 (**PJ**) at [94]-[104]; [2015] FCAFC 154; (2015) 329 ALR 213 (**FC**) at [76]-[92]) (**Question 1**)? The Commissioner submits that this question should be answered "Yes".

3. Alternatively, whether the Amount was ordinary income of the Appellant pursuant to s6-5 of the 1997 Act in accordance with the principles described in *Federal Commissioner of Taxation v Myer Emporium Ltd* (1987) 163 CLR 199 (***Myer Emporium***) (Notice of Contention, Ground 1) (cf PJ [93] and FC [140]) (**Question 2**). The Commissioner submits that this question, should it arise, should be answered "Yes".

4. Further, and in the alternative, whether the Amount was assessable income of the Appellant on the basis that it was an eligible termination payment or an employment termination payment (collectively, **ETP**) pursuant to s 27A(1) of the *Income Tax Assessment Act 1936* (Cth) (**1936 Act**) and s 82-130(1) of the 1997 Act (respectively) (Notice of Contention, Ground 2) (cf PJ [105]) (**Question 3**)? The Commissioner submits that this question, should it arise, should be answered "Yes".

5. Separately to Questions 1 to 3, and assuming any of those questions is answered "Yes", whether the Appellant derived two installments of the Amount in the 2007 income year on the basis that those installments were "applied or dealt with" on his behalf or as he directed within the meaning of s 6-5(4) of the 1997 Act or, if the Amount was an ETP, within the meaning of s 6-10(3) of the 1997 Act (Cross Appeal, Ground 2) (cf [2014] FCA 517 (**SJ**) at [42]-[45]; FC [94]-[96] and [146]) (**Question 4**). The Commissioner submits that this question should be answered "Yes".

6. In the alternative to all of the above questions, if the Amount was not ordinary income or an ETP and was assessable to the Appellant only on the basis that it represented the capital proceeds of a CGT event, whether the market value of the Appellant's rights under GI's PPP when he became an Australian resident on 1 January 2002 (determined

for the purposes of ascertaining the Appellant's cost base) included any value attributable to a "forward-looking component"; that is, value arising from the prospect of the Appellant sharing in the profits of GI in the event and to the extent the Appellant continued in the employment by GA or another subsidiary of GI after 1 January 2002 (Cross Appeal, Ground 3) (cf PJ [106]-[111] and FC [142]-[145]) (**Question 5**). The Commissioner submits that this question should be remitted for determination by the Federal Court or, alternatively, should be answered "No".

Part III: *Judiciary Act 1903* (Cth), s 78B

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7. The Respondent has considered whether a notice should be given under s78B of the *Judiciary Act 1903* (Cth) and certifies that no notice needs to be given.

Part IV: Facts

8. The relevant facts were set out at PJ [14]-[46] and FC [5]-[28]. The accounting of "some key events and agreements" at Part V of the Appellant's Submissions of 20 June 2016 (**AS**) is selective, inaccurate and does not faithfully reflect the findings of the Courts below. The following matters need to be emphasized.

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9. When the Appellant ceased employment with GA in December 2006 the agreement that was on foot and governed his entitlements under the PPP was the agreement entitled "Incentive Profit Participation Agreement" (**IPPA 2005**).[1] It was pursuant to the IPPA 2005 that the Appellant became entitled to the Amount on 15 March 2007 (PJ [26], FC [25], [76] and [125]; clauses A.2.3 and C.7). Accordingly, the primary judge and the Full Court correctly focused on the IPPA 2005 for the purposes of characterizing the Amount (PJ [36], FC [76] and [126]). The terms of the IPPA 2005 are comparatively neglected in the account at AS, Part V (cf AS [32]-[35]). This is the case notwithstanding, as demonstrated at FC [77], there was little or no material difference in
30 the operation of the IPPA 2005 and previous iterations of the PPP.

10. The IPPA 2005 (largely set out at PJ [36]) described itself as a "plan of deferred compensation" (Preamble, para 4). Consideration for participation in the plan was "the services to be rendered by the Employee" (ie the Appellant) (Preamble, para 5). The amount payable under the IPPA 2005 (**IPP**) was defined and described as "deferred compensation ... calculated on the basis of the results of GI (IPP)" (Definition 10; clause A.1.1). It was acknowledged for "US federal income tax purposes" that payments made pursuant to the IPPA 2005 represented "compensation being paid in consideration of the services rendered" (clause A.9.2). The amount of "deferred compensation"
40 payable under the IPPA 2005 was calculated by reference to *Genussscheine* (**GS**): Swiss profit sharing certificates which served as profit participation units (**PPUs**) and which were issued "[s]olely for the purpose of calculating the amount of IPP" (clause A.1.1,

[1] Using the same defined terms as were used in the judgment of the majority of the Full Court at FC [5]-[28].

A.3.1). Employees had no interest whatsoever in the GS and the GS gave no right or title to any assets, funds or property of GI or any Glencore entity (clause A.1.2). All GS or equivalents issued under previous iterations of the PPP (including the 1600 issued to the Appellant) became PPUs under the IPPA 2005 (Definition 17, Annex B; FC [23]). GI's articles did not "grant" any "claim" to the holders of GS and nor did the general meeting of shareholders of GI ever determine to distribute any portion of the balance sheet profit of GI to holders of GS (cf AS [20]). Rather, the Employee and holder of PPU under the IPPA 2005 was entitled to receive an amount of IPP calculated under the IPPA 2005, calculated by reference to the profits of the group as a whole (definition of IPP (clause A.2.2). IPP was due 30 days after the last day of the month on which the employee's employment was terminated, the employee died or suffered permanent disability or such other date as agreed provided a declaration in the form of Annex C had been executed (clause A.5; Definitions 13 and 4).

11. The IPPA 2005 was only effective if the Employee had executed a (new) Shareholders' Agreement (**SA 2005**) and purchased shares in Glencore Holding AG (**GH**) equal to the number of PPUs allocated to him or her under the IPPA 2005 (clause B.1). It this sense the IPPA 2005 and the SA 2005 were "stapled" together (FC [21]). The shares in GH were to be purchased at their par value of CHF50 (SA 2005, clause A.2). Clause C.1.3.2 of the SA2005 stated that "*the purpose of GH is neither the generation of profits nor the distribution of dividends to shareholders*". The SA 1994 was to the same effect. Generally, no dividends were payable on the shares in GH (clauses C.1.3.2 and C.2.3.1) and the shares were not transferrable and could not be encumbered without the consent of GH (clause D.3). The SA 2005 granted cross put and call options for the sale and purchase at par value of the shares in GH in the event of termination of the shareholder's employment with the relevant Glencore entity, death or dissolution of the shareholder, bankruptcy, redemption of the shareholder's interest in the IPPA 2005 or termination of the SA 2005 or the IPPA 2005 (clause D.4.1 and D.4.2).

12. Notwithstanding this "stapling", the repeated characterization of the Appellant's rights under the IPPA 2005 as mere "associated rights" of the shares in GH (AS [27] and [39]) is tendentious and inaccurate. As is discussed further below, this characterization is not supported by the findings of the Courts below and is not reflected in the terms of the IPPA 2005 or the SPA 2005.

13. Nor is the Appellant's characterization at AS [27] and AS [39] of the Amount as consideration for the disposal by the Appellant of his shares in GH, or as attributable to the value of the shares in GH, accurate. Again, there is no finding to that effect in the Courts below and it not supported by the terms of the IPPA 2005 and SPA 2005. The terms of the IPPA 2005, the SA 2005 and the structure of the Declaration (set out at PJ [36]) made it clear that the consideration for the shares in GH was an amount determined by their par value (in this case CHF 80,000) and was payable by GH and the Amount was paid in satisfaction of claims to payment under the IPPA 2005 and was

payable by GI. This was the finding of the primary judge (PJ [39]) and the Full Court (FC [26]).[2] The Appellant's attempt to conflate them should be rejected.

Part V: Legislation

14. In addition to the legislative provisions identified in the Annexure referred to at AS [83], the Commissioner relies on s 27A and s27B of the 1936 Act, s 82-10 and s 82-130(1) of the 1997 Act and s 6-5(4) of the 1997 Act. The text of those provisions is set out in the Annexure to these submissions.

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Part VI: Argument in Answer to the Appeal

Question 1: The Amount was ordinary income as deferred compensation from employment

15. The conclusion of the primary judge and the majority of the Full Court is a straightforward application of the principle affirmed by Jacobs J in *Reseck v FC of T* (1975) 133 CLR 45 (***Reseck***) at 56 that "an amount paid in a lump sum in consequence of retirement from, or termination of, an office or employment is income of that office or employment if it is deferred remuneration" (FC [84] and PJ [94]-[101]).

