FEDERAL COURT OF AUSTRALIA

Blank v Commissioner of Taxation [2015] FCAFC 154

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| Citation: | Blank v Commissioner of Taxation [2015] FCAFC 154 |
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| Appeal from: | Blank v Commissioner of Taxation [2014] FCA 87 Blank v Commissioner of Taxation (No 2) [2014] FCA 517 |
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| Parties: | **VAUGHAN RUDD BLANK v COMMISSIONER OF TAXATION** |
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| File number: | NSD 590 of 2014 |
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| Judges: | **KENNY, ROBERTSON AND PAGONE JJ** |
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| Date of judgment: | 29 October 2015 |
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| Catchwords: | **INCOME TAX** – appellant participated in profit participation schemes as employee of company group in foreign countries and in Australia – employee allocated “profit participation units” (PPUs) and equal number of shares in holding company – amount payable to appellant on termination of employment – whether amount assessable as ordinary income or as a capital gain – whether amount deferred compensation – PPUs a mechanism for calculation of amount of profit share to be paid to appellant – conditional executory promise to appellant to pay amount on termination – amount was reward for service as deferred compensation – amount assessable as ordinary income – part of amount withheld for discharge of foreign tax liabilities – when income derived – that part of amount was derived when paid by agreement with appellant to foreign tax authorities – whether income exempt under section 23AG of *Income Tax Assessment Act 1936* (Cth) as foreign earnings derived from foreign service – apportionment under section 23AG not possible – whether CGT event C2 happened – cost base of asset if CGT event C2 happened – valuation of appellant’s rights under profit participation scheme – whether prejudice caused to respondent if appellant allowed to re-open case – both appeal and cross-appeal dismissed |
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| Legislation: | *Income Tax Assessment Act 1936* (Cth)  *Income Tax Assessment Act 1997* (Cth)  *Income Tax Act 1952* (UK) |
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| Cases cited: | *Federal Commissioner of Taxation v Myer Emporium Ltd* [1987] HCA 18; 163 CLR 199  *Federal Commissioner of Taxation v McNeil* [2007] HCA 5; 229 CLR 656  *Le Grand v Federal Commissioner of Taxation* [2002] FCA 1258; 124 FCR 53  *Abbott v Philbin* [1961] AC 352  *McLaurin v Federal Commissioner of Taxation* [1961] HCA 9; 104 CLR 381  *Allsop v Federal Commissioner of Taxation* [1965] HCA 48; 113 CLR 341  *Federal Commissioner of Taxation v CSR Ltd* [2000] FCA 1513; 104 FCR 44  *Executor Trustee and Agency Company of South Australia Limited v Federal Commissioner of Taxation* [1932] HCA 69; 48 CLR 26  *Federal Commissioner of Taxation v Dixon* [1952] HCA 65; 86 CLR 540  *Reuter v Federal Commissioner of Taxation* (1993) 111 ALR 716  *Reseck v Federal Commissioner of Taxation* [1975] HCA 38; 133 CLR 45  *Bridges (Inspector of Taxes) v Hewitt* [1957] 1 WLR 59 *Donaldson v Federal Commissioner of Taxation* [1974] 1 NSWLR 627  *Federal Commissioner of Taxation v McArdle* (1988) 89 ATC 4051  *Scott v Federal Commissioner of Taxation* [1966] HCA 48; 117 CLR 514  *Henry v Foster* (1931) 145 LT 225; 16 TC 605  *Dewhurst v Hunter* (1932) 146 LT 510; 16 TC 637  *Tagget v Federal Commissioner of Taxation* [2010] FCAFC 109; 188 FCR 128  *Federal Commissioner of Taxation v Cooke* (1980) 42 FLR 403  *Brent v Federal Commissioner of Taxation* [1971] HCA 48; 125 CLR 418  *Gerlach v Clifton Bricks Pty Ltd* [2002] HCA 22; 209 CLR 478  *Lopez v Federal Commissioner of Taxation* [2005] FCAFC 157; 143 FCR 574  *Chaudri v Federal Commissioner of Taxation* [2001] FCA 554; 109 FCR 416  *Commissioner of Taxation (NSW) v Meeks* [1915] HCA 34; 19 CLR 568  *Mount Morgan Gold Mining Co Ltd v Commissioner of Income Tax (Qld)* [1923] HCA 37; 33 CLR 76 *Commissioner of Taxation v Cam & Sons Ltd* (1936) 36 SR (NSW) 544  *Australian Machinery and Investment Company v Deputy Commissioner of Taxation* [1946] HCA 65; 180 CLR 9 *Federal Commissioner of Taxation v French* [1957] HCA 73; 98 CLR 389  *Roadshow Distributors Pty Ltd v Commissioner of State Revenue* [1998] 1 VR 535  *Henderson v Federal Commissioner of Taxation* (1970) 119 CLR 612  *S P Investments Pty Ltd v Commissioner of Taxation* (1993) 41 FCR 282; 290  *Mordecai v Mordecai* (1988) 12 NSWLR 58  *Spencer v The Commonwealth* (1907) 5 CLR 418  *Boland v Yates Property Corporation Pty Ltd* (2007) 167 ALR 575  *Deputy Commissioner of Taxation v Gold Estates of Australia (1903) Ltd* (1934) 51 CLR 509 |
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| Text cited: | Parsons RW, *Income Taxation in Australia: Principles of Income, Deductibility and Tax Accounting* (The Law Book Company Ltd, Sydney, 1985) |
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| Dates of hearing: | 20 and 21 November 2014 |
|  |  |
| Place: | Sydney |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 152 |
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| Counsel for the Appellant and Cross-Respondent: | M Richmond SC with T Prince |
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| Solicitor for the Appellant and Cross-Respondent: | Clayton Utz |
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| Counsel for the Respondent and Cross-Appellant: | J Hmelnitsky SC with G O’Mahoney |
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| Solicitor for the Respondent and Cross-Appellant: | Minter Ellison |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 590 of 2014 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | VAUGHAN RUDD BLANK  Appellant |
| AND:  AND BETWEEN:  AND: | COMMISSIONER OF TAXATION  Respondent  COMMISSIONER OF TAXATION  Cross-Appellant  VAUGHAN RUDD BLANK  Cross-Respondent |

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| JUDGES: | KENNY, ROBERTSON AND PAGONE JJ |
| DATE OF ORDER: | 29 october 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The cross-appeal be dismissed.
3. The appellant pay the respondent’s costs of and incidental to the appeal.
4. The cross-appellant pay the cross-respondent’s costs of and incidental to the cross-appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| JUDGES: | KENNY, ROBERTSON AND PAGONE JJ |
| DATE: | 29 OCTOBER 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

# Kenny and Robertson JJ:

# introduction

1. This appeal and the cross-appeal are from a judgment of a single judge of the Court delivered on 26 May 2014.
2. The proceedings below resulted in two sets of reasons for judgment, delivered on 21 February 2014 and on 22 May 2014 respectively: see *Blank v Commissioner of Taxation* [2014] FCA 87 and *Blank v Commissioner of Taxation (No 2)* [2014] FCA 517. On 21 February 2014, the primary judge delivered reasons in which he held that payments amounting to USD160,033,328.25 (**the Amount**), which were made by Glencore International AG (**GI**) to, or at the direction of, the appellant, were assessable as ordinary income; and ordered that the parties provide short minutes of order to give effect to those reasons. On 27 February 2014, however, the appellant applied to re-open his case in order to argue that s 23AG of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**) applied, with the result that some part of the payments was exempt from tax. The primary judge dismissed this application, with reasons, on 22 May 2014 and made final orders on 26 May 2014.
3. The proceedings principally concern the correct characterisation, for tax purposes, of payments made by GI to the appellant in the 2007 to 2010 income years, following the termination of the appellant’s employment by his resignation from Glencore Australia Pty Limited (**Glencore Australia)**, a wholly owned subsidiary of GI, on 31 December 2006. The Amount was calculated by reference to the appellant’s entitlement under profit participation arrangements made during the course of his employment by companies in the Glencore group of companies (**Glencore Group**). The principal issue is whether the payments are assessable as ordinary income under s 6-5 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**) or, alternatively, s 26(e) of the ITAA 1936; or as a capital gain as a consequence of the ending of a CGT asset under s 104-25 of the ITAA 1997, on the execution of a Declaration of Assignment and General Release by the appellant on 15 March 2007 (**the Declaration**).
4. For the reasons stated below, we would dismiss the appeal and the cross-appeal, essentially because in our view the primary judge correctly held that the payments in question were assessable as ordinary income and we discern no error in his Honour’s determination of two other related issues, including his refusal of leave to re-open.

# The Facts Found by the Primary Judge

1. The primary facts are not in contest. The parties accepted the primary judge’s findings and analysis in *Blank* [2014] FCA 87 at [14]-[46]. The following is merely an abbreviated version of those findings, intended to do no more than assist the reader here.
2. The appellant was employed by GI or a subsidiary between November 1991 and 31 December 2006 in a number of countries, including Australia, from 2002 to the end of 2006. He became an Australian resident for fiscal purposes in 2002. As a consequence of his employment by companies in the Glencore Group, he acquired entitlements to participate in an employee profit participation plan and in replacement plans. On 15 March 2007, some months after he ceased his employment with the Glencore Group, the appellant executed a number of documents, including the Declaration, pursuant to an employee profit participation plan as it then existed, and became entitled to receive the Amount in relinquishment of “his claim to payments with respect to [profit entitlements] allocated in his name together with all preferential and ancillary rights”.
3. An understanding of the employee profit participation arrangements under which the appellant acquired his entitlements is central to the case. The primary judge gave a detailed account of them in *Blank* [2014] FCA 87 at [14]-[36]. The following is drawn from that account.
4. GI operated employee profit participation plans from about 1993 to 2010. Until 2006 there was only one type of profit participation plan, which became known as the ordinary profit participation plan. The original terms of the appellant’s participation in this type of plan were set out in two agreements executed around May 1994: (1) an agreement with GI (formerly called Marc Rich & Co AG) entitled “Profit Participation Agreement” (**PPA 1993**); and (2) an agreement with Glencore Holding AG (the ultimate holding company of the Glencore Group) entitled “Shareholders’ Agreement (NEWHO)” (**SA 1994**). These two agreements were “stapled” together, the validity of the PPA 1993 being conditional on the execution of the SA 1994 and the operation of the SA 1994 being conditional on execution of the PPA 1993.
5. Relevantly, under the SA 1994, the appellant was entitled to be issued shares in Glencore Holding AG (**GH**) (formerly Newgen AG) from time to time at a price of CHF50 per share (that is, par value) to be paid in cash, provided he had previously executed a Profit Participation Agreement with GI. The appellant could not sell, assign, transfer or otherwise deal with the shares without the prior written consent of GH **or** the occurrence of a “Triggering Event”. A “Triggering Event” gave rise to a call option for GH, and a put option for the appellant, over all shares in GH held by him at a price equal to their par value of CHF50 per share. The termination of employment by virtue of retirement was a “Triggering Event”.
6. Broadly speaking, under the PPA 1993, the appellant was granted the right to participate in GI’s future profits “in the form of (a) ‘Genussscheine’ ... and (b) a contractual claim”. A *Genussschein* (plural *Genussscheine*) is a profit sharing certificate issued by a company under its articles of association pursuant to Article 657 of the Swiss Code of Obligations. *Genussscheine* (**GS**) have no par value and must not be issued in exchange for capital contributions.
7. The basis for calculating the appellant’s profit participation was the net income as stated in the consolidated statement of income of the consolidated financial statements of the company expressed in US dollars as at December 31, with certain adjustments. The net income was to be “divided by the number of GS actually issued ... and then multiplied by the number of GS actually held by” participating employees during a particular period. The portions of consolidated profits allocated to participating employees would accumulate over the period an employee held GS. On the termination of employment by the Glencore Group, the employee was to return the GS that the employee held. An amount representing the employee’s profit participation was to become due 30 days after notice of termination and to be payable in 20 instalments over five years (with interest).
8. In 1994 or thereabouts, the appellant made an “Equity Participation Agreement” with GI, according to which the appellant became entitled to payment of the total amount of the Special Equity A and Special Equity B accounts created under that agreement at the same time and subject to the same conditions and limitations as his entitlement to profit participation under the PPA. Nothing was made of this in argument on the appeal.
9. In August 1996, the appellant executed an amendment to the PPA 1993 (**PPA 1993 (as amended)**). It is unnecessary to note the changes that the PPA 1993 (as amended) effected, most of which are reflected in the replacement plan made three years later.
10. In October 1999, the appellant executed a new Profit Participation Agreement (**PPA 1999**), which governed his entitlements when he came to Australia in 2002. The PPA 1999 provided that:

Any prior oral or written agreement related to the subject matter of this Agreement in particular any Exchange Profit Participation Agreement or Profit Participation Agreement shall be terminated herewith.

For present purposes, the operation of the PPA 1993, PPA 1993 (as amended) and the PPA 1999 was substantially the same.