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16. As the majority of the Full Court correctly observed at FC [76], where, as here, a payment is said to have the character of a reward for service, the focus of analysis for the purposes of characterizing the payment is the agreement which confers the reward considered in its factual context.[3] On any view, the terms of the IPPA 2005 gave the Amount the character of deferred remuneration from the Appellant's employment with GA. The IPPA 2005 described the amounts (IPP) for whose payment it provided as "deferred compensation". The "deferred compensation" was payable in consideration for the services rendered by the Appellant to the Glencore entity. The Appellant was described as the "Employee" (clause A.1). The principal trigger for the payment of
30 amounts under the IPPA 2005 was the cessation of employment of the Employee with a Glencore entity (whether by termination, death or permanent disability) (clause A.5; Definitions 13 and 4).

17. The characterization of the Amount as deferred compensation in the IPPA 2005 is not a product of casual, equivocal or inadvertent references in a Recital (as suggested at AS [62]). This is not a case where the recitals in an agreement depart from the true facts.[4] On the contrary, the character of the IPP as deferred compensation for services rendered by an employee is a pervasive element of the IPPA 2005 and previous iterations of the PPP. This is so either expressly (as in the IPPA 2005 and the

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2 As the primary judge points out at PJ[39] the Declaration signed by the Appellant mistakenly deleted elements of the pro-forma Declaration (set out at PJ[36]) and it made it appear that the whole consideration was payable by GH whereas the Amount was paid by GI. That error is of no significance.

3 See also, *Allied Mills Industries Pty Limited v FC of T* (1989) 20 FCR 288 at 309.

4 cf *Federal Coke Pty Limited v FC of T* (1977) 34 FLR 375 at 385.

IPPA 2003) or by inference from their structure and operation (as in the PPA 1993 and PPA 1999) (see FC [81] and [84]). As the majority of the Full Court demonstrated, the history of the versions of the PPP over the relevant period (1993-2005) disclose little, if any, material change in this regard (FC [79]).

18. The Appellant seeks to avoid the simple and correct conclusion by four steps, generally following the path laid out by the dissenting judgment of Pagone J in the Full Court at FC [130]-[137]. However, for the reasons given below, each step in the Appellant's argument is misplaced.

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19. *First*, as already noted, the Appellant seeks to characterize the rights under the IPPA 2005 as rights associated with, or interconnected to, the shares in GH and, thus, rights grated to him in his capacity of, and referable to his position as, shareholder of GH (see AS [46]-[48], [50] and [56]). In this respect, he adopts the analysis of Pagone J at FC [130]-[133].

20. However, as the majority of the Full Court pointed out at FC [90], while it may be accepted that the IPAA 2005 and the SA 2005 (and the previous versions of those agreements) were "stapled" in the sense described above, the characterization of the
20 rights created by the IPPA 2005 as mere "associated rights" of the shares in GH, held by the Appellant in his capacity as shareholder of GH, is contradicted by the clear terms of the IPPA 2005. As has been seen, the IPPA 2005 described and defined the amounts payable pursuant to it as "deferred compensation" paid by GI (not GH) in consideration for services to be rendered by the "Employee". The fact that payment is made after the termination of the contract of service, by a person other than the employer and separately to ordinary wages, salary or bonuses is not significant to its characterization as income if the payment is a recognized incident of the employment (*FC of T v Dixon* (1952) 86 CLR 540 at 556) (cf AS [50]). That is the case here. The clear light the terms of the IPPA 2005 shed on the character of the Amount should not be obscured by
30 any penumbra sought to be generated by the Appellant's shareholding in GH.

21. In any event, contrary to the contention of the Appellant and the characterization of Pagone J in the Full Court, the terms and structure of the SPA 2005 and the IPPA 2005 considered together disclose an unmistakable intention that the profit of the Glencore group should be distributed as deferred remuneration to employees in that capacity and not as a return on the shares in GH. Thus, under the SPA 2005 shares in GH generally paid no dividends and were purchased and sold only at par value (see [11] above). The PPP, and the deferred compensation for services for which it provided, was the mechanism for the distribution of the profit of the Glencore group and
40 it was paid to persons *qua* employees of GI or its subsidiaries in consideration of their service and in proportions determined by the extent to which their service was valued.[5]

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[5] PJ [14]; Affidavit of Andreas Hubmann, sworn 25 June 2013 at [9].

22. *Second*, the Appellant seeks to characterize as assets of a proprietary nature the "associated rights"—that is, GS and PPU—granted under the PPP which, he says, are analogous to the options the subject of *Abbott v Philbin* [1961] AC 352 (***Abbott***), *Donaldson v FC of T* [1974] 1 NSWLR 627 (***Donaldson***), *FC of T v McArdle* (1988) 19 ATR 1901 (***McArdle***) and *FC of T v McNeil* (2007) 229 CLR 656 (***McNeil***) (AS [48], [51]-[53], [58]-[59] and [63]). The difficulty with this is that, as the primary judge and the majority of the Full Court pointed out, it does not accord with the facts and the terms of the IPPA 2005 or previous iterations of the PPP (PJ [96]; FC [82]-[84]). As their Honours noted (and as seen above), the IPPA 2005 made plain that the PPUs were issued solely for the purpose of calculating the IPP and conferred no interest of any kind on the Employee. The IPPA 2003 did likewise (FC [83]). The right to a payment calculated using the PPUs crystalized only on termination of the Appellant's employment. This contrasts with the options the subject of *Abbott* which were exercisable at any time and whose value could readily be ascertained by comparing the share price from time to time with the exercise price.

23. It does not advance the Appellant's case to say, as is said at AS [35] and [62] (and as Pagone J said at FC [132]), that the IPPA 2005 (or IPPA 2003) did not cancel GS previously issued to the Appellant. This assumes, without establishing, that the GS issued prior to the IPPA 2003 had a proprietary character. In fact, what occurred with the IPPA 2005 was that the GS and equivalents previously issued *became* PPUs under the IPPA 2005 without differentiation (FC [23]). This strongly supports the conclusion of the primary judge and the majority of the Full Court that at all points the GS bore the non-proprietary character which the IPPA 2005 and IPPA 2003 made explicit (FC [83]).

24. The Appellant's submissions are notable for their failure to explain why the result for which he contends in relation to GS issued prior to 2003 also follows for the 100 PPU issued in 2003. The USD160,033,328,25 to which the Appellant became entitled on termination, none of which the Appellant accepts to be ordinary income, was an amount calculated by *all* of the PPU recognized by the 2005 agreement, including those 100 that were never issued as GS (cf AS [38] and [39(d)]). The true position, as explained by the majority in the Full Court, is that the amount referred to in the Declaration was the amount to which the Appellant was contractually entitled under the IPPA 2005, being an amount calculated by reference to all 1600 of the PPUs identified in the IPPA 2005, regardless of whether they were previously issued as GS. Given the terms of his agreements with GI and GH, the payment cannot sensibly be understood as the proceeds of disposal of the GS, or any other "bundles of rights", pursuant to paragraph B(b) of the Declaration.

25. In the result, the primary judge and the majority of the Full Court were correct to conclude that what the IPPA 2005 (and previous iterations of the PPPs) conferred on the Appellant was an executory and conditional promise to pay money at a future date

determined by reference to the PPUs allocated to the Appellant (PJ [96]; FC [85] and [88]). This has three consequences:

(a) As the majority of the Full Court pointed out at FC [85], it is a critical point of distinction between this case and the circumstances of *Abbott, Donaldson, McArdle* and *McNeil.* Each of those cases was concerned with the grant of proprietary rights of a non-pecuniary nature (ie options) (see the analysis at FC [60]-[75] and *Tagget v FC of T* (2010) 188 FCR 128 (***Tagget***) at [20]). Contrary to the statement at AS [63] (and FC [136]), *McNeil* was a case of a non-pecuniary gain because the "sell-back rights" granted to the taxpayer were put options which could be traded and thus turned to pecuniary account from the time of grant (at [5] and [11]).

(b) It identifies as the reward for service, or the actual benefit, for which the IPPA 2005 (and its predecessors) made provision as the payment of an amount ascertained according to its terms and not an anterior right to receive that amount (see PJ [97]-[101]; FC [84]). In contrast, in each of *Abbott, Donaldson, McArdle* and *McNeil* there was a grant of an anterior benefit (ie the option) which was separate and distinct from the receipt which could be generated by turning it to pecuniary account;

(c) As Professor Parsons[6] and the Full Court in *Tagget* (at [31]) pointed out, it has the consequence for a receipts based taxpayer (such as the Appellant: PJ [103]), that there is no derivation of any income pursuant to the rights granted under the IPPA 2005 (or its predecessors) until an actual or constructive receipt of an amount. In this case, that did not occur until after 15 March 2007. Contrary to the statement of Pagone J at FC [138], it is a general principle that a receipts based taxpayer only derives income (whether consisting of money or property) on actual or constructive receipt (*Tagget* at [31]-[33]). To speak, as Pagone J did, of "bundles of rights" tells nothing against that principle.

26. *Third*, following from the second step, the Appellant says that, as in *Abbott, Donaldson, McArdle* and *McNeil,* the "associated rights" (ie GS and PPU) granted by various iterations of the PPP to the Appellant were assessable at the time of grant. This is said to be so either as ordinary income under s 6-5 of the 1997 Act or as statutory income under s 26(e) of the 1936 Act and / or its successor s 15-2 of the 1997 Act (AS [48]-[53] and [59]-[60]). This proposition falls away once the analogy of the "associate rights" to the options in *Abbott, Donaldson, McArdle* and *McNeil* is shown to be misplaced. However, there are two further difficulties with it.

27. Insofar as the "associated rights" are said to be ordinary income, that contention depends on the proposition that they could be turned to pecuniary account (AS [48]; *FC*

[6] RW Parsons, *Income Taxation in Australia* (LBC, 1985) at p28-29, [2.15]-[2.16].

of T v Cooke (1980) 42 FLR 403 (***Cooke***) at 414). The options granted in *Abbott* could be turned to pecuniary account because they could have been exercised at any time and the shares so purchased sold (*Abbott* at 366, 371-372, 377-379). Nothing similar was available in this case. It was only on the occurrence of one of the events which triggered the "Notice Date", the expiry of 30 days therefrom and the execution of a declaration that a right to payment under the PPP would become due and could be brought to account for as actual receipt (see IPPA 2005 clause A.5). With one exception, the rights and claims and GS issued under the various versions of the PPP could not be transferred or alienated or the subject of any grant of an interest.[7] The exception concerned assignment to a personal holding company, trust or foundation controlled by the employee provided GI consented.[8] The Appellant relies on that single, conditional exception to submit that the value of the "associated rights" had in truth come home to him on issue because they could be turned to pecuniary account (AS [48]). However, the majority of the Full Court were correct to reject this argument (FC [89]). The exception for assignment to an employee's personal holding company, trust or foundation was concerned with an employee's personal financial planning and cannot seriously be considered as a means of turning the rights under the PPP to pecuniary account. If and to the extent that ever occurred, it would involve no more than the Appellant assigning his claims to payment payment under the IPP to an entity that was already under his complete control.

28. Insofar as the GS and PPU are said to have been assessable under s 26(e) of the 1936 Act or its successor s 15-2 of the 1997 Act (AS [49] and [67]), that submission fails once it is appreciated that the rights granted under the IPPA 2005 (and previous iterations of the PPPs) were executory and conditional promises to pay money. Windeyer J observed in *Scott v FC of T* (1966) 117 CLR 514 (at 525-526) that the purpose of s 26(e) of the 1936 Act was to ensure that receipts or advantages which are in truth rewards for a taxpayer's employment or services are treated as assessable income even if they are not paid fully in money but by way of allowances or advantages which have a money value for the taxpayer (see also *Cooke* at 418). Accordingly, as the Full Court in *McArdle* observed (at 1902), one effect of s 26(e) of the 1936 Act was to overcome the principle in *Tennant v Smith* [1892] AC 150 to the effect that only money or things capable of being turned to pecuniary account were income, although that may not have been its only effect.[9] At all events, it has never been suggested, and there is no support for the proposition, that s 26(e) of the 1936 Act of s 15-2 of the 1997 Act includes within a taxpayer's assessable income the value of executory and conditional promises to pay money in respect of, or for, or in relation directly or indirectly to, employment or services rendered. To so conclude would render every employee an accruals based taxpayer taxable on their wages and salary before they received it. There

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7 PPA 1993, clause C.2; PPA 1999, clause C.2; IPPA 2003, clause C.2; IPPA 2005, clause C.2.

8 This exception appeared in the PPA 1999, IPPA 2003 and IPPA 2005, but not in the PPA 1993.

9 See *Smith v FC of T* (1988) 164 CLR 513 at 522-523, 529-530.

is no warrant in the text of s 26(e) of the 1936 Act or s 15-2 of the 1997 Act for so radical a conclusion.

29. As the GS and PPU granted by various iterations of the PPP to the Appellant were not assessable at the time of grant, either as ordinary income or under s 26(e) of the 1936 Act, the Appellant's warning against the dangers of "double taxation" at AS [68] misfires.

30. *Fourth*, following from the previous three steps, the Appellant contends that the Amount was not assessable income because it was the exploitation of rights earlier granted to the Appellant in his capacity as shareholder (ie the GS and PPU) and was not an amount received in the capacity of employee (AS [50]-[51]). In this connection the Appellant again seeks to draw an analogy with the *Abbott, Donaldson* and *McArdle* and relies on the terms of the Declaration (AS [61]). However, once it is appreciated, as demonstrated above, that the IPPA 2005 (and previous iterations of the PPP) conferred on the Appellant no more than an executory and conditional promise to pay money determined by reference to the PPUs, having the character of deferred compensation for serviced rendered, this contention must too fail. So understood, the Amount was not the proceeds from the exploitation of any anterior set of rights (in contrast to the shares received in *Abbott* or the payments received in *McArdle*) but was the performance of the promise to pay money made in the IPPA 2005 on satisfaction of the conditions on which that performance depended.

31. As noted above in [13], in the light of a proper understanding of the terms of the IPPA 2005 and the SPA 2005, the terms of the Declaration (set out at FC [136]) do not assist the Appellant. As the primary judge observed PJ [39], the consideration of CHF 80,000 referred to in clause B of the Declaration was the price for the Appellant's 1,600 shares paid by GH at a par value of CHF 50 per share (for which clause D.4 of the SA 2005 made provision) the assignment of which para (c) of the Declaration effected. The $US160,033,328.25 referred to in the first half of clause B was paid by GI in satisfaction of the rights under the IPPA 2005 as determined by the PPUs allocated to the Appellant and was referable to paras (a) and (b) of the Declaration. The suggestion at AS [61] and by Pagone J at FC [135]-[136] that the amounts in clause B should be regarded as constituting a global consideration both for the sale of shares and the satisfaction of the rights under the IPPA 2005 is not sustainable against the background of the terms of the IPPA 2005 and the SPA 2005. Furthermore, contrary to an apparent suggestion of Pagone J at FC [132], the terms of para (a) and (b) of the Declaration should be understood as signifying that the Amount was accepted on receipt in full satisfaction of the rights under the IPPA 2005 and not as attempting to confer on the GS and PPU a proprietary character they did not otherwise possess.

32. In the result, nothing in the Appellant's submissions has shown any error in the conclusion of the primary judge and the majority of the Full Court that the Amount was

ordinary income of the Appellant as deferred compensation for services rendered as an employee. For this reason, the appeal should be dismissed.

Part VII: Argument on notice of contention or cross appeal

Question 2: Myer Emporium (Notice of Contention, Ground 1)

33. In *Myer Emporium* (at 211) this Court derived from (inter alia) the "celebrated decision" of the Lord Justice Clerk in *Californian Copper Syndicate v Harris* (1904) 5 TC 159 the "important proposition" that a receipt may constitute income if it arises from an isolated business operation or commercial transaction entered otherwise than in the ordinary course of a business if entered into with the intention or purpose of making a profit or gain. The Court went on (at 213) to distinguish a circumstance where an asset, acquired for a purpose other than profit making by sale, is subsequently sold for a profit (in which case the profit will be capital) from a circumstance where an asset is sold by way of the implementation of an intention of profit making by sale existing at the time of acquisition. *Myer Emporium* established the proposition that the receipt from the sale of the asset in the latter circumstance is income according to ordinary concepts, at least where the transaction generating the receipt has the character of a business operation or commercial transaction (at 210). In *Westfield Limited v Commissioner of Taxation* (1991) 28 FCR 333 Hill J (with the agreement of Lockhart and Gummow JJ) pointed out (at 334-335) that *Myer Emporium* required that, in order to be income, the means by which the profit from the sale of the asset is in fact made must be the means by which it was intended at the time of acquisition that the profit should be made.

34. If, as the Appellant contends, the various units granted to him under the different iterations of the PPP—the GS, Phantom Units and PPUs, collectively the PPUs—are to be characterized as "assets" which he realized on 15 March 2007 by assignment of them to GI in consideration for payment of the Amount, that was a realization of the PPUs to derive a profit by means which were always contemplated by the PPP. In all iterations of the PPP, the amounts payable under the plan were payable upon the "assignment" of the PPUs to GI at the end of employment.[10] There were no other means by which the Appellant could turn the PPUs to account to derive a profit or gain. As noted above, with immaterial exceptions, the Appellant could not sell, grant any interest in or option over the PPUs under any iteration of the PPP. The "assignment" of the PPUs to GI on 15 March 2007 was the effectuation of an intention to profit from the grant of them existing at the time of the grant by the only means provided for in all the iterations of the PPP. It was no mere realization or change of an investment.