1. Under the PPA 1999 (as under the PPA 1993), the appellant received the right to participate in the “results” of GI in the form of GS to be “issued” by GI to him from time to time (for nil consideration) and a contractual claim against GI. Broadly speaking, the calculation of a participating employee’s profit participation remained much the same, although the inclusion of a vesting clause in the PPA 1993 (as amended) was continued and was reflected in this calculation. The amount representing the employee’s profit participation continued to be due 30 days after notice of termination and was to be payable in 20 instalments over five years (with interest). Further, the PPA 1999 continued to be “stapled” to the shareholders’ agreement with GH, with the result that the issue of GS was tied to the appellant’s purchase of a corresponding number of shares in GH.
2. The primary judge specifically found (from [21(2)]) that under the PPA 1999:

To reflect an agreement between GI and the Swiss Federal Tax Administration (“FTA”) … 55% of the Profit Participation was to be “received” by the [appellant] as a profit distribution under his GS … and the remaining 45% as a contractual claim. The 55% of the Profit Participation “received” as profit distribution under the GS was subject to Swiss dividend withholding tax of 35%, and 35% of 55% of each instalment payable to the applicant would be withheld … .

The GS “issued” were to be held for the [appellant] in a special blocked safekeeping account with GI … .

Generally, the [appellant] could not transfer, alienate, grant a right over, assign, cede or encumber his GS or any of his rights and claims granted under the agreement. However, he could assign the rights and claims and GS granted under the agreement to a personal holding company, trust or foundation controlled by the [appellant] by capital and/or votes, or otherwise, with the prior written approval of GI … .

Upon termination of the [appellant’s] employment with the Glencore Group, the [appellant] was to return to GI all of his GS and execute a Declaration of Assignment and General Release in the form annexed to the agreement … .

Provided that the [appellant] executed a Declaration of Assignment and General Release substantially in the form annexed to the agreement, then 30 days after notification of termination of the [appellant’s] employment, the [appellant’s] Profit Participation would become due …, payable in USD in 20 quarterly instalments … and bearing interest on its unpaid balance at the six month LIBOR USD rate, compounding annually and paid with each instalment … .

The amount of the Profit Participation was determined in accordance with [the PPA 1999]. With effect from 31 December of each year the [appellant] was allocated a portion of the consolidated profits of GI for that year dependent on the number of GS held by the [appellant] at that time (“Periodical Profit Participation”) … and the amounts aggregated over the period in which the [appellant] held the GS to arrive at the total Profit Participation.

GI could offer at any time to repurchase from the [appellant] part or all of the [appellant’s] GS on terms not more favourable than the [appellant’s] Profit Participation, provided GI at the same time offered to repurchase the same number of GH shares at par value … .

1. In about June 2003, the appellant executed an “Incentive Profit Participation Agreement” (**IPPA 2003**) with GI and a wholly owned subsidiary of GI. Under the IPPA 2003, rather than being issued GS in GI directly as under the previous profit participation agreements, the appellant was to be allocated “Phantom Units” in GI, essentially as a mechanism for calculating his entitlement to the profit participation ultimately payable to him on the surrender of his rights. Under the IPPA 2003, a Phantom Unit was treated in much the same way as a GS issued under the PPA 1999 for the purposes of calculating the appellant’s profit participation. The other key provisions also remained essentially the same.
2. The grant of Phantom Units was again tied to the appellant’s purchase of a corresponding number of shares in GH. Only if the appellant elected to pay the purchase price of the shares could he receive the Phantom Units; and the ultimate realisation of his entitlement to profit participation required him to assign the shares back to GH for their par value. As the appellant’s senior counsel observed at the hearing of the appeal, notwithstanding the superficial differences between the IPPA 2003 and the PPA 1999, the profit participation arrangements remained much the same under the IPPA 2003, at least so far as participating employees were concerned.
3. The IPPA 2003 was subject to amendment around late 2004 but nothing turns on this.
4. Between May 1994 and 2 January 2002, GI “issued” GS to the appellant (although not in the form of physical certificates) and GH issued an equal number of shares in GH to him. Shortly after 7 July 2003, he was issued with a further 100 shares in GH and allocated 100 Phantom Units.
5. In 2005, when the appellant held 1,500 GS in GI on the terms of the PPA 1999 (as amended) and 100 Phantom Units on the terms of the IPPA 2003 (as amended) and 1,600 shares in GH, the appellant entered into a new Shareholders’ Agreement with GH (**SA 2005**) and another “Incentive Profit Participation Agreement” (**IPPA 2005**) with GI and a subsidiary company, Glencore AG. The IPPA 2005 provided that “[a]ny prior oral or written agreement related to the PPU which are the subject matter of this Agreement shall be terminated herewith”. The ‘PPU’ or profit participation units included the GS and Phantom Units formerly issued. The SA 2005 replaced the SA 1994 and the IPPA 2005 replaced the PPA 1999 and IPPA 2003. Once again, the IPPA 2005 was “stapled” to the SA 2005. The IPPA 2005 was only effective if the appellant executed the SA 2005 and fulfilled his obligations under it to purchase the same number of shares in GH as the number of PPU allocated to him under the IPPA 2005.
6. Pertinent parts of the IPPA 2005 are set out in *Blank* [2014] FCA 87 at [36]. Broadly speaking, under the IPPA 2005, the appellant was granted deferred compensation called Incentive Profit Participation (**IPP**). The IPPA 2005 defined “Profit Participation Units/PPU” as:

... the number of GS actually allocated and participating as of a respective date, whether issued by [Glencore 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.

1. The last lines recognise that all of the appellant’s GS had become PPUs for the purposes of the 2005 IPPA. The IPP was calculated “on the basis of the results of GI” and in essentially the same manner as profit participation under the PPA 1999. The only major difference in this respect is that the calculation was done with respect to Profit Participation Units (**PPUs**) rather than GS and Phantom Units. The 2005 IPPA also specified that:

The parties to this Agreement acknowledge that the GS issued by [Glencore] AG and owned and held by GI are being issued solely for the purpose of implementing the Plan and calculating the amount of deferred compensation in the form of PPU which shall be allocated to Employee in accordance with the Plan and this Agreement. Employee shall not have nor be deemed to have any interest whatsoever in the GS. Employee shall not acquire by reason of the Plan or this Agreement any right in or title to any assets, funds or property of GI, [Glencore] AG or any other Subsidiary whatsoever, including, without limiting the generality of the foregoing, any specific funds or assets (including the GS which [Glencore] AG has issued to GI ...).

1. For the purposes of the IPPA 2005, the appellant was allocated 1,600 PPU with the same Allocation Date as the 1,500 GS and 100 Phantom Units previously issued to him under the PPA 1999 and the IPPA 2003 respectively. As under the PPA 1999, the appellant could not, under the IPPA 2005, transfer, alienate, grant a right over, assign, cede or encumber his rights under the agreement, although he could assign the rights and claims under the agreement to a personal holding company, trust or foundation that he controlled provided GI gave its prior written consent.
2. The IPPA 2005 was on foot when the appellant’s employment with Glencore Australia ceased on 31 December 2006 **and** on 15 March 2007 when he became entitled to receive the Amount of USD160,033,328.25. Pursuant to the IPPA 2005 the IPP became “due as of the Due Date [as defined], provided that a declaration of assignment and general release substantially in the form as per Annex C hereof has been executed by the Employee and submitted to GI”. Annex C was a Declaration of Assignment and General Release which provided that in consideration of the payment of a sum (as would be stated), the Employee relinquished his claim to payments with respect to PPU and GS allocated in his name together with all preferential and ancillary rights to GI and assigned his shares in GH together with all preferential and ancillary rights to GH. As under the IPPA 2003, the effect of the definition of “Due Date” and other clauses in the 2005 IPPA was that the IPP became due 30 days after the termination of the appellant’s employment and was payable by 20 equal instalments, with interest. As the appellant’s senior counsel observed, “there was really no change so far as the taxpayer was concerned in his entitlements by virtue of this agreement being entered into. He was entitled to the very same amounts that he would have been entitled to had it not been [made]”.
3. As the primary judge recounts in *Blank* [2014] FCA 87 at [38]-[39], after his employment with Glencore Australia ended in December 2006, the appellant executed the Declaration on 15 March 2007. By the Declaration, in consideration for the Amount of USD160,033,328.25 and CHF80,000 the appellant: (1) relinquished “his claim to payments with respect to the PPU and GS allocated in his name together with all preferential and ancillary rights, to GI”; (2) assigned “all GS, registered and/or held in his name together with all preferential and ancillary rights, to GI, and irrevocably [authorised] GI to take over the respective certificates”; and (3) assigned “all his shares of GH, registered and/or held in his name together with all preferential and ancillary rights to GH, and irrevocably [authorised] GH to take over the respective certificates”. Notwithstanding the form of the Declaration, GH was to pay CHF80,000, being the par value of the appellant’s shares in GH, and GI was to pay USD160,033,328.25 in accordance with the “conditions and limitations” provided in the IPPA 2005. As already indicated, pursuant to the IPPA 2005, the Amount of USD160,033,328.25 was payable in 20 instalments over a five year period (together with interest at the six month LIBOR rate for USD on the outstanding balance of the debt), with the final instalment being payable on 31 December 2011.
4. In January 2008, the appellant (through his agent in Switzerland) executed an agreement with GI to alter his repayment schedule. The effect was that he agreed that GI would withhold the first four instalments in order to pay his dividend withholding tax liability to the Swiss Federal Tax Administration (**FTA**). The primary judge recorded that the parties had accepted that, for present purposes, it was immaterial that the payments were treated as, in part, subject to Swiss dividend withholding tax: *Blank* [2014] FCA 87 at [41].
5. The primary judge recorded that from 31 July 2007 until 1 July 2010, in accordance with its contractual obligations GI paid to the appellant, or dealt with at his direction, 14 instalment payments. The timing and amount of the payments, including the principal and interest component of each payment, is set out in a table in his Honour’s reasons: see *Blank* [2014] FCA 87 at [47].

# Decisions of the primary judge

1. As earlier indicated, in reasons delivered on 21 February 2014, the primary judge held that the payments made by GI to the appellant in the income years 2007 to 2010 were assessable as ordinary income; and on 27 February 2014, the appellant applied to re-open his case in order to argue that s 23AG of the ITAA 1936 applied to exempt part of the Amount from tax. The primary judge dismissed this application on 22 May 2014 and made final orders on 26 May 2014.
2. The beginning and end of the primary judge’s analysis of the nature of the payments were the agreements. His Honour stated (*Blank* [2014] FCA 87 at [95]):

There can be no doubt, if the recitals (called preamble) to the instruments under the last two manifestations of the PPPs – the IPPA 2003 and the IPPA 2005 – can be taken as a guide, that the plans were intended by the relevant parties – GI, [Glencore] AG and the applicant – to provide the applicant with deferred compensation in consideration of the services to be rendered by the applicant to his Glencore Group employer. Further support for this conclusion is to be drawn from the operative part of the instruments, in the case of the IPPA 2005 – the definition of *Incentive Profit Participation/IPP* and *Plan* in paras 10 and 16; Clause [A.1.1]; “GI grants Employee deferred compensation…”; and Clause A.1.2 refers to GS being “issued solely for the purpose of … calculating the amount of deferred compensation”.

1. The primary judge rejected the appellant’s submission that the GS were themselves provided as a reward for services and that, subsequent to the termination of his employment, he simply received the proceeds of the realisation of capital assets: *Blank* [2014] FCA 87 at [96]-[102], stating (at [102]) that:

It is the money constituting the Amount, not the contractual right to the Amount, which is the reward for his services and if that analysis be correct, it is the money constituting the Amount which is ordinary income not the monetary value of the contractual right.

1. Having found that the payments made by GI to the appellant were assessable as ordinary income, it was unnecessary for the primary judge to consider the respondent Commissioner’s contention that, if the GS were properly characterised as assets of the appellant, then they were revenue assets and the gain on their realisation was ordinary income according to the principles in *Federal Commissioner of Taxation v Myer Emporium Ltd* [1987] HCA 18; 163 CLR 199. Nor was it necessary for him to consider the Commissioner’s contention that the payments were income from property by analogy with the decision of the High Court in *Federal Commissioner of Taxation v McNeil* [2007] HCA 5; 229 CLR 656. His Honour nonetheless commented that these contentions had “no arguable merit”: *Blank* [2014] FCA 87 at [94].
2. The primary judge rejected the Commissioner’s alternative contention that the payments were non-share equity interests in GI under s 974-70(1) of the ITAA 1997, read with item 1 or item 2 in the table in s 974-75(1) and assessable under s 44(1) of the ITAA 1936 as dividends under s 159GZZZP of the ITAA 1936 or as non-share dividends under s 974-120 of the ITAA 1997. His Honour stated ([2014] FCA 87 at [65]) that:

Despite the particulars provided by the Commissioner … it was common ground that the applicant was not a “member or stockholder” of GI such as to attract Item 1 of the table in s 974-75(1). As noted … by virtue of s 974-75(2), the other items of the table in s 974-75(2) do not give rise to an equity interest in GI unless the scheme is a “financing arrangement” for GI.

His Honour held that there was no financing arrangement: *Blank* [2014] FCA 87 at [74]–[76], [84]-[87]. There was therefore no non-share equity interest in GI under s 974-70(1) and the payments to the appellant could not be dividends or non-share dividends: see *Blank* [2014] FCA 87 at [90].