[10] PPA 1993, clauses A.3.3 and A.5; PPA 1999, clauses A.3.3 and A.5; IPPA 2003, clauses A.3.3 and A.5; IPPA 2005, clauses A.3.3 and A.5.

35. That being so, even on the premise which the Appellant's argument depends—namely, the PPUs were assets in the nature of the options granted in *Abbott v Philbin*—the principle in *Myer Emporium* is engaged with the result that the Amount bears the character of ordinary income.

36. The primary judge summarily dismissed the application of the principle in *Myer Emporium* on the basis that the Appellant was not carrying on a business (PJ [93]). Pagone J did likewise in the Full Court (FC [140]). The Appellant adopts that proposition at AS [45] and [69]-[71]. The majority in the Full Court did not need to consider this issue (FC [93]). However, as seen above, the premise of the principle in *Myer Emporium* is that the relevant receipt was not derived in the ordinary course of, or as an incident to, the taxpayer's business yet is income in character if it was attended by the relevant intention and was the product of a transaction which has the requisite character as a business operation or commercial transaction. Whether the taxpayer was otherwise carrying on a business is wholly incidental and cannot affect the characterization of the relevant receipt. Contrary to AS [71], nothing in the Court's judgment in *Myer Emporium* or the later decision in *Commissioner of Taxation v Montgomery* (1999) 198 CLR 639 dictates that the principle is limited to a taxpayer who is carrying on a business.

37. Pagone J stated at FC [140], as a further reason for rejecting the application of the principle in *Myer Emporium,* that the Appellant's receipt of the Amount was from the disposal of the rights accrued under the PPPs and "not from the carrying out by him of any profit making scheme of the kind considered in *Myer Emporium*". But that is to pose a false dichotomy. As the sole means contemplated by the PPP to bring the PPUs to account to derive a receipt, the "assignment" of the PPUs to GI on termination in return for subsequent periodical payments was the culmination of the profit making undertaking or scheme, or commercial transaction, represented by the PPP. It was not something which stood in contradistinction to it.

38. In the result, even on the basis of the characterization of the PPUs advanced by the Appellant (that is, they were "assets" of the Appellant and were not mere mechanisms for calculation of the amount to be paid to the Appellant on termination) the Amount was income according to ordinary concepts on the basis of the principle in *Myer Emporium.* The primary judge and Pagone J in the Full Court were wrong to reject this contention and the orders of the Full Court were correct on this additional basis.

Question 3: Eligible / Employment Termination Payment (Notice of Contention, Ground 2)

39. Before the primary judge and in the Full Court the Commissioner contended in the alternative that the Amount was assessable income of the Appellant on the basis that it was an ETP pursuant to s 27A(1) of the 1936 Act and / or s 82-130(1) of the 1997 Act.

The 1936 Act applied in relation to the 2007 income year and the 1997 Act applied in relation to the 2008 – 2010 income years.[11] If it was an ETP, the Amount was included in the Appellant's assessable income by s 27B of the 1936 Act (for the 2007) and / or s 82-10(2) of the 1997 Act (for the 2008-2010 years).

40. The primary judge rejected the Commissioner's contention on the sole ground that the Amount was not paid "in consequence" of the termination of the Appellant's employment within the meaning of s 27A(1)(a) of the 1936 Act and s 82-130(1)(a)(i) of the 1997 Act, but that "termination was only an occasion by reference to which the Amount became payable" (PJ [105]). Given the conclusion to which they came, the majority of the Full Court did not need to consider this issue (FC [93]). Pagone J, who was required to consider this contention given his conclusion on the Appellant's appeal, did not consider it.

41. The phrase "in consequence of the termination of any [your] employment" in s 27A(1)(a) of the 1936 Act and s 82-130(1)(a)(i) of the 1997 Act traces its origin to a like phrase in s 26(d) of the 1936 Act. In *Reseck* Gibbs J (at 51) and Jacobs J (at 56) considered that phrase in s 26(d) and rejected the argument that it required the termination be the dominant cause of the payment. Gibbs J expressed the view that it was satisfied when the payment followed as an effect or result of the termination. Jacobs J remarked that "[a] consequence in this context is not the same as a result. It does not import causation, rather a 'following on'" (at 56).

42. The judgments of Gibbs and Jacobs JJ in *Reseck* were considered by the Full Court of the Federal Court in *McIntosh v Commissioner of Taxation* (1979) 49 FLR 279 (***McIntosh***). Brennan J (at 282-283) viewed the judgments in *Reseck* as leading to the conclusion that where a payment was made to satisfy an entitlement "the phrase 'in consequence of retirement' requires that the retirement be the occasion of, and a condition of, the entitlement to payment". Lockhart J took the view that the phrase "in consequence of" was wider than "caused by" and was satisfied if there was a connexion between the payment and the retirement, "the act of retirement being either a cause or an antecedent of the payment" (at 296). All the members of the Full Court were satisfied that the requirement was satisfied where an employee following retirement had elected to partially commute a pension to a lump sum payment (see also Toohey J at 287).

43. Both *Reseck* and *McIntosh* were considered by Goldberg J in *Le Grand v Commissioner of Taxation* (2002) 124 FCR 53 (***Le Grand***) in the context of a payment made to a former employee to settle a claim for damages brought against the employer following his termination. Goldberg J remarked at [33] that the "issue cannot be determined by seeking to identify 'the occasion' for the payment", but that it was necessary that the

[11] Contrary to the suggestions at AS, fn 1 and AS [72] the Commissioner presses this contention in relation to all the years of income (2008 – 2010) and not simply 2007 and 2008.

payment follows "in a causal sense ... as an effect or result of the termination", even if not the dominant cause. At [35] Goldberg J concluded that the criterion was satisfied in that case because "the payment was an effect or result of [the] ... termination in the sense that there was a sequence of events following the termination of the employment which had a relationship and connection which ultimately led to the payment".

44. In *Dibb v FC of T* (2004) 136 FCR 388 (***Dibb***) at [15]-[17] the Full Court of the Federal Court applied the analysis of Goldberg J in *Le Grand* to conclude that a payment made in settlement of proceedings brought following an employee's termination was a payment made "in consequence of the termination" within the meaning of s 27A of the 1936 Act.

45. Under clause A.5 of the IPPA 2005 there were three possible triggers for the "IPP" (ie the Amount) to become due: termination, death or permanent disability, and agreement between the parties (see definitions of "Due Date" and "Notice Date" at PJ [36]). It was the first of those which occurred on 31 December 2006 when the Appellant's employment with GA ceased (FC [25]). The other two never occurred. The Appellant's entitlement to payment of the Amount was then only conditional on the execution of a Declaration and the effluxion of 30 days (see clause A.5 and the definition of "Due Date" and "Notice Date"). That condition was satisfied on 15 March 2007 (FC [26]).

46. In those circumstances, whether assessed according to any of the various approaches in *Reseck*, *McIntosh* or *Le Grand*, the primary judge erred in concluding that the payment of the Amount to the Appellant was not "in consequence of" the termination of the Appellant's employment within the meaning of s 27A(1)(a) of the 1936 Act and s 82-130(1)(a)(i) of the 1997 Act. Each of the following may be truly said:

(a) the payment of the Amount followed as "an effect or result" of the termination (*Reseck* at 51 per Gibbs J);

(b) the payment of the Amount "followed on" from the termination (*Reseck* at 56 per Jacobs J);

(c) the Appellant's termination was both the "occasion of, and the condition of" the entitlement to payment of the Amount (*McIntosh* at 283 per Brennan J);

(d) there was a connection between the payment of the Amount and the termination by which the termination was both a cause of, or antecedent to, that payment (*McIntosh* at 296 per Lockhart J); and

(e) there was a sequence of events following the termination which had a relationship and connection and ultimately led to the payment of the Amount (*Le Grand* at [35]).

47. The Appellant's termination was, contrary to the primary judge's conclusion, no mere "occasion" for the payment of the Amount (PJ [105]). This is not a case where the termination merely placed the Appellant in the time and place where he could receive payment of the Amount (cf *Chappel v Hart* (1998) 195 CLR 232 at [26]-[30]). On the contrary, the Appellant's termination was an—probably *the*—operative factor in the series of events which crystallized the Appellant's rights under the IPPA 2005 and led to the payment of the Amount.