1. The primary judge also rejected the Commissioner’s other contention that the payments to the appellant were assessable as employment termination payments (**ETPs**), stating that “the fact that the termination of his employment was an occasion by reference to which the Amount became payable, is not sufficient to enable it to be said that the payments were made in consequence of the termination of his employment: *Le Grand v Commissioner of Taxation* [[2002] FCA 1258,] 124 FCR 53 at [33]”: see *Blank* [2014] FCA 87 at [106].
2. Since the primary judge rejected the appellant’s submission that the payments were only assessable as a capital gain, it was unnecessary for him to determine the market value of the appellant’s contractual rights under the profit participation arrangements when he became an Australian resident on 2 January 2002, although his Honour did in fact outline his views on the issue. The primary judge stated that he preferred the valuation methodology of Mr Lonergan, an expert witness on whose evidence the appellant relied, to that of Mr Samuel, on whose expert evidence the Commissioner relied, on the basis that it “not only accords with reality, but is supported by the authorities”. Nonetheless, he preferred “the input of Mr Samuel’s figures into Mr Lonergan’s methodology”, noting that “Mr Samuel conceded … if that were done, his valuation would more likely approximate a maximum of AUD77 million as opposed to Mr Lonergan’s AUD103 million”: *Blank* [2014] FCA 87 at [111].
3. In his 22 May 2014 reasons, the primary judge explained his refusal of the appellant’s application for leave to re-open on the basis that the appellant’s argument with regard to s 23AG had insufficient merit to warrant the grant of leave: *Blank v Commissioner of Taxation (No 2)* [2014] FCA 517 at [41]. But for this, his Honour would apparently have granted the leave sought: *Blank* [2014] FCA 517 at [14], [23]. His Honour saw little merit in the appellant’s submission that some part of the payments qualified as “foreign earnings derived by [him] from … foreign service” and was thus exempt from tax under s 23AG(1) of the ITAA 1936. Whilst, in his Honour’s view, the payments qualified as “foreign earnings”, his Honour considered that they were not exempt under s 23AG(1) because the payments were not derived by the appellant from “foreign service”: *Blank* [2014] FCA 517 at [31]. This was because the payments were derived by the appellant from both foreign **and** Australianservice and that was not enough to qualify for an exemption from tax. For the reasons his Honour stated, he did not consider that apportionment was either appropriate or possible.
4. Also in his 22 May 2014 reasons, the primary judge held that the appellant derived the first two payments when, with the appellant’s agreement, they were paid to the FTA by GI on his behalf and they were not derived at the earlier time when they were simply withheld by GI from payment to the appellant: *Blank* [2014] FCA 517 at [45].
5. The appellant appeals from the final orders of the primary judge made on 26 May 2014 that gave effect to his reasons of 21 February and 22 May 2014 and the respondent cross-appeals from those orders.

# Grounds of appeal and cross-appeal and notice of contention

1. On the appeal, the appellant’s main challenge was to the primary judge’s finding that the payments made by GI to him were ordinary income as a reward for services derived when received (appeal grounds 1-10). In the alternative, the appellant contested his Honour’s decision that s 23AG of the ITAA 1936 could not apply and contended that leave should have been granted to him to re-open his case, with the result that a substantial part of the payments (if otherwise assessable) should be held exempt from tax under s 23AG(1) (appeal grounds 11-14). The appellant further contended that the primary judge erred in failing to determine the value of the cost base of the appellant’s CGT asset (appeal ground 15) and that his Honour ought to have determined the cost base at AUD77 million.
2. The Commissioner cross-appealed, challenging the primary judge’s conclusion in his 22 May 2014 reasons that the appellant only derived as income the amounts represented by the first two payments when, with the appellant’s agreement, they were paid to the FTA by GI on his behalf.
3. By a Notice of Contention, the Commissioner further contended that the primary judge should have refused the application to re-open on the ground of prejudice. The Commissioner also contended that the primary judge erred in concluding that the payments were not ordinary income in accordance with *FCT v Myer Emporium* 163 CLR 199 and that the payments were not ETPs within the meaning of s 82-130(1) of the ITAA 1997. Lastly, in the event that the Court held that the appellant was assessable merely on a capital gain, then the Commissioner contended that the primary judge ought to have assessed the cost base without including any value attributable to any future period of the appellant’s employment. This resulted, in the Commissioner’s submission, in an assessed cost base of around AUD22 million.

# parties’ submissions

## The appellant’s submissions

1. The appellant emphasised that the purpose of the profit participation arrangements was, as a 2007 Glencore Group prospectus indicated, to align “the interests of management and key employees with those of Glencore”. In this context, the appellant’s primary submission was that his reward for services was not the Amount of USD160,033,328.25; rather it was the receipt of shares and the PPUs (that is, the 1,500 GS and 100 Phantom Units) and associated contractual rights that GI had granted to him over time. Referring to *Abbott v Philbin* [1961] AC 352, the appellant characterised a PPU as a “chose in action capable of being turned to pecuniary account” or “an equity-like instrument to enable the calculation of the appellant’s share of the consolidated annual profit of [GI] accrued while he was a shareholder of … GH”. The appellant contended that the PPUs had a significant value to him at the time they were granted even though the amount ultimately payable was uncertain.
2. In written submissions developed at the hearing, the appellant submitted these rights were assessable at the time of grant as ordinary income under either s 25(1) of the ITAA 1936 or s 6-5 of the ITAA 1997, alternatively, under s 26(e) of the ITAA 1936. The appellant submitted that the shares and the 1,200 GS (and associated rights) granted to him before 2002 were exempt or non-assessable at grant because he was a non-resident: see s 25(1) of the ITAA 1936 and ss 6-5(3) and 6-10(5) of the ITAA 1997. The appellant added that the PPUs (the 300 GS and 100 Phantom Units) granted after that time may have been exempt or non-assessable under s 23L of the ITAA 1936 but that issue did not need to be determined. The appellant submitted that he exploited the rights conferred on him in previous years by executing and delivering the Declaration in March 2007, upon which the Amount became due (as a debt). This exploitation of rights involved the disposal of a CGT asset under s 104-25 of the ITAA 1997 giving rise to a capital gain in the 2007 year alone. The appellant further submitted that, on being paid the Amount (by instalments), he received a benefit but that benefit was not a reward for services. Rather, the benefit was the proceeds of the realisation of rights previously granted to him.
3. The appellant contended that the primary judge had erroneously focussed on the IPPA 2005 to the exclusion of the prior grant of rights and shares in GH. He submitted that the IPPA 2005 should not be considered in isolation and that it was important to bear in mind that, before executing the IPPA 2005, he had been a GH shareholder and received, as fully vested, the 1,500 GS and 100 Phantom Units. The appellant submitted that his Honour overly emphasised the IPPA 2005’s description of the PPUs as “deferred compensation” and that *Abbott v Philbin* [1961] AC 352 was a reliable guide in this case.
4. One would arrive at the same result, so the appellant contended, if some of the Amount were income as reward for services, because it would be impossible to ascertain by calculation the extent to which the Amount related to income or to capital. In this circumstance, so the appellant submitted, the entire Amount would be capital in nature, citing *McLaurin v Federal Commissioner of Taxation* [1961] HCA 9; 104 CLR 381, *Allsop v Federal Commissioner of Taxation* [1965] HCA 48; 113 CLR 341 and *Federal Commissioner of Taxation v CSR Ltd* [2000] FCA 1513; 104 FCR 44.
5. The appellant contended that, given that taxing legislation is to be construed to avoid double taxation (cf. *Executor Trustee and Agency Company of South Australia Limited v Federal Commissioner of Taxation* [1932] HCA 69; 48 CLR 26 at 44 (Dixon J)), then it would be wrong for the Court to identify two rewards for services – one on grant, which was taxable either as ordinary income or under s 26(e), and another on the exercise of the rights conferred on him.
6. Alternatively, if the reward for services was the Amount, then the appellant accepted that the Amount was income under s 6-5 of the ITAA 1997 derived by him in the 2007 year, because that was when the profit from the relinquishment of the contractual rights giving rise to the Amount was realised; or under s 15-2 of the ITAA 1997 derived in the 2007 year because that is when the relevant benefit was provided by GI to him.
7. If, however, the Court were to hold that the Amount was ordinary income, then, the Court should, so the appellant submitted, exercise its discretion to allow him to re-open his case on the grounds that, first, his Honour had erroneously concluded s 23AG of the ITAA 1936 did not apply and, secondly, there would be no prejudice to the Commissioner if leave were given. The appellant argued that the primary judge had erred in construing s 23AG because he had read the provision as if it applied only to exempt from tax “any foreign earnings derived ... **exclusively** from that foreign service” (emphasis in original). The appellant submitted that the authorities indicated that the appropriate method of apportionment in this case was to have regard to the number of days spent in foreign service compared to the number of days not spent in foreign service. In the alternative, the appellant submitted that, having regard to the rights issued to the appellant in respect of his foreign service, it was possible to identify USD123,944,037 of the Amount as exclusively for the appellant’s foreign service, being the amount flowing from the appellant’s relinquishment of 1,200 PPUs issued because of his prior service in South Africa, Switzerland and Hong Kong.
8. The appellant argued that the Commissioner’s contention that the payments made to him were ETPs received in consequence of the termination of his employment was wrong because the payments were either deferred compensation as a reward for services rendered (as the primary judge held) or the proceeds of the realisation of benefits granted as a reward for services in earlier years (as the appellant maintained).
9. Lastly, the appellant contended that, if he were to succeed, then the Court should conclude that the market value and hence the cost base of his CGT asset was AUD77 million, noting that the primary judge considered the likely range to be between AUD77 million and AUD103 million and that on the appeal the appellant did not contend for a valuation in excess of AUD77 million.

## The Commissioner’s submissions

1. The Commissioner maintained that the primary judge had correctly held that the payments of the Amount received by the appellant were ordinary income in the nature of deferred compensation for services rendered during his employment with companies in the Glencore Group. In this connection, the Commissioner referred to *Federal Commissioner of Taxation v Dixon* [1952] HCA 65; 86 CLR 540 at 556, where Dixon CJ and Williams J had observed that “if payments are really incidental to an employment, it is unimportant whether they come from the employer or from somebody else and are obtained as of right or merely as a recognized incident of the employment or work”. The Commissioner also referred to the remarks of Hill J in *Reuter v Federal Commissioner of Taxation* (1993) 111 ALR 716 at 730, to the effect that for income tax purposes it would be immaterial “whether an amount which is a reward for services is paid to the taxpayer in advance of the services being performed ... or after the services have been performed …”.
2. The Commissioner contended that the appellant’s argument about the GS, Phantom Units and PPUs was flawed for a number of reasons. First, the Commissioner submitted that the appellant’s characterisation of the Amount as the exploitation of the “valuable rights” conferred earlier deflected attention from the real issue as to the character of the payments received by him. To quote the Commissioner, “[w]hat matter[ed] [was] not the classification of the rights discharged by the payment but the character of the payment itself”. Citing Jacobs J in *Reseck v Federal Commissioner of Taxation* [1975] HCA 38; 133 CLR 45 at 56, the Commissioner submitted that, if a payment under an agreement has the character of deferred compensation, then it is income according to ordinary concepts. Secondly, the Commissioner submitted that particular aspects of the profit participation arrangements could not be reconciled with the appellant’s contention that the GS were issued as “a reward in and of themselves”. The GS, Phantom Units and PPUs were not, so the Commissioner said, capable of being turned into pecuniary account, in the sense of being sold or pledged or held to produce a stream of income. Thirdly, the Commissioner submitted that the appellant’s reliance on *Abbott v Philbin* [1961] AC 352 was misplaced. Referring to *Bridges (Inspector of Taxes) v Hewitt* [1957] 1 WLR 59, the Commissioner submitted that, in the appellant’s case, the rights were only ever to be discharged by payment in cash in the future if he worked and if profits were derived, noting that the right to be paid only arose once his employment was terminated, and only on the terms already provided for in the profit participation agreement.
3. As already noted, in the cross-appeal the Commissioner contended that the primary judge erred in determining that two payments, which were due and payable to the appellant during the 2007 income year but withheld in that year by GI in order to discharge his Swiss tax obligations, were not derived by the appellant in that year.
4. The Commissioner supported the primary judge’s construction of s 23AG, on the basis that, for an amount to come within the exemption, the whole of the amount *within the exemption* must meet the statutory requirement of being “from … foreign service”. Further, as regards the appellant’s application for leave to re-open, the Commissioner submitted that the primary judge had failed to take into account the prejudice that the Commissioner would suffer if leave were granted. The Commissioner pointed to matters that he would have explored with the appellant in cross-examination and other evidence that might have been led had the s 23AG issue been raised at an earlier time.
5. In addition, the Commissioner submitted that the payments to the appellant could be characterised as ETPs within the meaning of ss 27A(1) of the ITAA 1936 and 82-130(1) of the ITAA 1997, because there was sufficient causal nexus between the termination of the appellant’s employment and the payment of the disputed amounts for it to be said that the one was in consequence of the other. The Commissioner also relied on *FCT v Myer Emporium* 163 CLR 199 to support an alternative proposition that, if the Court were of the view that the appellant’s gain was the proceeds of the realisation of assets, then those assets were held on revenue account, not capital account as the appellant’s argument assumed. Finally, the Commissioner argued that, if the Court were to hold that the appellant was assessable merely on a capital gain, then the primary judge erred in his assessment of the cost base, having regard to the evidence of Mr Samuel at trial as to the appropriate method of valuation.

# consideration

## Whether the payments were ordinary income

### Competing approaches

1. Income is not a technical concept and the word “income” is to be construed in accordance with ordinary usages. In Australia, people commonly use the word “income” to refer to a reward for services:cf. *Reuter v FCT* 111 ALR at 730. This appeal largely turns on whether the primary judge was correct to characterise the payments of the Amount made to the appellant in the 2007 to 2010 income years as income within ordinary concepts, being the reward for services rendered by him.
2. One may accept that, as the appellant submitted, from the perspective of the Glencore Group, the purpose of the profit participation arrangements was, as a 2007 prospectus said, “to promote management stability and to preserve Glencore’s capital” and that the arrangements led to “an alignment of the interests of management and key employees with those of Glencore”. This does not, however, identify, for tax purposes, the character of the payments made to the appellant, as the appellant at one point may have suggested.
3. As we have seen, the primary judge held that the payments were the reward for services derived by the appellant when he received them. On the one hand, the Commissioner’s case was that his Honour was correct and that the payments were in the nature of deferred compensation. The Commissioner’s argument was, in essence, that the profit participation agreements (PPA 1993, PPA 1999, IPPA 2003 and IPPA 2005) provided contractual rights to receive cash instalments on termination. Senior counsel for the Commissioner submitted that the profit participation agreements provided an executory promise to pay money, “being a share of profit on termination”, in instalments and subject to withholding for Swiss tax. On the other hand, the appellant argued that the primary judge was in error and it was the shares, the PPUs and associated contractual rights conferred on him under the profit participation arrangements that were the reward for services rendered by him. He sought to substantiate his position by reference to various authorities, particularly *Abbott v Philbin* [1961] AC 352.
4. In order to assess the appellant’s argument, we consider first *Abbott v Philbin* and the Australian cases in line with it on which the appellant particularly relied. We indicate the way in which the appellant relied on these cases, but defer discussion of the Commissioner’s position until later.

### Abbott v Philbin

1. The issue in *Abbott v Philbin* [1961] AC 352 was whether the taxpayer was rightly assessed as to income tax as “perquisites or profits” of employment in Schedule E of the *Income Tax Act 1952* (UK), on the difference between the market price of the shares taken up when he exercised a share purchase option in 1956 and the option price of the shares in 1954 when the option was granted. The taxpayer, who was the company secretary, had been granted an option to purchase shares in the company at the then market price and exercised the option when the market price of the shares increased. The options were non-transferable and to expire on the earlier of 10 years, retirement or death.
2. The House of Lords held that the taxpayer was wrongly assessed on the difference between the market price in 1956 and the option price less the cost of the option in 1954. The relevant “perquisite” (or, in terms familiar in Australian law, “reward for service”) was the original grant of the option, which had not been brought to tax. This was because, as soon as it was granted, the option to take up shares was capable of being turned to pecuniary account: see [1961] AC at 367 (Viscount Simonds), 371 (Lord Reid) and 378 (Lord Radcliffe). Viscount Simonds said (at 366) that the test was whether the option was something “by its nature capable of being turned into money”. Lord Reid said (at 371) that “the test must be the nature of the right and not whether this particular option could readily have been turned to pecuniary account in ... 1954”. This latter observation bears particularly on the analysis in the present case.
3. Plainly enough, the option to take up shares was, as Viscount Simonds said, “something which the employee thinks it worth his while to pay for ... And it is something which can assuredly be turned to pecuniary account”: [1961] AC at 365-366. Viscount Simonds continued:

There was no bar, express or implied, to a sale of the shares as soon as the option was exercised, and there could be no difficulty in the grantee arranging with a third party that he would exercise the option and transfer the shares to him.

Viscount Simonds added (at 367):

There could not be one perquisite at the date of the grant and a second perquisite when the shares were taken up. ... I do not find it easy to say that the increased difference between the option price and the market price in 1956 ... arises from the office [of employment]. It will be due to numerous factors which have no relation to the office of the employee, or to his employment in it.

1. Lord Reid, who approached the matter a little differently, said (at 372):

If in fact this type of option is a kind of right which can be turned to pecuniary account, what more is necessary to make it a perquisite? I have not been able to find any clear answer … in this case. It appears to me that if a right can be turned to pecuniary account that in itself is enough to make it a perquisite.

1. Lord Radcliffe adopted a similar course of reasoning to Lord Reid, stating (at 377) “the appellant is right in saying that what taxable receipt there is lies in the acquisition of the option, and that if it had a monetary value when received it is that value that represents the profit or perquisite of the office”. His Lordship expanded on this simple statement (at 378-379), saying:

I think that the Revenue are right in saying that a line has to be drawn somewhere between convertible and non-convertible benefits ... . What I do not think, however, is that a non-assignable option to take up freely assignable shares lies on that side of the line which contains the untaxable benefits in kind. The option, when paid for, was thereafter a contractual right enforceable against the company at any time during the next 10 years so long as the holder paid the stipulated price and remained in its service. That right is, in my opinion, analogous for this purpose to any other benefit in the form of land, objects of value or legal rights. It was not incapable of being turned into money or of being turned to pecuniary account within the meaning of these phrases in *Tennant v Smith* [[1892] AC 150] merely because the option itself was not assignable. What the option did was to enable the holder at any time, at his choice, to obtain shares from the company which would themselves be pieces of property or property rights of value, freely convertible into money. ... I think that the conferring of a right of this kind as an incident of service is a profit or prerequisite which is taxable as such in the year of receipt, so long as the right itself can fairly be given a monetary value ...

The advantage which arose by the exercise of the option ... was not a perquisite or profit from the office during the year of assessment: it was an advantage which accrued to the appellant as the holder of a legal right which he had obtained in an earlier year ... . The quantum of the benefit, which is the alleged taxable receipt, is not in such circumstances the profit of the service: it is the profit of his exploitation of a valuable right.

1. Lord Reid also considered that there was another difficulty, which might point to grant of the option itself as the reward for services, remarking (at 372-373):

Rule 1 taxes a person exercising an office or employment of profit “in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom *for* the year of “assessment”. It does not say salaries or perquisites received during the year of assessment. It may be difficult to relate a perquisite strictly to a particular year. But if a reward is given in the form of an option and the option is itself the perquisite, it would generally be sufficiently related to the year in which it is given to be properly regarded as a perquisite for that year. If, on the other hand, the option is not the perquisite—if there is no perquisite until the option is exercised and shares are issued, it may be many years later—in what sense would the shares be a perquisite *for* the year when they were issued. There would be no relation whatever between the service during that year and the giving of the option many years earlier or the exercise of the option during the later year. I do not wish to express any concluded opinion on this point but it does seem to lend support to the conclusion which I have reached on other grounds.

(Original emphasis.)

We note here that the primary judge drew attention to this second aspect: namely, that, in the case of a grant of an option to take up shares, there may be no relevant relationship between the profit and service in that year or in the year of grant to bring the profit within the charge to tax. We return to this below.

1. The parties differed about the significance of *Abbott v Philbin* [1961] AC 352. At the hearing of the appeal, senior counsel for the appellant submitted that the appellant’s case was analogous to *Abbott v Philbin* and that the “benefit that the appellant obtained by the exercise of the ... rights in ... 2007 ... had to do with the ... stellar performance of Glencore in the period after he acquired the rights”. The appellant’s point was that he had been given benefits (in the form of issued shares and PPUs) between 1993 and 2003 for services rendered, which could be turned to pecuniary account and were assessable as ordinary income, alternatively, had a value to him that could be brought to tax under s 26(e). As the appellant’s senior counsel put it, these benefits were either of a contractual nature or equity-like interests in the Glencore Group that would “accrue value to him regardless of the extent to which he performs services”. The appellant, so his senior counsel said, acquired “a combination of contractual rights and shares which confer an entitlement irrespective of whether any services are actually performed or the quality of those services”. There was, so he said, no other voluntary act to be done by any Glencore Group company, which was bound to make payment to the appellant, who was to be taxed at the time the benefit was granted, not when it was exploited.
2. The Commissioner took a contrary view and submitted that the appellant’s reliance on *Abbott v Philbin* [1961] AC 352, as well as *Donaldson v Federal Commissioner of Taxation* [1974] 1 NSWLR 627 and *Federal Commissioner of Taxation v McArdle* (1988) 89 ATC 4051, was misplaced.

### Donaldson v Federal Commissioner of Taxation

1. Mr Donaldson was a manager of a company. The employer company issued options to acquire shares to him under a “Supplemental Key Personnel Option Scheme”. The Scheme included a provision that “the optionee [was] to continue to serve” the company for a certain period, depending on age and position, and it restricted the assignment of rights. The Supreme Court of New South Wales held in *Donaldson v FCT* [1974] 1 NSWLR 627 that a benefit of an income nature was “allowed, given or granted” to Mr Donaldson under the Scheme, within the meaning of s 26(e) of the ITAA 1936. In reaching this conclusion, reference was made to Windeyer J’s remarks in *Scott v Federal Commissioner of Taxation* [1966] HCA 48; 117 CLR 514 at 525-526, where Windeyer J said:

As I read s. 26(e) its meaning and purpose is to ensure that certain receipts and advantages which are in truth rewards of a taxpayer’s employment or calling are recognized as part of his income. In other words the enactment makes it clear that the income of a taxpayer who is engaged in any employment or in the rendering of any services for remuneration includes the value to him of everything he in fact gets, whether in money or in kind and however it be described, which is a product or incident of his employment or a reward for his services. If instead of being paid fully in money, he is remunerated, in whole or in part, by allowances or advantages having a money value for him they must be taken into account. The enactment does not bring within the tax-gatherer’s net moneys or moneys’ worth that are not income according to general concepts. Rather it prevents receipts of money or moneys’ worth that are in reality part of a taxpayer’s income from escaping the net.

1. Citing *Abbott v Philbin* [1961] AC 352, Bowen CJ in Eq concluded (at 642) that such benefits as Mr Donaldson received were to be “regarded as being in the nature of a bonus or an addition to salary and are of an income nature, where they are conferred in relation to the employment or to services rendered” and were a relevant benefit within s 26(e). His Honour concluded that the benefit could be valued and its value expressed in money; and the benefit had a value to Mr Donaldson in the year of grant. His Honour said (at 643), “[t]o say the option rights could not be exercised in the year of income is no answer to the application of s. 26(e). Indeed, it is to confuse the enjoyment of the fruit of the rights with the enjoyment of the rights, a mistake made in argument on behalf of the Crown in *Abbott v. Philbin*”. His Honour added that s 26(e) made assessable as income “the value to the taxpayer of the benefit allowed, given or granted to him, that is to say, the rights conferred on him which others lack”.
2. The appellant submitted that the circumstances of the present case were “closely analogous to the rights which the taxpayer had in *Donaldson*”. The appellant’s senior counsel submitted that “[i]t’s as if he received shares without the PPUs attached to them. It’s as if he had received shares from the time of each allotment of shares and PPUs, had become an equity holder with certain rights to redeem those shares at future times, death or disability or termination and so on. That’s really what this structure has done.”

### Federal Commissioner of Taxation v McArdle

1. The issue in *FCT v McArdle* 89 ATC 4051 was a little different, although also involving options. Between late 1975 and early 1980 Mr McArdle was granted options to purchase stock in the company that employed him. He also entered into agreements with the company under which, on exercising the rights under the agreements, he would receive a cash payment equal to the excess of the value of the stock over the exercise price of the options. In late 1981 Mr McArdle surrendered his stock options and stock appreciation rights in return for a lump sum payment of $1,100,000. A Full Court of this Court (Davies, Gummow and Lee JJ) upheld the judgment of the trial judge that the agreement to pay the lump sum was not made in consequence of his employment but as consideration for the surrender of his options and appreciation rights. In relation to s 26(e) their Honours said (at 4,052):

The provision brings into a taxpayer’s assessable income the value to him of all allowances etc. given or granted to him in respect of or in relation to any employment of or services rendered by him. One effect of the provision is to overcome the principle enunciated in the United Kingdom in *Tennant v Smith* (1892) 3 T.C. 158 that a perquisite of office is not taxable unless it can be turned to pecuniary account. See also *Abbott v Philbin* [1961] AC 352.

Under sec. 26(e), it is not the benefit itself which is assessable income but only the value thereof to the taxpayer.

1. Having discussed both *Donaldson v FCT* and *Abbott v Philbin*, their Honours considered whether the amount of $1.1 million was assessable to tax, holding that (1) this benefit was the benefit conferred by the agreement he made with the company in 1981, which had a value equal to or less than the surrender by Mr McArdle of the options and rights held by him; and (2) the benefit was not a grant assessable to Mr McArdle under s 26(e) “but rather the exploitation by him of rights received in previous years, the value whereof would have been assessable under sec. 26(e) in those years but for the operation of sec. 26AAC(10)”: *FCT v McArdle* 89 ATC at 4058. Their Honours agreed with the primary judge that s 25(1) of the ITAA 1936 had no application because the amount of $1.1 million was a capital receipt “being received as consideration for the surrender of valuable rights”: *FCT v McArdle* 89 ATC at 4059.
2. At the hearing, senior counsel for the appellant acknowledged that there were differences between the appellant’s case and *FCT v* *McArdle* but submitted that, as in *FCT v McArdle*, the appellant “should be seen in the later year as exploiting the valuable contractual rights acquired at the earlier time which were the reward for service when granted”.