48. None of the alleged "insuperable logical difficulties" referred to at AS [76]-[77] in truth arise. *First*, they are premised on a construction of the phrase "in consequence of" in s 27A(1)(a) of the 1936 Act and s 82-130(1)(a)(i) of the 1997 Act which is wholly unsupported in the authorities; namely, that the termination must be "the effective or operative cause of the payment" (see AS [75(b)]). None of *Reseck*, *McIntosh*, *Le Grand* or *Dibb* support that proposition.[12] As seen above, it is the very proposition rejected by Gibbs and Jacobs JJ in *Reseck*. *Second*, contrary to AS [76(a)], even if it the Appellant is correct to characterize the Amount as the proceeds of the exploitation of non-pecuniary assets previously granted (ie the GS and PPU), that does not logically gainsay the proposition that the Amount was paid "in consequence" of the termination where, as here, the termination was the trigger for, and a condition of, that exploitation. Hypotheticals concerning what may have happened if the Appellant had gone to work for another GI subsidiary or how else an amount may have been paid pursuant to the IPPA 2005 do not illuminate consideration of whether the payment of the Amount was, in fact, a consequence of the Appellant's termination. *Third*, the statement at AS [76(b)] that if the Amount was ordinary income because it was deferred compensation for services rendered, the termination was not a cause of the payment is incoherent. If the payment was ordinary income, it does not matter whether it was also an ETP. In any event, the implied premise of the statement, namely that a payment for prior services rendered cannot be paid "in consequence" of termination, is unsupported by reasoning and discloses no logical force.

49. Thus, payment of the Amount was an ETP and part of the Appellant's assessable income pursuant to by s 27B of the 1936 Act and / or s 82-10(2) of the 1997 Act. On this ground alone, the orders of the Full Court were correct and the appeal should be dismissed.

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[12] The references at AS [75] to the decision of Full Court in *Forrest v FC of* T (2010) 78 ATR 417 at [79]-[82] and [91] do not support the Appellant's submission either. Nor does the judgment of Northrop and Fisher JJ in *Paklan Pty Ltd v FC of T* (1983) 67 FLR 328 at 347-348 (referred to an fn 55 and 56) or the judgment of Ryan J in *FC of T v Pitcher* (2005) 146 FCR 344 at [39]-[47] (referred to at fn 54) lend any support to the Appellant's submission.

Question 4: 2007 Income year (Cross Appeal, Ground 2)

50. Two instalments of the Amount became payable to the Appellant in the 2007 income year (SJ [44]; FC [94] and [146]). The IPPA 2005 contemplated that deductions would be made from amounts payable to the Appellant to satisfy his Swiss withholding tax obligations (see clauses A.4 and A.9; PJ [36]). A letter from GI to the taxpayer dated "2007" confirmed "[d]eduction of Swiss withholding tax in the amount of US$30,806,415.70 as agreed with the Swiss Tax Authorities from your first four quarterly instalments". In the result, the Appellant did not receive in the 2007 income year the instalments of the Amount due to him. However, no payments were actually made by GI to the Swiss Tax Authorities on the Appellant's behalf until January 2008 (SJ [44]-[45]; FC [95] and [146]). Before the primary judge and in the Full Court the Commissioner contended that the instalments of the Amount due in the 2007 income year had been derived by the Appellant in that year because they had been "applied or dealt with" on his behalf or as he directed within the meaning of s 6-5(4) of the 1997 Act or, if the Amount was an ETP only, within the meaning of s 6-10(3) of the 1997 Act (SJ [42] and FC [94]).

51. The primary judge and the Full Court rejected this contention. The primary judge did so on the basis that there was no agreement to vary the payment terms to provide for a withholding for Swiss tax until 24 January 2008 (SJ [44]-[45]). The Full Court upheld the primary judge's conclusion, making reference to the statement of Gibbs J in *Brent v Commissioner of Taxation* (1971) 125 CLR 418 (***Brent***) at 430, concerning s 19 of the 1936 Act, that "[i]ncome is not 'dealt with' ... when all that happens is that a debtor refrains from paying his debt at the request of the borrower" (FC [95] and [146]).

52. The Appellant addresses no substantive submissions to this issue, but contents himself with the assertion that special leave to cross appeal should be refused (AS [5]). However, the matter raises an issue of principle as to the interpretation and application of s 6-5(4) and s 6-10(3) of the 1997 Act, a provision that has not been considered by this Court since *Brent*. The conclusion of the courts below on this issue provides a basis, never previously recognised, for taxpayers to defer their liability to tax by making arrangements in one year of income for a debtor to discharge liabilities in a later year of income. For that reason it is an appropriate subject for a grant of special leave to cross appeal (and given the substantial amount involved of approximately $7.5 million).

53. Both the primary judge and the Full Court were in error. The primary judge was wrong to conclude that there was no agreement to withhold until 24 January 2008. The right of GI to withhold instalments of the Amount to satisfy Swiss tax obligations was contained in clauses A.5 and A.9 of the IPPA 2005 and was confirmed in the letter dated "2007". The Full Court were in error to conclude that this case was analogous to *Brent* and all that occurred in the 2007 income year was the failure by GI to pay a debt at the request of the Appellant.

54. The object of s6-5(4) and 6-10(3) of the 1997 Act is to prevent a taxpayer escaping the imposition of tax where, although income has not actually been paid to him or her, his resources have actually been increased through its utilization for a purpose (*Permanent Trustee Company of NSW v Commissioner of Taxation* (1940) 2 AITR 109 at 110-111 per Rich J; *Brent* at 430 per Gibbs J). In the present case, there was more than a mere failure by GI to pay the amounts due to the Appellant in the 2007 income year; rather, those amounts were earmarked for and devoted to the purpose of discharging the Appellant's Swiss tax obligations and *for that reason* withheld.[13] The fact that they were not actually paid to the Swiss tax authorities until 2008 is adventitious. By being so earmarked and so devoted, rather than being paid to him, the instalments of the Amount due to the Appellant in the 2007 income year were "applied or dealt with" on his behalf or as he directed and, therefore, were derived by him within s6-5(4) and 6-10(3) of the 1997 Act.

55. In the result, the primary judge and the Full Court were wrong to conclude that the Appellant had not derived any of the Amount in the 2007 income year and the Commissioner's cross appeal in relation to the 2007 income year should be allowed.

Question 5: Capital gains tax cost base (Cross Appeal, Ground 3)

56. It was accepted before the primary judge and in the Full Court that the Appellant's execution of the Declaration on 15 March 2007 caused CGT event C2 to happen (s 104-25, 1997 Act). It was also accepted that the Amount was the capital proceeds of that event. If the Amount was not ordinary income of the Appellant or an ETP (with the result that any capital gain would be reduced to that extent (s 118-20), the Appellant's assessable capital gain was determined by the Amount less the market value of the Appellant rights under GI's PPP when he became an Australian resident on 1 January 2002 (s 855-45, 1997 Act).

57. It follows that Question 5, which concerns the manner of calculation of those rights, only arises in the event that the Appellant succeeds on his appeal. However, the findings of the trial judge in relation to this issue, in addition to suffering from the error to which Question 5 is directed, were not definitive (PJ [111]-[112]). Although the issue was raised and fully argued in the Full Court, the majority did not need to consider the issue and did not do so. The valuation of the Appellant's rights has therefore not been finally determined by any judge below and the particular issue of principle on which the parties are divided has not been considered at the appellate level, save by Pagone J in dissent. The issue remains a significant one for the parties (involving about $12.8 million in tax) and, in the circumstances, a grant of special leave is warranted in the interests of justice as well as for the reasons identified at [67] below in relation to the law of valuation more generally.

[13] IPPA 2005, clause A.9; Declaration clause C; letter from GI to the Appellant dated "2007".

58. The Commissioner's primary position, should it be necessary to determine this issue, is that leave should be granted but that the matter should be remitted to the Full Federal Court for this question to be determined. The constitution of that Court would need to take into account the fact that Pagone J has already expressed a conclusion on the issue. Alternatively, the Commissioner submits that leave should be granted and that the question should be determined by this Court. In that event, the Commissioner makes the following submissions.

59. Before the primary judge two experts expressed divergent opinions as to the value of the Appellant's rights on 1 January 2002. Mr Lonergan, who was called by the Appellant, valued those rights at A$103 million and Mr Samuel, who was called by the Commissioner, valued them at around A$20 million (PJ [48]). That divergence was largely attributable to a difference on the extent to which, if at all, any value should be recognised for the so-called "forward looking component"; namely, value arising from the prospect of Appellant sharing in the profits of GI in the event and to the extent the Appellant continued in employment by GA or another subsidiary of GI after 1 January 2002 (FC [144]). Mr Lonergan valued the "forward looking component" by positing three scenarios in which the Appellant continued in employment with GI for five, seven and ten years from 1 January 2002. He then calculated the profit share the Appellant would become entitled to during in each scenario on the basis of differing compound annual growth rates and assigned a percentage probability to each scenario to arrive at a single value as at 1 January 2002.[14]

60. In contrast, Mr Samuel assigned no value to the forward looking component. He did so on the basis that the employment of the Appellant was terminable on one month's notice by either party and the hypothetical willing but not anxious purchaser on 1 January 2002 would have no sound basis for determining, and no capacity to control, when or whether the Appellant's employment might be terminated.[15] In Mr Samuel's opinion, an assumption that the Appellant gave an undertaking to continue in employment for a period of time involved a new asset which would require a separate valuation and was not a valuation of the Appellant's existing assets. Furthermore, Mr Samuel pointed out that assigning value to the forward looking component was inconsistent with the nature and purpose of the Appellant's rights under GI's PPP which was to provide an incentive to remain in employment by rewarding an employee for personal exertions after he or she ceases employment. A hypothetical sale of the Appellant's rights on 1 January 2002 including a forward looking component would destroy the very incentive the PPP was intended to create, reward the Appellant for personal exertions before they occurred and

[14] Report of Wayne Lonergan, dated 28 June 2013 at [23]-[29].