### Federal Commissioner of Taxation v McNeil

1. At the hearing, senior counsel for the appellant further submitted that, in addition to the authorities discussed above, the appellant’s case was supported by *FCT v McNeil* 229 CLR 656, where the principal issue was whether the taxpayer had derived income on the grant of what were termed “sell-back rights”. In 1992, the taxpayer’s shareholding in St George Building Society Limited was converted into ordinary shares in St George Bank Ltd. Some years later, the Bank announced an off-market buy-back of ordinary shares under a capital reduction scheme. Under the scheme, the taxpayer was issued put options on 19 February 2001, which meant that she could require the Bank to purchase her shares for a fixed amount of $16.50 per share, which was above the share market price. The put options or “sell-back rights” were issued and listed on that date at a market value of $1.89. On 2 April 2001 the taxpayer received the proceeds of the sale of her sell-back rights ($576.64). The taxpayer conceded that an amount of $62.64 representing the increase in the realisable value of the sell-back rights since their issue date was assessable as a capital gain. The question was: what was the correct characterisation of the balance ($514) representing the market price of the put options as at the date of issue? The majority of the High Court held that the grant of the sell-back rights to the taxpayer was a derivation of income and assessable to tax on this basis. The majority reached this conclusion after a careful examination of the documents by which the share buy-back procedures were implemented. Citing *Abbott v Philbin* [1961] AC 352, the majority found that under these documents the taxpayer’s rights were “accrued, not merely executory, and were vested in her”: 229 CLR 656 at [27] (Gummow A-CJ, Hayne, Heydon and Crennan JJ). The majority concluded (at [51]) that “when the taxpayer’s sell-back rights were granted … ‘for the absolute benefit’ of the taxpayer, as stated in the Sell Back Right Deed Poll, there was a derivation of income by her represented by the market value of her rights of $514”.
2. Senior counsel for the appellant submitted that what the appellant acquired under the profit participation agreements was “very similar” to the sell-back rights at issue in *FCT v McNeil*. That is, so he submitted, the appellant had “a right to sell back the shares on the PPUs in return for a sum of money”. Senior counsel further submitted:

But, more importantly, what the [High] Court is accepting here as being income is the sell-back right itself, which is a chose in action to receive a sum of money, so we say there is no principle of tax law that says the taxpayer who receives a chose in action which is a right to receive a sum of money does not derive income being the market value of that right at the time of grant, but only derives it when it’s paid … .

… Importantly, the High Court saw no distinction needed to be drawn between *Abbott v Philbin*, which was the right to receive property, compared to the rights in St George, which were right[s] to receive money.

### The profit participation agreements and the relevant rights

1. Relevantly for this case, *Abbott v Philbin*, *Donaldson v FCT*, *FCT v McArdle* and *FCT v McNeil* show that, in determining what is the reward for services, the focus is on the agreement that is said to confer the reward for services. Not everything that can be turned to pecuniary account falls within the ordinary concept of income or s 26(e) of the ITAA 1936. Whether a right or bundle of rights can be turned to pecuniary account in the way those authorities contemplate depends on the agreement that creates them and what that agreement shows about the right or bundle of rights and any subsequent payment. Both parties’ arguments assumed as much. We have already outlined the appellant’s argument about the profit participation arrangement, the allocation of shares and PPUs (including GS and Phantom Units) and the associated contractual rights. The Commissioner’s argument about deferred compensation also depended on the characterisation of the rights conferred on the appellant by the profit participation agreements. The parties differed about the nature of what the appellant received during his employment under these arrangements; and it was this difference that resulted in competing characterisations of the payments made to him after his employment ended.
2. An analysis of the four profit participation agreements entered into by the appellant in the course of his employment by the Glencore Group shows that, notwithstanding differences in drafting and terminology, as a matter of substance, for present purposes, there was little or no material difference in their operation. For present purposes, the key provisions were as follows:

|  |  |  |
| --- | --- | --- |
| 1. PPA 1993 | a. | GI (formerly MRAG) “is willing to grant EMPLOYEE a participation in future profits” (preamble); |
|  | b. | GI (formerly MRAG) “grants EMPLOYEE a participation in future profits of [GI] in the form of [GS] … and a contractual claim … collectively referred to as Profit Participation 1993” (cl A.1); |
|  | c. | “The basis for the calculation of the … Profit Participation 1993 [is] the net income … of [GI]… and [s]uch Net Income for Profit Participation [is] divided by the number of GS actually issued … and then multiplied by the number of GS actually held by EMPLOYEE as of such [date]. [This Yearly Profit Participation 1993 is] allocated as profit participation under GS and under the contractual claim in the proportion indicated … and accumulated over the period the EMPLOYEE holds GS …” (cl A.2); |
|  | d. | “As long as the approval by the [FTA] is maintained, the EMPLOYEE shall receive 55[%] of his Cumulative Profit Participation 1993 as profit distribution under his GS” (cl A3.5); and “45[%] of his Cumulative Profit Participation 1993 as contractual claim hereunder” (cl A.4); |
|  | e. | “The Cumulative Profit Participation 1993 will become due 30 days after notice of termination of the employment of EMPLOYEE” (cl A.5); |
|  | f. | “Cumulative Profit Participation 1993 shall be paid to EMPLOYEE in twenty equal quarterly instalments over a period of [5] years …” (cl A.6); |
|  | g. | “Deductions will have to be made in connection with payments of Profit Participation 1993 for Swiss withholding tax and for Swiss social security … to the extent applicable” (cl. A.9). |
| 1. PPA 1999 | a. | GI grants the appellant a participation in the results of GI in the form of GS and a contractual claim, collectively referred to as Profit Participation (cl A.1); |
|  | b. | A form of Declaration of Assignment and General Release which confirms the termination of employment and the assignment of GS to GI and assignment of shares in GH to GH is added; |
|  | c. | In other material respects the PPA 1999 is substantially the same as the PPA 1993. |
| 1. IPPA 2003 | a. | “GI has adopted a plan of deferred compensation known … as the ‘Incentive Profit Participation Plan for Selected Employees of [GI] and its Subsidiaries’ (the PLAN)” (preamble); |
|  | b. | “in consideration of the services to be rendered by EMPLOYEE to the SERVICE PROVIDER in connection with the SERVICE AGREEMENT, [Glencore] AG and GI have agreed that EMPLOYEE should participate in the PLAN and EMPLOYEE desires to participate in the PLAN” (preamble); |
|  | c. | “GI grants EMPLOYEE deferred compensation which will be calculated on the basis of the results of GI (Profit Participation). Solely for the purpose of calculating the amount of Profit Participation, [Glencore] AG has issued to GI [GS] … which shall serve as phantom units … for the purpose of calculating … Profit Participation …” (cl A.1.1); |
|  | d. | “The parties … acknowledge that the GS issued by [Glencore] AG and owned and held by GI are being issued solely for the purpose of implementing the PLAN and calculating the amount of deferred compensation in the form of PHANTOM UNITS” (cl A.1.2); |
|  | e. | “Such Net Income for Profit Participation shall be divided by the number of GS actually allocated and participating … whether issued by [Glencore] AG under the PLAN and this Agreement … or issued by GI and held directly by employees of GI or … its SUBSIDIARIES pursuant to … Profit Participation Agreements and then multiplied by the number of PHANTOM UNITS allocated to EMPLOYEE” (cl A.2.3); |
|  | f. | “GI, [Glencore] AG and EMPLOYEE … agree … that for U.S. federal income tax purposes the payments made directly by GI to EMPLOYEE … represent compensation being paid in consideration of the services to be rendered by the EMPLOYEE … including services performed for [Glencore] AG under the Service Agreement” … (cl A.9.2); |
|  | g. | In other material respects the PPA 1999 is substantially the same as the PPA 1993 and the PPA 1999. |
| 1. IPPA 2005 | a. | “GI has adopted a plan of deferred compensation known as the ‘Incentive Profit Participation Plan for Selected Employees of [GI] and its Subsidiaries’” (preamble); |
|  | b. | “in consideration of the services to be rendered by Employee to the Service Provider in connection with the Service Agreement, [Glencore] AG and GI have agreed that Employee should participate in such plan and Employee desires to participate in such plan” (preamble); |
|  | c. | “the majority of the voting stock in GI is held by [GH]… of which Employee shall become a shareholder under a separate shareholders’ agreement” (preamble); |
|  | d. | “Incentive Profit Participation/IPP means the deferred compensation calculated on the basis of the results of GI granted to Employee hereunder” (Definitions, paragraph 10); |
|  | e. | “Profit Participation Units/PPU means the number of GS actually allocated and participating as of a respective date, whether issued by [Glencore] AG under the Plan and any Incentive Profit Participation Agreement … and held by GI … or GS issued by GI and held directly by Employees of GI or any of its Subsidiaries pursuant to profit participation agreements” (Definitions, paragraph 17); |
|  | f. | “GI grants Employee deferred compensation … calculated on the basis of the results of GI (IPP). Solely for purposes of calculating the amount of IPP, [Glencore] AG has issued to GI GS ….which shall serve as PPU for the purpose of calculating Employee’s IPP” (cl A.1.1); |
|  | g. | “The parties … acknowledge that the GS issued by [Glencore] AG and owned and held by GI are being issued solely for the purpose of implementing the Plan and calculating the amount of deferred compensation in the form of PPU which shall be allocated to Employee in accordance with the Plan and this Agreement. Employee shall not have nor be deemed to have any interest whatsoever in the GS. Employee shall not acquire by reason of the Plan or this Agreement any right in or title to any assets, funds or property of GI, [Glencore] AG or any other Subsidiary ….” (cl A.1.2); |
|  | h. | “Any prior oral or written agreement related to the PPU which are the subject matter of this Agreement shall be terminated herewith” (cl C.7); |
|  | i. | In other material respects the IPPA 2005 is substantially the same as the PPA 1993, the PPA 1999 and the IPPA 2003. |