[15] The appellant's employment agreements provided for termination without cause on one month's notice: see Exhibit VRB-1, Tab 16 to the affidavit of Vaughan Rudd Blank sworn 22 June 2013.

prior to him or her ceasing employment and result in an asset of an entirely different character to that which existed.[16]

61. Given his conclusion that the Amount was ordinary income, the primary judge did not have to determine this issue. Nevertheless, the primary judge expressed a preference for Mr Lonergan's methodology and Mr Samuel's "input" and stated that, had it been necessary to do so, he likely would have arrived at a value "closer to Mr Samuel's figure of A$77 million than Mr Lonergan's figure of $103M" (PJ [106]-[111]). The majority of the Full Court did not have to consider this issue (FC [93]). Pagone J did and reached a conclusion consistent with the primary judge's expressed preference (FC [144]-[145]).

62. The foundation of the views expressed by the primary judge and Pagone J to the effect that the value of the Appellant's rights under the GI PPP should include a "forward looking component" was the proposition that the hypothetical sale posited by the "exchange value test"[17] is on reasonable terms and, in this instance, that must be assumed to involve a promise by the Appellant to continue in employment with GI for some agreed period. Their Honours relied on the decision of the NSW Court of Appeal in *Mordecai v Mordecai* (1988) 12 NSWLR 58 (***Mordecai***) as authority for this proposition (PJ [108] and FC [145]). The Appellant adopts this analysis (AS [80]).

63. While it may be accepted that the hypothetical transaction posited by the exchange value test is on reasonable terms and conditions, *Mordecai* provides no support for a CGT argument, or the implication of a promise of continued employment as postulated by the primary judge and Pagone J. *Mordecai* involved the valuation of goodwill of a company and the NSW Court of Appeal concluded that the hypothetical transaction of the exchange value test must be assumed to involve a restrictive covenant restraining the directors of the vendor company from corroding the value of that goodwill by canvassing former customers (at 68E-69E). The assumption of a restrictive covenant preventing a vendor from eroding the existing value of the asset hypothetically sold is qualitatively different from the assumption of a promise obliging the vendor to take future action to enhance the value of the asset. *Mordecai* says nothing in favour of the latter assumption. Nor do the observations of Rich, Dixon and McTeirnan JJ in *Deputy Federal Commissioner of Taxation v Gold Estates of Australia (1903) Pty Limited* (1934) 51 CLR 509 (at 515) (referred to by Pagone J at FC [145]) provide any support for such an assumed term. Their Honours observations were directed to the application of the exchange value test in circumstances where, because of depressed market conditions (such as obtained in 1931), an actual sale was practically unlikely. They are remote from the present context.

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[16] Report of Tony Samuel, dated 16 August 2013 (**Samuel report**) at [19]-[21], at [52]-[56], at [117]-[118].

[17] Being the label applied by Spigelman CJ in *MMAL Rentals Pty Limited v Bruning* (2004) 63 NSWLR 451 at [55]-[56] to the test of market value enunciated in *Spencer v Commonwealth* (1907) 5 CLR 418 at 432 per Griffith CJ, at 441 per Isaacs J.

64. The approach adopted by the primary judge and Pagone J of valuing the Appellant's interest in GI's PPP as at 1 January 2002 by assuming a promise to continue in employment for an agreed period values a bundle of assets which did not (and never has) existed and fundamentally departs from the proper application of the exchange value test. Notably, neither the primary judge nor Pagone J identified the precise period which it was assumed that the Appellant would agree to remain in employment by GI. No doubt this is because that agreed period could be no more than the subject of speculation. Moreover, as Mr Samuel pointed out, to the extent that such an assumed promise generates added value by reason of the prospect of the Appellant sharing in the profits of GI after 1 January 2002, that value is attributable to the fictional promise and not the actual rights of the Appellant as at 1 January 2002.[18] It is no answer to say, as the primary judge did, that the Appellant's assets are to be valued according to their highest and best use (PJ [109]). So much may be accepted, but it provides no warrant for the creation of a fictional asset and the attribution of the value created by that asset to the Appellant's actual rights as at 1 January 2002. In any event, the assumed promise did not meet the possibility (noted by Mr Samuel) that GI could terminate the Appellant's employment on 30 days notice, or his employment might unexpectedly end by death or permanent disability. The primary judge and Pagone J did not consider how those possibilities, unaddressed by the postulated term, affected the value of any forward looking component of the Appellant's rights as at 1 January 2002.

65. The primary judge at PJ [109] referred to the inclusion in the hypothetical sale of a "going forward component ... on a deferred or rebate basis" which was said to avoid the difficulty of "creating another asset which might require the hypothetical price to be split between two discrete assets". In this connection, the primary judge referred to a series of questions he put to Mr Samuel suggesting that the hypothetical sale of the Appellant's interest on 1 January 202 could include terms in which the payment for the forward looking component would be defeated if he did not continue in employment with GI for a specified period (T130.5-131.10). However, as Mr Samuel pointed out in his evidence, such a postulate did not identify a market value as at 1 January 2002 for the Appellant's rights, but identified a price for the provision of future services by the Appellant which would be defeated or rebated if those services were not performed (T144.35-144.45). The scenario provided no foundation for the inclusion of any forward looking component in the market value of the Appellant's rights as at 1 January 2002.

66. In the result, both the primary judge and Pagone J were in error to prefer Mr Lonergan's methodology to Mr Samuel's in relation to the inclusion of a forward looking component in the market value of the Appellant's rights. As Pagone J pointed out at FC [145], the primary judge can be understood as otherwise preferring Mr Samuel's evidence and the Appellant has not challenged that conclusion. Accordingly, in the event that the Amount was not ordinary income of the Appellant or an ETP, this Court

[18] Samuel report at [19(a)(ii)].

can and should conclude that the market value of the Appellant rights under GI's profit participation plan excluded any forward looking component and was as identified by Mr Samuel; namely, in the order of A$20 million.

67. The determination of this issue involves an important question concerning the application of the exchange value test to assets that are not readily transferable. For that reason, in addition to the reasons of justice described in [57] above, there should be a grant of special leave to appeal in relation to this issue.

10 **Part VIII: Time Estimate**

68. It is estimated that 2.5 hours will be required for the presentation of the oral argument of the Respondent.

Dated: 11 July 2016

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S144 of 2016

BETWEEN:

VAUGHAN RUDD BLANK

Appellant

10

COMMISSIONER OF TAXATION

Respondent

ANNEXURE OF LEGISLATIVE MATERIALS

20

Filed for the Respondent on 11 July 2016

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Income Tax Assessment Act 1936

Act No. 27 of 1936 as amended

This compilation was prepared on 20 December 2006
taking into account amendments up to Act No. 168 of 2006

Volume 1 includes:	Table of Contents Sections 1 – 78A

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 79A – 121L
Volume 3 includes:	Table of Contents Sections 124K – 202G
Volume 4 includes:	Table of Contents Sections 204 – 624
Volume 5 includes:	Table of Contents Schedules 2, 2C – 2H, 2J and 3 – 5
Volume 6 includes:	Note 1 Table of Acts Act Notes Table of Amendments Repeal Table Notes 2 – 7 Tables A and B

which the rolled-over amount was ascertained or, if there are 2 or more rolled-over amounts in relation to that qualifying annuity, the aggregate of the eligible service periods in relation to the eligible termination payments by reference to which those rolled-over amounts were ascertained; and

(B) the period commencing on the date on which the qualifying annuity was purchased and ending on the date on which the relevant eligible termination payment was made; and

(ii) in any other case—the period commencing on the date on which the qualifying annuity referred to in that paragraph was purchased and ending on the date on which the relevant eligible termination payment was made.

eligible superannuation fund has the same meaning as in Part IX.

eligible termination payment, in relation to a taxpayer, means any of the following:

(a) any payment made in respect of the taxpayer in consequence of the termination of any employment of the taxpayer, other than a payment:

(i) made from a superannuation fund in respect of the taxpayer by reason that the taxpayer is or was a member of the fund;

(ii) of an annuity, or supplement, to which section 27H applies;