1. As already noted, each of these profit participation agreements was “stapled” to a share agreement, under which the appellant acquired issued shares in GH at par, provided he had executed a profit participation agreement. During his employment the appellant was unable to deal with the shares without GH’s consent; and the termination of employment gave rise to a call option for GH, and a put option for the appellant, over all shares in GH held by him at a price equal to their par value.
2. Bearing in mind that the four profit participation agreements and the share agreements attached to them remained essentially the same so far as the appellant was concerned, the analysis of the agreements made by the primary judge is not fairly open to the criticism levelled at it by the appellant on appeal. His Honour set out the IPPA 2005 in greater detail than the other agreements and made particular mention of its provisions because the IPPA 2005 was the agreement on foot when the appellant’s employment terminated in December 2006 and when he became entitled to receive the Amount of USD160,033,328.25 on 15 March 2007. Further, by December 2006, the IPPA 2005 governed the whole of his entitlements under the profit participation arrangements: cf. IPPA 2005, cll A.2.3 and C 7. This understanding of the relationship of the IPPA 2005 to earlier agreements is consistent with a statement made by Mr Andreas Hubmann, one of GI’s senior executives, who deposed that “[i]n 2005, a general revision of both the Profit Participation Agreement and the Shareholders’ Agreement occurred with a view to streamlining, simplifying, and modernizing the agreements without compromising or changing the concepts and principles”. The history of these agreements confirms that there was little, if any, material change in the relevant profit participation arrangements over the relevant period.
3. In our opinion, an examination of the profit participation agreements bears out the analysis made of them by the primary judge and supported on appeal by the Commissioner.
4. At the time his employment terminated and when he became entitled to receive the payments in dispute, the governing profit participation agreement (IPPA 2005) stated expressly that the benefit conferred on the appellant under that agreement was “in consideration of the **services to be rendered**” by him: preamble, paragraph 5 (emphasis added). The IPPA 2003 contained a statement to the same effect: preamble, paragraph 5. While there is no such direct statement in the two earlier iterations of the profit participation arrangements (the PPA 1993 and the PPA 1999), it can be inferred from their structure and operation (which was essentially the same as the IPPA 2003 and the IPPA 2005) that they conferred a benefit on the appellant in the same way. The enquiry naturally turns to identifying the benefit that was being conferred on the appellant under these agreements.
5. The four profit participation agreements show that the GS in the PPA 1993 and PPA 1999, the GS/Phantom Units in the IPPA 2003 and the PPUs in the IPPA 2005 were, in each case, an essential part of the mechanism for calculating the payment to be made, relevantly, on termination of the appellant’s employment. That is, the PPUs, Phantom Units and GS gave rise to contractual rights that, so far as the appellant was concerned, served only as mechanisms for calculating the amount to be paid on termination, being an amount that was to represent his share of profits at that time.
6. As the primary judge held, at the time his employment terminated, the appellant did not hold any property right or interest in the GS, Phantom Units or PPUs, their **sole** purpose being to act as a calculation mechanism. This is made clear by cll A.1.1 and A.2 of the IPPA 2005 and cll A.1.1 and A.1.2 of the IPPA 2003 and is consistent with cl A.2 of the PPA 1993 and cl A.2 of the PPA 1999.
7. That the GS, Phantom Units and PPUs were not the benefit (or even part of the benefit) conferred on the appellant under the relevant profit sharing arrangements but only mechanisms for calculating his profit share to be paid on termination exposes the fact that it was the **payment** of this profit share that was the actual benefit conferred on the appellant under the IPPA 2005 and, since they operated in the same way, the earlier profit participation agreements. In this circumstance, the fact that the IPPA 2005, like the IPPA 2003, described this payment as “deferred compensation” was not merely a label, as the appellant proposed, but was an apt description of the character of the payment. As Jacobs J affirmed in *Reseck v Federal Commissioner of Taxation* 133 CLR at 56, citing *Henry v Foster* (1931) 145 LT 225; 16 TC 605 and *Dewhurst v Hunter* (1932) 146 LT 510; 16 TC 637, “[it] is well established 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”: see also *Reseck v FCT* 133 CLR at 51 (Gibbs J).
8. In this circumstance – the payment being deferred compensation for services rendered by the appellant – the payment was income according to ordinary concepts. The analogy with the options at issue in *Abbott v Philbin* [1961] AC 352 breaks down, since the appellant’s contractual rights under the IPPA 2005 and earlier agreements do not in fact resemble the options in that case. As the Commissioner submitted, *Abbott v Philbin*, *Donaldson v FCT*, *FCT v McArdle* and *FCT v McNeil* are not analogous cases because they were essentially concerned with non-pecuniary gain; and, in this context, whether that gain had “come home” in the sense that it could be turned to pecuniary account. The non-pecuniary gain in *Abbott v Philbin* was always the options; and the only relevant change was in the market for the shares, with the result that Mr Abbott’s shares were worth more in 1956 (when he exercised the options) than in 1954 when he acquired the options but did not exercise them. A similar analysis applies to *Donaldson v FCT* (options under the Supplemental Key Personnel Option Scheme), *FCT v McArdle* (stock options) and *FCT v McNeil* (sell-back rights). In the present case, the appellant’s entitlement was to a **payment** representing his profit share in relation to GI, which only arose when his employment terminated. His entitlement depended on him continuing in the employment of the Glencore Group for a time (cf. PPA 1993 (as amended), cl A.2.4; PPA 1999, cl A.2.3; IPPA, cl A.2.3; IPPA 2005, cl A.2.1) and the exigencies and contingencies that affected company profit over the years he remained in employment after his allocation of PPUs (including GS and Phantom Units).
9. The circumstances of this case were closer to *Tagget v Federal Commissioner of Taxation* [2010] FCAFC 109; 188 FCR 128, a case which the appellant sought to distinguish, than to *Abbott v Philbin*, *Donaldson v FCT*, *FCT v McArdle*  and *FCT v McNeil*. Mr Tagget entered into an agreement with a company to provide certain services to it on the basis that the company agreed to transfer a parcel of land, valued at the time at $450,000, to him for a nominal consideration. The land was transferred to Mr Tagget in 2005, when it was valued at $1.2 million. It was common ground that the benefit that he received was remuneration for the services he provided. The Full Court (Dowsett, Jessup and Gordon JJ) held that the taxpayer derived ordinary income within the meaning of s 6-5(2) of the ITAA 1997 in 2005, because that was when he received the land, the monetary value of which was to be determined at that time.
10. The Full Court rejected Mr Tagget’s submission that his case was analogous to *Abbott v Philbin* and that the benefit should have been brought into his assessable income at the value it had in 1998/1999 because he had then been granted valuable rights that could have been turned to pecuniary account immediately. The Court rejected the analogy with *Abbott v Philbin* on the basis that in 1998, he “was in the position of a person to whom conditional executory promises had been made, under which he would be remunerated for services rendered. Whether he would ever receive the contemplated remuneration was, in 1998, entirely a matter for the future”: *Tagget* at [30]. Their Honours also said (at [31]) that since Mr Tagget filed returns on a cash receipts basis he was to be assessed on the cash received by him in the year of assessment “because it is the receipt of the cash which constitutes a derivation of income for the purposes of s 6-5(2)”; and in the case of such a taxpayer “it will not be to the point that the right to receive the income accrued in an earlier year”.
11. Plainly enough, *Tagget* differs in a number of respects from the present case, but, for the reasons stated above, *Tagget* is not distinguishable on the basis that there was no conditional executory promise in the profit participation agreements akin to that in *Tagget*, as the appellant maintained. As in *Tagget*, in this case the remuneration by way of profit participation that was promised the appellant was a matter for the future, depending as it did on the profits (if any) of GI and whether the appellant had worked sufficiently long to satisfy the relevant vesting provision at the time of his termination (which was itself a matter for the future). In this sense, the appellant was in the same position as Mr Tagget: that is, he was in the position of a person to whom a conditional executory promise had been made, under which he would be remunerated for services rendered. Whether or not the appellant would receive the contemplated remuneration was, at the time the PPUs (including the GS and Phantom Units) issued also “entirely a matter for the future”.
12. The primary judge was not satisfied that the appellant made a gain that could be turned to pecuniary account in the way the authorities (such as *Abbott v Philbin*, *Donaldson v FCT*  and *FCT v McArdle*) contemplated when he received the PPUs (including the GS and Phantom Units) and associated contractual rights. We can discern no error in his Honour’s analysis. The appellant had a restricted right to assign certain rights to a personal holding company provided he had GI’s consent. We are not satisfied that the profit participation agreements in this or any other way conferred a gain at the time the GS or Phantom Units were allocated to him that might be turned to pecuniary account in the way these authorities would have it and constituted either ordinary income or, for the purposes of s 26(e) of the ITAA 1936, a benefit granted to the taxpayer of the kind to which the authorities refer. It does not seem to us that the appellant’s acquisition of shares in GH on terms that meant GH effectively controlled their assignment and GH re-acquired them on the appellant’s termination at a price equal to their par value has any material effect on this analysis. We are confirmed in this conclusion by the fact that the profit participation agreements and the shareholders’ agreements were “stapled” to one another (in the way already stated) and fall to be read together.
13. The fact that these two kinds of agreements were “stapled” in this way and fall to be read the one in light of the other does not mean that the PPUs (including GS and Phantom Units) were a calculation device to determine the value of the appellant’s shares in GH, as the appellant first contended in his written submissions in reply and later touched on at the hearing. As stated earlier, the focus must be on the terms of an agreement said to confer the reward for services, and there is nothing in the IPPA 2005 (or preceding profit participation agreements) nor in the SA 2005 (or the previous shareholders’ agreement) that would support the appellant’s proposition. To the contrary, as already indicated, the IPPA 2005 (like the IPPA 2003) expressly stated that that the PPUs were a mechanism for calculating the appellant’s share of profits in relation to GI (not GH). As already noted, earlier profit participation agreements were entirely consistent with this express statement. Separate provision was made for the relinquishment by the appellant of the GH shares back to GH at par value, for which the appellant received CHF80,000 from GH. We do not consider that the ‘stapling’ of the shareholders agreements to the profit participation agreements and linking the shares to the PPUs changes the essential character of the reward for services conferred on the appellant, which was the payment, by way of deferred compensation, of the Amount on the termination of his employment, which represented his share of profits in relation to GI.
14. Furthermore, some care must be taken with *Abbott v Philbin* in so far as it depends on the different wording of UK legislation, notwithstanding that Australian cases, including *Federal Commissioner of Taxation v Cooke* (1980) 42 FLR 403, *Donaldson v FCT*, *FCT v McArdle* , *Tagget v FCT* and *FCT v McNeil* treat it as having some persuasive authority. The legislative differences are reflected to some extent in the remarks of Lord Reid set out at [65] above. In the end, questions about the effect of such differences can be put to one side, however, because, for the reasons already outlined, this case is different from *Abbott v Philbin*.
15. For the foregoing reasons, we discern no error in his Honour’s finding that the payments made by GI to the appellant were assessable as ordinary income.
16. Having regard to this conclusion, it is unnecessary to consider the Commissioner’s arguments about *FCT v Myer Emporium Ltd* 163 CLR 199 and ETPs. It is also unnecessary to consider the parties’ respective submissions concerning the assessment of the cost base on the assumption that the appellant was merely assessable on the Amount as a capital gain, since in our opinion the primary judge was correct to reject this possibility.

## Derivation of income in the 2007 income year

1. At first instance, the appellant argued, and the primary judge accepted, that the appellant derived the first two instalments of the Amount in January 2008. As noted earlier, the Commissioner contended by his cross-appeal that the primary judge was wrong on this point and that the first two instalments of the Amount were derived in the 2007 income year because the appellant was entitled to receive those payments then and, in withholding them, GI acted consistently with the terms of the IPPA 2005. The Commissioner submitted that, in withholding the payments, GI dealt with them on the taxpayer’s behalf for the purposes of s 6-5(4) of the ITAA 1997 and, for this reason, that the payments were derived in the 2007 income year.
2. The primary judge rejected this submission, finding that the relevant agreement was made in January 2008, pursuant to which GI made a payment to the Swiss authorities in discharge of the appellant’s obligations to them: *Blank* [2014] FCA 517 at [44]. The appellant argued, and we accept, that his Honour was correct in this regard. An amount representing the two payments in question was not in fact dealt with on the appellant’s behalf until January 2008, as evidenced by a letter of 24 January 2008 with the accompanying agreement. The difficulty with the Commissioner’s submission is that it postulates that income is relevantly “dealt with” on behalf of a taxpayer when the debtor (here GI) refrains from making payment of a debt due to the taxpayer at the creditor’s request. *Brent v Federal Commissioner of Taxation* [1971] HCA 48; 125 CLR 418 indicates that more is required: see *Brent v FCT* at 125 CLR at 430 (Gibbs J). There was therefore no derivation of income in the 2007 income year when the first two instalments, though due, were merely withheld from payment to the appellant. It was the additional events in January 2008 that gave rise to the relevant derivation of income. The applicant derived the first two instalments as income when, in January 2008, they were paid, with his agreement, to the FTA by GI on his behalf.
3. For these reasons, we reject the Commissioner’s contention that the primary judge was in error in holding that there was no derivation of income in the 2007 income year in respect of the first two instalments of the Amount.

## The application of s 23AG

1. On an appeal from a final judgment or order, an appellant can challenge an interlocutory order which affected the final result and an appellate court can determine that challenge: *Gerlach v Clifton Bricks Pty Ltd* [2002] HCA 22; 209 CLR 478 at 483. The appellant challenged the primary judge’s refusal of leave to re-open primarily on the basis that his Honour misconstrued s 23AG of the ITAA 1936. The refusal of leave was capable of affecting the final result.
2. Section 23AG(1) exempts certain income from liability to income tax to the extent that it is satisfied and s 23AG(2) is not attracted. At the relevant time, s 23AG relevantly provided:
3. Where a resident, being a natural person, has been engaged in foreign service for a continuous period of not less than 91 days, any foreign earnings derived by the person from that foreign service is exempt from tax.

…

1. An amount of foreign earnings derived in a foreign country is not exempt from tax under this section if the amount is exempt from income tax in the foreign country only because of any of the following:

(a) a law of the foreign country giving effect to a double tax agreement;

(b) a double tax agreement;

(c) provisions of a law of the foreign country under which income covered by any of the following categories is generally exempt from income tax:

(i) income derived in the capacity of an employee;

(ii) income from personal services;

(iii) similar income;

(d) the law of the foreign country does not provide for the imposition of income tax on one or more of the categories of income mentioned in paragraph (c);

(e) a law of the foreign country corresponding to the *International Organisations (Privileges and Immunities) Act 1963* or to the regulations under that Act;

(f) an international agreement to which Australia is a party and that deals with:

(i) diplomatic or consular privileges and immunities; or

(ii) privileges and immunities in relation to persons connected with international organisations;

(g) a law of the foreign country giving effect to an agreement covered by paragraph (f).

…

(7) In this section:

…

***foreign earnings*** means income consisting of earnings, salary, wages, commission, bonuses or allowances …

***foreign service*** means service in a foreign country as the holder of an office or in the capacity of an employee.

***income tax***, in relation to a foreign country:

(a) in all cases—does not include a municipal income tax; and

(b) in the case of a federal foreign country—does not include a State income tax.

1. As already stated, the appellant submitted that the primary judge misconstrued s 23AG because his Honour read the provision as if it applied only to “foreign earnings derived ... exclusively from that foreign service”; and that the better view was that s 23AG permitted an apportionment between the number of days spent in foreign service and the number of days not spent in foreign service, alternatively, between PPUs (GS) issued before he became an Australian resident and the PPUs (Phantom Units) issued after he became an Australian resident.
2. Section 23AG(1) exempts only foreign earnings **derived** by a taxpayer **from foreign service** engaged in by him: cf. *Lopez v Federal Commissioner of Taxation* [2005] FCAFC 157; 143 FCR 574 at [77] (Ryan, Lander and Crennan JJ). Plainly enough, a taxpayer may receive an amount that is made up of income from foreign service and income from Australian service, in which case the amount can be separated into exempt and assessable income (assuming s 23AG(2) has no application). The provision can, however, only apply where there is the requisite connection between the taxpayer’s foreign earnings and foreign service. Not all foreign earnings will be derived from foreign service; and not all foreign service will give rise to foreign earnings.
3. The expression “derived … from … foreign service” in s 23AG(1) shows that the requisite statutory enquiry is different from that in the former s 23(q) (referring to “derived … from sources out of Australia) or s 6AB of the ITAA 1936 (“derived from sources in a foreign country”). As a Full Court of this Court noted in *Chaudri v Federal Commissioner of Taxation* [2001] FCA 554; 109 FCR 416 at [14] (Hill, Drummond and Goldberg JJ), before the introduction of the first version of s 23AG in 1986, there was some disagreement as to whether or not the source of personal services income was referable to the place where the contract of employment was made or the place where the services were performed. Section 23AG(1) requires no such constructional choice. It does, however, require that the taxpayer’s foreign earnings are derived from foreign service.
4. In this case, no part of the Amount can be accurately characterised as earnings “derived … from … foreign service”, as opposed to earnings derived from foreign **and** Australian service. This becomes clear when the bases for apportionment suggested by the appellant are considered. In this circumstance, such authorities as *Commissioner of Taxation (NSW) v Meeks* [1915] HCA 34; 19 CLR 568, *Mount Morgan Gold Mining Co Ltd v Commissioner of Income Tax (Qld)* [1923] HCA 37; 33 CLR 76, *Commissioner of Taxation v Cam & Sons Ltd* (1936) 36 SR (NSW) 544, *Australian Machinery and Investment Company v Deputy Commissioner of Taxation* [1946] HCA 65; 180 CLR 9, *Federal Commissioner of Taxation v French* [1957] HCA 73; 98 CLR 389 (concerning s 23(q)) and *Roadshow Distributors Pty Ltd v Commissioner of State Revenue* [1998] 1 VR 535 – on which the appellant relied – provide little assistance. This is because the suggested bases of apportionment do not result in an amount of earnings that meets the statutory description in s 23AG(1).
5. The appellant first submitted that an appropriate method of apportionment in this case was to have regard to the number of days in foreign service compared with the number of days not in foreign service. The appellant proposed that this should be ascertained by comparing the number of days he spent as an employee of the Glencore Group in service in foreign countries (claimed as 3,686) compared with the number of days he spent as an employee of Glencore Australia in service in Australia (claimed as 1,825 days).
6. The Amount, which constituted the earnings at issue, represented the appellant’s aggregated share of the profits earned by GI as at the termination of his employment, as calculated under the IPPA 2005. As explained below, under the IPPA 2005 (as under the previous profit participation agreements) the Amount was incapable of apportionment as between earnings from foreign service, on the one hand, and earnings not from foreign service on the other because the agreed method of calculating that Amount did not allow for that distinction to be made. The Amount was incapable of being calculated on a per diem basis as the appellant proposed. The appellant’s entitlement to the Amount depended on his allocation of vested PPUs (whether GS or Phantom Units) and GI’s profits during particular periods, aggregated at the relevant Notice Date (here, the termination of his employment). The calculation was made irrespective of the days on which the appellant was employed at any particular place. No integer in the calculation PPUs or otherwise was affected by the place in which the appellant rendered services to a Glencore Group company. Furthermore, the agreed calculation contemplated periods that would not align with the proportional per diem basis proposed by the appellant. For instance, the appellant’s proposed proportional per diem basis did not attempt to align the number of days of the appellant’s service in foreign countries with GI’s profits in the same time span or spans. The vesting period requirement further confirms that any attempted per diem formula would be an artificial and inappropriate basis for apportionment.
7. While it may be possible to take apart the agreed formula and to create another formula that permitted a proportional per diem calculation referable to foreign and non-foreign service, this is not the formula that the parties agreed should be used to arrive at the Amount that would be paid to the appellant on the termination of his employment. The Amount was a single figure, calculated in an agreed way at an agreed time. Even if the IPP per PPU during a particular period could be ascertained on a daily basis, and whether that day was spent in foreign service or non-foreign service could be determined (a more nuanced approach than that proposed by the appellant), the calculation of the Amount required an aggregation of the IPP per PPU over the **entire** period in which each PPU stood in the appellant’s name, from the point of allocation until the Notice Date. In the appellant’s case, this entire period covered both the period of the appellant’s employment in “foreign service” and his employment in non-foreign service. In calculating the Amount it was irrelevant that the appellant had been allocated a PPU at the time when he said he was employed in foreign service. No part of the Amount can be properly described as earnings “derived … from … foreign service”. Rather, the whole of the Amount was aptly described as derived from both foreign service and non-foreign service.
8. Furthermore, the Notice Date was, as we have seen, provided by the termination of the appellant’s service in Australia; and, in this way, the appellant’s non-foreign service determined the point at which the aggregate of GI’s profits was to be calculated, and the final Amount ascertained.
9. The appellant’s second proposed basis for apportionment fares no better in the present context, and encounters the same difficulties as the first proposed basis. The appellant proposed an apportionment between PPUs (GS) issued before he became an Australian resident and the PPUs (Phantom Units) issued after he became an Australian resident. It was common ground that the appellant had 1,200 GS at the time he came to Australia. The appellant claimed nearly $124 million was exempt by reason of an apportionment based on the fact that the GS were granted in the course of his employment in South Africa, Switzerland and Hong Kong. The claimed amount of $124 million represented the proportion of his share of the profits (calculated under the IPPA 2005 as at the Notice Date) that was said to be referrable to the 1,200 GS. There are a number of difficulties with this analysis.
10. Again, the calculation of the Amount (as agreed) was by reference to **all** PPUs (whether GS or Phantom Units) that had been allocated to the appellant. The calculation was made by reference to the aggregate of GI’s profits during particular periods at the Notice Date. Thus, the PPUs allocated when the appellant was employed outside Australia continued as integers of the calculation of the Amount, or, to put it another way, the appellant’s share of GI’s profits at any particular time, including while he was in Australia, was determined by reference to all PPUs allocated to him regardless of where he had been employed when any particular PPU was allocated to him. The appellant’s location at any particular time was irrelevant to the ascertainment of these profits.
11. Further, as the respondent pointed out, by the end of 2001 and before the appellant arrived in Australia at the start of 2002, the appellant had notionally accumulated about USD14 million in his share of the profits attributable to his 1,200 GS. The appellant did not contend that this figure was the appropriate figure representing the PPUs issued before he became an Australian resident. Rather, as we have seen, the appellant argued for a figure of nearly USD124 million. The difficulty with the appellant’s contention is manifest at this point, because this latter figure includes most of his share of the profits earned by GI while he was an Australian resident (around USD109 million), on the basis that this proportion of the Amount that accumulated after 1 January 2002 arose in respect of GS allocated to him while he was in foreign service prior to 1 January 2002. We are unable to accept, however, that the USD109 million, which accumulated while the appellant was an Australian resident employed by Glencore Australia, is properly characterised as earnings from “foreign service”.
12. Senior counsel for the appellant submitted that the primary judge’s “central error” was that he mistakenly treated as determinative that “the mere fact that apportionment [was] required where a sum is received which can relate to foreign service and service which is not”. This was not an error made by the primary judge. The primary judge’s point was a different one: namely, that the method agreed on to calculate the Amount made it impossible to apportion the Amount as the appellant wished. In our view the primary judge correctly stated in his 22 May reasons (*Blank* [2014] FCA 517 at [36]):

It is not possible to identify any portion of the Amount as being derived exclusively from foreign service because the Amount was not calculated by reference to days of service. The Amount was “calculated on the basis of the results of GI (IPP). Solely for the purpose of calculating the amount of IPP, AG has issued to GI GS pursuant to Section [sic] 657CO which shall serve as PPU for the purpose of calculating the Employee’s IPP as provided in A.2. below”: Clause A.1.1. of the instrument pursuant to which the IPPA 2005 was constituted … . The Amount is a “single, undissected amount” to use the words of the High Court in *McLaurin v Federal Commissioner of Taxation* (1960–1961) 104 CLR 381 at 391, and its apportionment is not appropriate: “In such a case the amount must be considered as a whole: *Du Cros v Ryall* (1935) 19 TC 444 at 453”.

1. Hence the primary judge was correct to conclude that there was insufficient merit in the appellant’s foreshadowed argument to justify the appellant being granted leave to re-open his case. It is unnecessary to consider further the question of prejudice to the Commissioner if leave to appeal were granted.

# disposition

1. For the foregoing reasons, we would dismiss the appeal, with costs. We would also dismiss the cross-appeal, with costs.

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| I certify that the preceding one hundred and twelve (112) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Kenny and Robertson. |

Associate:

Dated: 29 October 2015

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 590 of 2014 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| --- | --- |
| BETWEEN: | VAUGHAN RUDD BLANK  Appellant |
| AND: | COMMISSIONER OF TAXATION  Respondent |

|  |  |
| --- | --- |
| JUDGES: | KENNY, ROBERTSON AND PAGONE JJ |
| DATE: | 29 OCTOBER 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

# PAGONE J:

1. This appeal concerns the tax treatment of payments received by the appellant, Mr Blank, or which were dealt with at his direction, from Glencore International in the 2007 to 2010 years of income. The Commissioner’s principal contention is that the payments were assessable upon Mr Blank’s receipt as ordinary income under s 6-5 of the *Income Tax Assessment Act 1997* (Cth) (“the 1997 Act”) as deferred compensation. Mr Blank’s principal contention is that he was assessable for the payments as a capital gain in consequence of CGT Event C2 happening upon the execution of a declaration. Each of the parties had alternative contentions but it may be convenient to deal with their principal contentions before turning to the alternative ways in which their cases were put.
2. Mr Blank signed a document on 15 March 2007 headed “Declaration of Assignment and General Release” confirming his termination of employment. In executing that declaration he relinquished and assigned certain rights in consideration of payment to him of USD$160,033,328.25 by Glencore International and CHF80,000 by Glencore Holding AG. These amounts were calculated by reference to entitlements which had accrued to him under incentive profit participation arrangements which attached to his employment since 1993.
3. Mr Blank was at all material times employed by a company within a group which may for convenience be referred to as the Glencore Group, although the relevant names changed over time as did Mr Blank’s employer within the group depending, in particular, on the country in which Mr Blank worked for the group. The Glencore Group operated one of the world’s largest international commodity trading businesses. Glencore International had been incorporated in Switzerland under the name Marc Rich & Co AG and changed its name to Glencore International AG in 1994. At all times Glencore International was a majority owned subsidiary of Glencore Holding AG which in turn had been incorporated in Switzerland under the name Newgen AG. Its name was changed to Glencore Holding in 1994.
4. Between November 1991 and 31 January 1996 Mr Blank was a resident of South Africa and was employed by SA Ore Pty Ltd (which was later named Glencore SA Pty Ltd) as a commodity trader in the coal division. Between 1 February 1996 and July 1999 Mr Blank was a resident of Switzerland and was employed by Glencore International as a trader in the coal division. Between 8 July 1999 and 1 January 2002 Mr Blank was a resident of Hong Kong and was employed by Glencore Asia Limited as a commodity trader in the coal division of the Glencore Group. In 2002 Mr Blank was employed by Glencore Australia as a senior trader in the coal division and became a resident of Australia. He held that position and worked for the Glencore Group between 2 January 2002 and 31 December 2006.
5. Glencore International had a profit participation plan between about 1993 and 2010 as part of the means by which key employees were rewarded and encouraged to remain within the group. Mr Blank was selected to participate in one of these plans from about May 1994 and continued his participation in the plans (as varied over time) until he ceased employment with the Glencore Group with effect from 31 December 2006. The general objective of the employee profit participation plans was for the Glencore Group, through the relevant employer, to provide an incentive to key employees by giving them a stake in the economic performance of the group during the time of their employment. Mr Andreas Hubmann, head of the share based compensation program of Glencore International plc (which at the time he gave evidence was then named Glencore Xstrata plc), said in an affidavit made for the proceedings that the purpose of the employee profit participation plans was as described in the annual prospectuses for the 2003-2007 years under the heading “Shareholders”. Under that heading in the 2007 prospectus the relevant arrangement with the employees was described as follows:

Glencore International is fully owned by its management and key employees through Glencore Holding AG (“Glencore Holding”) and Glencore L.T.E AG (“LTE”). The shareholding arrangements as described below are designed to promote management stability and to preserve Glencore’s capital. The arrangements lead to an alignment of the interests of management and key employees with those of Glencore. By investing their own capital (through sharing in Glencore International’s shareholders’ funds) management and key employees are motivated to take a long‑term view on Glencore’s key performance drivers, including long‑term producer and customer relationships, prudent risk management and protection of invested capital through succession planning that preserves continuity and stability. Only active employees of the Group are permitted to become shareholders of Glencore Holding or LTE.

This description is not of itself sufficient to determine the tax outcomes in dispute but provides a broad and convenient description of the purpose sought to be achieved by what was offered to employees including Mr Blank. That is to say, that part of his annual rewards included an ability to participate in the profits of the company by receiving entitlements which he could access only upon termination. The plan, as described, was seen as a means of having key employees “investing” what was described as “their own capital” and was only open to “active employees”.