(iii) from a fund in relation to which section 121DA, as in force at any time before the commencement of section 1 of the *Taxation Laws Amendment Act (No. 2) 1989*, has applied in relation to the year of income commencing on 1 July 1984 or any subsequent year of income;

(iiia) from a fund that is or has been a non-complying superannuation fund in relation to any year of income;

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

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

(aa) any payment made to the taxpayer in consequence of the termination of any employment of another person, where:

(i) the payment is made after the death of the other person;

(iii) the payment is made to the taxpayer otherwise than as trustee of the estate of the other person; and

(iv) the payment is not a payment:

(A) made to the taxpayer from a superannuation fund by reason that another person was a member of the fund;

(B) of an annuity, or supplement, to which section 27H applies;

(C) from a fund in relation to which section 121DA, as in force at any time before the commencement of section 1 of the *Taxation Laws Amendment Act (No. 2) 1989*, has applied in relation to the year of income commencing on 1 July 1984 or any subsequent year of income; or

(D) from a fund that is or has been a non-complying superannuation fund in relation to any year of income;

(b) any payment made from a superannuation fund in respect of the taxpayer by reason that the taxpayer is or was a member of the fund, not being a payment:

(i) that is income of the taxpayer; or

(ii) to which paragraph (d), (da), (e) or (ga) applies; or

(iii) that is a benefit to which subsection 26AF(1), 26AFA(1) or 26AFB(2) or (3) applies; or

(iv) that is a contributions-splitting ETP;

reduced by any amount that has been or will be included in the assessable income of the taxpayer under subsection 26AF(2), 26AFA(3) or 26AFB(5) in respect of the transfer by the taxpayer of a right to receive the payment or any part of the payment;

(ba) any payment made to the taxpayer from a superannuation fund by reason that another person was a member of the fund, where:

(i) the payment is made after the death of the other person;

(iii) the payment is made to the taxpayer otherwise than as trustee of the estate of the other person; and

(iv) the payment is not:

(A) income of the taxpayer;

(B) a payment to which paragraph (d), (db), (e), (f) or (gb) applies; or

(C) a benefit to which subsection 26AF(1), 26AFA(1) or 26AFB(2) or (3) applies;

reduced by any amount that has been or will be included in the assessable income of any person under subsection 26AF(2), 26AFA(3) or 26AFB(5) in respect of the transfer to the taxpayer of a right to receive the payment or any part of the payment;

(bb) an amount that is a contributions-splitting ETP;

(c) any payment made by the trustee of an approved deposit fund in respect of the taxpayer by reason that the taxpayer is or was a depositor with the fund, not being a payment that is income of the taxpayer;

(ca) any payment made to the taxpayer by the trustee of an approved deposit fund by reason that another person was a depositor with the fund, where:

(i) the payment is made after the death of the other person;

(iii) the payment is made to the taxpayer otherwise than as trustee of the estate of the other person; and

(iv) the payment is not income of the taxpayer;

(d) any payment made in respect of the taxpayer in relation to the commutation, in whole or in part, of a superannuation pension that was payable to the taxpayer;

(daa) an amount resulting from the commutation in whole or in part of a superannuation pension payable to the taxpayer from a superannuation fund, being an amount:

(i) that remains in the fund after the commutation, for the purpose of providing superannuation benefits to the taxpayer or to dependants of the taxpayer in the event of the death of the taxpayer; or

(ii) that is applied, immediately after the commutation, towards the provision of one or more other superannuation pensions payable to the taxpayer from that fund;

(da) a payment (in this paragraph called the ***capital payment***) made after the death of the taxpayer to the trustee of the estate of the taxpayer where:

(i) the capital payment is made by reason that the taxpayer was a member of a superannuation fund (whether or not the capital payment is made from the fund); and

(ii) at some time after the death of the taxpayer, a person had a right to elect to receive a superannuation pension (whether or not from the person making the capital payment) in lieu of the capital payment being made to the trustee;

(db) a payment (in this paragraph called the ***capital payment***) made to the taxpayer after the death of another person (in this paragraph called the ***deceased person***) where:

(i) the capital payment is made by reason that the deceased person was a member of a superannuation fund (whether or not the capital payment is made from the fund);

(ii) the capital payment is made to the taxpayer otherwise than as trustee of the estate of the deceased person; and

(iii) at some time after the death of the deceased person, the taxpayer or another person had a right to elect to receive a superannuation pension (whether or not from the person making the capital payment) in lieu of the capital payment being made to the taxpayer;

(e) any payment made in respect of the taxpayer of the residual capital value of a superannuation pension that was payable to the taxpayer;

(ea) the residual capital value of a superannuation pension payable to the taxpayer from a superannuation fund:

(i) that remains in the fund, after the residual capital value of the pension became payable, for the purpose of the provision of superannuation benefits to the taxpayer or to dependants of the taxpayer in the event of the death of the taxpayer; or

(ii) that is applied, immediately after the residual capital value of the pension became payable, towards the provision of one or more other superannuation pensions payable to the taxpayer from that fund;

(f) any payment made to the taxpayer of the residual capital value of a superannuation pension where:

(i) the residual capital value is paid to the taxpayer after the death of the person to whom the pension was payable; and

(ii) the payment is made to the taxpayer otherwise than as trustee of the estate of the person to whom the pension was payable;

(fa) a payment under section 63, 64, 65, 66 or 67 of the *Small Superannuation Accounts Act 1995*, where the payment is in respect of an account kept under that Act in the name of the taxpayer;

(fb) a payment under section 68 of the *Small Superannuation Accounts Act 1995* made after the death of the taxpayer to the trustee of the estate of the taxpayer, where the payment is in respect of an account kept under that Act in the name of the taxpayer;

(fc) a payment made to the taxpayer under subsection 76(6) of the *Small Superannuation Accounts Act 1995*;

(fd) a payment under subsection 76(7) of the *Small Superannuation Accounts Act 1995* made after the death of the taxpayer to the trustee of the estate of the taxpayer, where the payment is in respect of an account kept under that Act in the name of the taxpayer;

(fe) a payment made to the taxpayer under section 65A or 66 of the *Superannuation Guarantee (Administration) Act 1992*;

(ff) a payment under section 67 of the *Superannuation Guarantee (Administration) Act 1992* made after the death of the taxpayer to the trustee of the estate of the taxpayer;

(g) any payment made in respect of the taxpayer in relation to the commutation, in whole or in part, of an qualifying annuity that was payable to the taxpayer;

(gaa) an amount resulting from the commutation in whole or in part of a qualifying annuity (the ***first annuity***) payable to the taxpayer, being an amount applied, immediately after the commutation, towards the provision of one or more other qualifying annuities payable to the taxpayer by the payer of the first annuity;

(ga) a payment (in this paragraph called the ***capital payment***) made after the death of the taxpayer to the trustee of the estate of the taxpayer where:

(i) the capital payment is made by reason that the taxpayer was a member of a superannuation fund (whether or not the capital payment is made from the fund); and

(ii) at some time after the death of the taxpayer a person had a right to elect to receive an annuity (whether or not from the person making the capital payment) in lieu of the capital payment being made to the trustee;

(gb) a payment (in this paragraph called the ***capital payment***) made to the taxpayer after the death of another person (in this paragraph called the ***deceased person***) where:

(i) the capital payment is made by reason that the deceased person was a member of a superannuation fund (whether or not the capital payment is made from the fund);

(ii) the capital payment is made to the taxpayer otherwise than as trustee of the estate of the deceased person; and

(iii) at some time after the death of the deceased person, the taxpayer or another person had a right to elect to receive an annuity (whether or not from the person making the capital payment) in lieu of the capital payment being made to the taxpayer;

(h) any payment made in respect of the taxpayer of the residual capital value of an qualifying annuity that was payable to the taxpayer;

(ha) the residual capital value of a qualifying annuity (the ***first annuity***) payable to the taxpayer, that is applied, immediately after that residual capital value became payable, towards the provision of one or more other qualifying annuities payable to the taxpayer by the payer of the first annuity;

(j) any payment made to the taxpayer of the residual capital value of an qualifying annuity where:

(i) the residual capital value is paid to the taxpayer after the death of the person to whom the annuity was payable; and

(ii) the payment is made to the taxpayer otherwise than as trustee of the estate of the person to whom the annuity was payable; or

(jaa) an amount that was taken to be an ETP by former subsection 160ZZPZE(4) of this Act or an amount referred to in subsection 152-310(2) of the *Income Tax Assessment Act 1997*;

but does not include any of the following:

(ja) the tax-free amount of a bona fide redundancy payment, or of an approved early retirement scheme payment, made on or after 1 July 1994;

(k) a payment by way of advance or loan, being an advance or loan made on terms and conditions similar to the terms and conditions that could reasonably be expected to apply in respect of an advance or loan to the payee by a person with whom the payee was dealing at arm's length in relation to the advance or loan;

(ka) an exempt resident foreign termination payment or an exempt non-resident foreign termination payment;

(m) consideration of a capital nature for, or in respect of, a legally enforceable contract in restraint of trade by the taxpayer, to the extent to which the amount or value of the consideration is, in the opinion of the Commissioner, reasonable having regard to the nature and extent of the restraint;

(ma) a payment from a fund that is an eligible resident non-complying superannuation fund, or an eligible non-resident non-complying superannuation fund, when the payment is made;

(n) consideration of a capital nature for, or in respect of, personal injury to the taxpayer, to the extent to which the amount or value of the consideration is, in the opinion of the Commissioner, reasonable having regard to the nature of the personal injury and its likely effect on the capacity of the taxpayer to derive income from personal exertion;

(p) a transfer of an amount from a fund that is a taxable contribution under subsection 274(10), being a transfer that:

(i) was not made at the request of a member of the fund; and

(ii) either:

(A) was made by the fund for the purpose of ensuring that the fund remain a complying superannuation fund; or

(B) as a result of which the fund became such a fund;

(q) amounts included in the assessable income of the taxpayer under Division 13A;

(qa) a payment that is a departing Australia superannuation payment;

(r) an amount:

(i) received by the taxpayer, or to which the taxpayer is entitled, as the result of the commutation of a pension payable from a constitutionally protected fund (within the meaning of Part IX); and

(ii) wholly applied in paying any superannuation contributions surcharge (as defined in section 38 of the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997*);

(s) an amount:

(i) received by the taxpayer, or to which the taxpayer is entitled, as the result of the commutation of a pension payable by a superannuation provider (within the meaning of the *Superannuation Contributions Tax (Assessment and Collection) Act 1997*; and

(ii) wholly applied in paying any superannuation contributions surcharge (as defined in section 43 of that Act).

employment includes the holding of an office.

equivalent old system ETP, in relation to an amount that is an ETP in relation to a taxpayer, means the amount that would have been the amount of the ETP if taxable contributions were exempt income.

ETP means an eligible termination payment.

excessive component, in relation to an ETP, means so much of the ETP as the Commissioner has determined under subsection 140R(1) exceeds the reasonable benefit limits.

exempt non-resident foreign termination payment, in relation to a taxpayer, means:

Definitions

(5) In this section:

eligible annuity has the same meaning as in Part VIIIB of the *Family Law Act 1975*.

identified component, in relation to an eligible termination payment, means any of the following:

(a) the concessional component;

(b) the post-June 1994 invalidity component;

(c) the CGT exempt component;

(d) the undeducted contributions;

(e) the untaxed element of the post-June 83 component.

27B Assessable income to include certain superannuation and similar payments

(1) If an ETP (other than a death benefit ETP) is made in relation to a taxpayer in a year of income, the taxpayer's assessable income of the year of income includes:

(a) the taxed element of the retained amount of the post-June 83 component; and

(b) the untaxed element of the retained amount of the post-June 83 component.

(1A) If a death benefit ETP is made in relation to a taxpayer in relation to a year of income, the taxpayer's assessable income of the year of income includes:

(a) the taxed element of the retained amount of the post-June 83 component; and

(b) the untaxed element of the retained amount of the post-June 83 component.

(2) Where an ETP is made in relation to a taxpayer in a year of income, the assessable income of the taxpayer of the year of income includes the non-qualifying component.

(3) Where an ETP is made in relation to a taxpayer in a year of income, the assessable income of the taxpayer of the year of income includes the excessive component.

Income Tax Assessment Act 1997

Act No. 38 of 1997 as amended

This compilation was prepared on 27 March 2007
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Volume 1 includes:	Table of Contents Sections 1-1 to 36-55

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 40-1 to 55-10
Volume 3 includes:	Table of Contents Sections 58-1 to 122-205
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Volume 6 includes:	Table of Contents Sections 240-1 to 410-5
Volume 7 includes:	Table of Contents Sections 700-1 to 727-910
Volume 8 includes:	Table of Contents Sections 768-100 to 995-1

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Operative provisions

82-10 Taxation of life benefit termination payments

Tax free component

(1) The *tax free component of a *life benefit termination payment you receive is not assessable income and is not *exempt income.

Taxable component

(2) The *taxable component of the payment is assessable income.

(3) You are entitled to a *tax offset that ensures that the rate of income tax on the amount mentioned in subsection (4) does not exceed:

(a) if you are your *preservation age or older on the last day of the income year in which you receive the payment—15%; or

(b) otherwise—30%.

Note: The remainder of the taxable component is taxed at the top marginal rate in accordance with the *Income Tax Rates Act 1986*.

(4) The amount is so much of the *taxable component of the payment as does not exceed the *lesser* of:

(a) the *ETP cap amount, reduced (but not below zero) by the amount worked out under this subsection for each *life benefit termination payment you have received earlier in the income year; and

(b) the ETP cap amount, reduced (but not below zero) by the amount worked out under this subsection for each life benefit termination payment you have received earlier in consequence of the same employment termination, whether in the income year or an earlier income year.

Note 1: For the ETP cap amount, see section 82-160.

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

Note 2: If you have also received a death benefit termination payment in the same income year, your entitlement to a tax offset under this section is not affected by your entitlement (if any) to a tax concession for the death benefit termination payment (under section 82-65 or 82-70).

Note 3: Certain other life benefit termination payments made before 1 July 2012 may be treated as earlier payments under paragraph (4)(b): see section 82-10H of the *Income Tax (Transitional Provisions) Act 1997*.

Subdivision 82-B—Employment termination payments: death benefits

Guide to Subdivision 82-B

82-60 What this Subdivision is about

If you receive a death benefit termination payment after the death of a person, part of the payment may be tax free (the tax free component).

You are entitled to a tax offset on the remaining part of the payment (the taxable component), subject to limitations.

The extent of your entitlement to the offset depends on whether or not you were a death benefits dependant of the deceased, and on the total amount of payments you receive in consequence of the same employment termination.

If a death benefit termination payment is payable to the trustee of the estate of the deceased for the benefit of another person, the payment is taxed in the hands of the trustee in the same way as it would be taxed if it had been paid directly to the other person.

Table of sections

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

Operative provisions

82-130 What is an *employment termination payment*?

(1) A payment is an ***employment termination payment*** if:

(a) it is received by you:

(i) in consequence of the termination of your employment; or

(ii) after another person's death, in consequence of the termination of the other person's employment; and

(b) it is received no later than 12 months after that termination (but see subsection (4)); and

(c) it is *not* a payment mentioned in section 82-135.

Note 1: If a payment would be an employment termination payment but for paragraph (b), see subsection (4) and section 83-295.

Note 2: The holding of an office is treated as employment for this Part: see section 80-5. Also, the termination of employment is treated as including the termination of employment by retirement or by death: see section 80-10.

Types of employment termination payment

(2) A ***life benefit termination payment*** is an *employment termination payment to which subparagraph (1)(a)(i) applies.

(3) A ***death benefit termination payment*** is an *employment termination payment to which subparagraph (1)(a)(ii) applies.

Exemption from 12 month rule

(4) Paragraph (1)(b) does not apply to you if:

(a) you are covered by a determination under subsection (5) or (7); or

(b) the payment is a *genuine redundancy payment or an *early retirement scheme payment.

Note: The part of a genuine redundancy payment or an early retirement scheme payment worked out under section 83-170 is not an employment termination payment: see section 82-135.

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

(5) The Commissioner may determine, in writing, that paragraph (1)(b) does not apply to you if the Commissioner considers the time between the employment termination and the payment to be reasonable, having regard to the following:

(a) the circumstances of the employment termination, including any dispute in relation to the termination;

(b) the circumstances of the payment;

(c) the circumstances of the person making the payment;

(d) any other relevant circumstances.

(6) A determination under subsection (5) is not a legislative instrument.

(7) The Commissioner may, by legislative instrument, determine that paragraph (1)(b) does not apply to either or both of the following, as specified in the determination:

(a) a class of payments;

(b) a class of recipients of payments.

(8) A determination under subsection (7) may provide for paragraph (1)(b) not to apply in circumstances relating to any (or all) of the following, as specified in the determination:

(a) a class of employment termination (including a class described by reference to disputes of a specified type);

(b) a class of payments;

(c) a class of persons making payments;

(d) the period after the employment termination until payment is received;

(e) any other relevant circumstances.

82-135 Payments that are not *employment termination payments*

The following payments you receive are *not employment termination payments*:

(a) a *superannuation benefit (see Divisions 301 to 307);

(b) a payment of a pension or an *annuity (whether or not the payment is a superannuation benefit); and

(c) an *unused annual leave payment (see Subdivision 83-A);

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

Income Tax Assessment Act 1997

Act No. 38 of 1997 as amended

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(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.