1. The first Profit Participation Agreement entered into by Mr Blank was with Marc Rich & Co AG (as the relevant company within the group was then called). The arrangement involved two agreements bearing the date of 5 May 1994. At that time Mr Blank was employed by the Glencore Group in South Africa and he had no relevant connection with Australia. One of the agreements was headed “Profit Participation Agreement”, the other was headed “Shareholders’ Agreement”. The former recited in the preamble that Mr Blank’s employer (which at the time was, and was named, SA Ore Pty Limited) was willing to grant him “a participation in future profits” of the employer. The agreement then provided, by clause A.1, that the employer was to grant Mr Blank “a participation in future profits of [the employer], in the form of (a) ‘Genussscheine’ (GS) as per section 657 of the Swiss Code of Obligations (CO) and (b) a contractual claim hereunder, both defined herein and collectively referred to as ‘Profit Participation 1993’”. Clause A.2 provided the means for calculating Mr Blank’s profit participation by reference to the employer’s net income as stated in audited accounts. Mr Blank’s specific entitlement depended upon the number of GS issued to him as at a measuring date. Clause A.2 provided:

**Calculation**

The basis for the calculation of the EMPLOYEE’s Profit Participation 1993 shall be the net income as stated in the consolidated statement of income of the consolidated financial statements of [the employer] expressed in US$ as at December 31, as audited by [the employer’s] statutory auditors, prepared in accordance with International Accounting Standards (IAS) consistently applied by [the employer] and its subsidiaries (the Net Income), adjusted by the change in open contracts, if applicable, by the change of cumulative translation adjustment account, by any preferred dividend paid or accrued on shares B of [the employer] to [Glencore Holding], and by the net income attributable to shares A of [the employer], calculated as per Exhibit D to the sale and purchase and option agreement entered into between Marc Rich & Co Holding AG and [the employer] as of November 29, 1993, all adjustments to be calculated as per Annex C hereof (Net Income for Profit Participation).

Such Net Income for Profit Participation shall be calculated once yearly as of December 31 of each year or such other date as of which [the employer] closes its business year (Measuring Date) and the claims for Profit Participation 1993 shall finally be determined by [the employer’s] auditors. The first basis for the calculation of Profit Participation 1993 shall be the consolidated financial statements of [the employer] expressed in US$ as at December 31, 1993.

Such Net Income for Profit Participation shall be divided by the number of GS actually issued as of a respective Measuring Date and then multiplied by the number of GS actually held by the EMPLOYEE as of such Measuring Date (Yearly Profit Participation 1993). The Yearly Profit Participation 1993 will then be allocated as profit participation under GS and under the contractual claim in the proportion indicated herein (See C.3.5. and C.4.) and accumulated over the period the EMPLOYEE holds GS (Cumulative Profit Participation 1993).

Clause A.3 dealt with the GS generally and recorded that the employer was authorised under its Articles of Incorporation to issue GS registered in the name of their respective holders which granted to the respective holders a claim to profit participation. Clause B.1 made the Profit Participation Agreement conditional upon the execution by Mr Blank of the other agreement entered into, namely, the Shareholders’ Agreement. Clause B.1 of the Profit Participation Agreement provided:

**Execution of Shareholders’ Agreement [Glencore Holding]**

This Agreement shall only be valid if the Employee has executed the agreement for the administration of [Glencore Holding] (Shareholders’ Agreement [Glencore Holding]) and fulfilled his obligations thereunder, in particular to subscribe and pay the par value for the same number of shares in [Glencore Holding] as the number of GS the EMPLOYEE is entitled to receive hereunder.

Annexure C to the Profit Participation Agreement contained a form for the calculation of net income for profit participation.

1. The grant in clause A.1 of the Profit Participation Agreement was expressed to be a grant of two things, namely of the GS and of a contractual claim. The former was governed by clause A.3 and the latter by clause A.4. Clause A.3.1 described the GS as the “grant [of] a claim to profit participation”:

Under its articles of incorporation [the employer] is authorised to issue GS registered in the name of their respective holder which grant a claim to profit participation. While [Glencore Holding] as major shareholder of [the employer] will take the necessary resolutions, [the employer] shall undertake all corporate actions necessary to provide for a profit distribution as agreed herein.

Clause A.3.2 provided that the employer shall “issue to” the employee the number of GS indicated in annexure A. In the case of Mr Blank, 50 GS were provided to him in his first year of participation. Clause A.3.3 provided that the GS which were held by him were to be “returned” to the employer at the end of his employment together with an assignment in the terms of annexure B. Clause A.3.4 required Mr Blank to deposit all GS which were issued to him then or which may subsequently be issued to him in the future in a special blocked safe keeping account with the employer and provided that the GS could only be disposed of upon his instructions or based on a final judgment of a competent court. Clause A.3.5 provided that Mr Blank was to receive 55% of his Cumulative Profit Participation 1993 as profit distribution under his GS for as long as an approval by the Swiss Federal Tax Authorities was maintained. Clause A.4 provided that he was to receive the other 45% of his Cumulative Profit Participation 1993 as the contractual claim under the agreement.

1. No amount of any entitlement under the profit participation plan, however, was payable to Mr Blank under the Profit Participation Agreement until the termination of his employment. Clause A.5 provided for the due date of payment being, at the time, 30 days after notice of termination of employment or death. Clause A.6 relevantly provided for payment of the accumulated entitlements to be by instalments over a period of years once they became payable upon termination of employment in accordance with the terms of the agreement. The Commissioner’s assessment placed significant weight upon the fact that no amount was payable to Mr Blank until the termination of his employment. The Commissioner’s principal contention was that the participation plan provided for deferred payment of wages which Mr Blank, as a receipts taxpayer in the 2007 tax year, did not derive until receipt of his entitlement.
2. An additional and essential condition upon Mr Blank’s ability to take part in the profit participation plan was, as mentioned, the requirement that he enter into a Shareholders’ Agreement for the purchase of shares in Glencore Holding. Mr Blank purchased the requisite number of shares in Glencore Holding pursuant to the Shareholders’ Agreement which were held by him pursuant to that agreement. The Shareholders’ Agreement entered into by Mr Blank in 1994 recited, amongst other matters, the desire of the holding company to provide stability and to promote the continuity of the management and policies of both the employer and the holding company. In the same recital the parties recorded a desire “to restrict the manner and means by which the [relevant] shares in [the holding company] may be sold assigned or otherwise transferred”.
3. Mr Blank was required under the combined effect of the Profit Participation Agreement and the Shareholders’ Agreement to purchase the same number of shares in the holding company as had been issued to him by his employer as GS. Initially that required the acquisition by Mr Blank of 50 shares for which he paid 2,500 Swiss Francs in cash. One of the corresponding conditions in the Shareholders’ Agreement for the issue of shares under that agreement was that Mr Blank had entered into the Profit Participation Agreement. Clause D.2 required Mr Blank to deposit all of the shares in a special blocked safe keeping account which could not be disposed of except by joint instructions from him and the holding company or upon a final judgment of a competent court. Clause D.3 prevented Mr Blank from transferring or encumbering the shares thus acquired in the following terms:

Any [Glencore Holding] shares owned by a Shareholder may not be sold, assigned, transferred, disposed of, pledged or given any other lien on, nor shall any option, pre‑emption right or right of first refusal or the like be granted in connection with [Glencore Holding] shares without the prior consent of [Glencore Holding] in writing.

Clause D.4 granted an option to Glencore Holding to purchase Mr Blank’s shares upon the occurrence of a number of triggering events including the termination of his employment.

1. Mr Blank had been allocated a combined total of 1,200 GS before he commenced employment in Australia in 2002. He had received allocations totalling the 1,200 GS in varying amounts from effective allocation dates of 1 January in each of the years 1993 and 1995 to 2001. Mr Blank would then not have been subject to any Australian tax had he terminated his employment and become entitled to enjoy the fruits of 1,200 GS in 2002 rather than to have become an employee of the group in Australia. He was thereafter issued with a further 300 shares in Glencore Holding and a further 300 GS by Glencore International on 6 May 2002 with an allocation date of 1 January 2002 after transferring to Australia.
2. The terms upon which the GS and shares were issued to Mr Blank varied from time to time but did not differ materially as far as concerns the tax issues in dispute. One variation which was made during this period that should be mentioned is that made by an amendment dated 23 August 1996 affecting the 1996 allocation. Amongst the amendments made to the Profit Participation Agreement at that time was the introduction of a vesting date which had the effect of deferring enjoyment of entitlements flowing from the profit participation plan by 24 months after termination of employment. Clause A.2.3 was substituted by the following provision:

Such Net Income for Profit Participation shall be divided by the number of GS actually issued and participating as of a respective Measuring Date and then multiplied by the number of GS actually held by EMPLOYEE as of Measuring Date (Yearly Profit Participation). The Year Profit Participation will then be allocated as profit participation under GS and under the contractual claim in proportion indicated herein (see A.3.5 and A.4 respectively). Only such GS are participating in the net income for profit participation which at the date of receipt of notice of termination of the employment of EMPLOYEE as per A.5 hereof have been issued for more than 24 months, the date of issue being January 1 of the first calendar year for which such GS have been issued. This vesting period shall apply to such GS only which have been issued to EMPLOYEE in the 1996 or subsequent years and shall not apply in case of death or permanent disability of the EMPLOYEE.

Clauses A.5 and A.6, amongst others, were also amended, but in general terms they continued to provide for a payment mechanism which converted an employee’s entitlement under the GS to a debt which would become due 30 days after notice of termination of the employment and became payable by instalments over five years.

1. Another change that requires mention was made with effect from 2003 for units to be issued by Glencore AG, a subsidiary of Glencore International. The mechanism to give effect to the profit participation arrangements from that year was for Glencore AG to issue what were described as phantom units rather than GS. A new Incentive Profit Participation Agreement was entered into with Mr Blank but in general terms the phantom units were treated in the same way as the GS which had been issued under the previous arrangements. The phantom units were used for the purpose of calculating Mr Blank’s profit participation in respect of which the units applied and were no doubt called “phantom” units because they were given by the Glencore subsidiary to reflect interests in Glencore International rather than being given by Glencore International itself. The commercial objective was, however, the same as previously, and the legal mechanism adopted was designed to achieve the objective of enabling the relevant key employees to have the phantom units as the means by which to enjoy profits in the future. The arrangements continued to require that Mr Blank acquire shares to match the number of phantom units and that the units and shares be held by him until termination of employment. Mr Blank was issued under that arrangement with 100 phantom units shortly after 7 July 2003 with an allocation date of 1 January 2003 and he acquired a further 100 shares in Glencore Holding.
2. The contractual terms governing Mr Blank’s entitlements as at the date of his termination of employment in 2007 are to be found in the Incentive Profit Participation Agreement and the Shareholders’ Agreement entered into in 2005. The general terms and effect of these were the same as had existed between the parties before their execution in 2005 but their terms need specifically to be considered because his entitlements upon termination, including any which had (or may have) accrued before termination, were governed by the 2005 agreements. The 2005 Shareholders’ Agreement applied to and governed all of Mr Blank’s shares in Glencore Holding but the terms of the new Shareholders’ Agreement were substantially as they had been under the earlier Shareholders’ Agreement signed in 1994. It remained a requirement under the 2005 agreements for Mr Blank to purchase shares in connection with the profit participation plan which thereafter was referred to as the Incentive Profit Participation Agreement. Clause A.2 continued to make it a condition for Mr Blank to have issued shares and that he had executed an agreement with Glencore International or Glencore, or both, for profit participation under the earlier arrangements.
3. The primary judge correctly focused upon the terms of the 2005 agreements in considering the effect of Mr Blank’s entitlements when he executed the declaration on 15 March 2007 following his termination of employment with Glencore Australia on 31 December 2006. The 2005 Incentive Profit Participation Agreement was intended by the parties to cover, and did cover, any accrued entitlements under the earlier agreements. His Honour set out the relevant provisions of the 2005 Incentive Profit Participation Agreement in detail and noted that it had replaced the earlier 1999 agreement, and that the 2005 Shareholders’ Agreement replaced the earlier 1994 Shareholders’ Agreement. The 2005 agreements, however, did not create new rights in substitution of rights which may have accrued by 2005 but, rather, provided that accrued rights were to be dealt with under the 2005 agreements. Clause A.3.1 of the 2005 Incentive Profit Participation Agreement authorised Glencore to issue GS but the 2005 agreement recognised, in clause A.3.2, that Glencore had issued GS to Glencore International and that Glencore International had allocated to Mr Blank what was described in the 2005 agreement as the number of “PPU” indicated in annexure B. The reference to PPU was to the term “Profit Participation Units/PPU” which was defined in clause 17 to mean:

… the number of GS actually allocated and participating as of a respective date whether issued by [Glencore] under the Plan and any Incentive Profit Participation Agreement (including this agreement) and held by [Glencore International] in accordance with the terms of the Plan and this Agreement or GS issued by [Glencore International] and held directly by Employees of GI or any of its Subsidiaries pursuant to profit participation agreements.

These provisions contemplated that whatever had previously been granted to Mr Blank before the 2005 agreements continued to exist but that rights in existence before the 2005 agreements were entered into were thereafter governed by the 2005 agreements. Annexure B to the 2005 Incentive Profit Participation agreement listed the PPU which had been allocated to Mr Blank by reference to the dates and numbers of GS issued from 1 January 1993 to 1 January 2003. Mr Blank thus continued to hold the GS and phantom units which had been issued to him and which were treated as the Profit Participation Units/PPU for the purpose of calculating the deferred compensation under the 2005 agreement. It is also significant to note that the arrangements had always required the issue of shares in tandem with the GS, phantom units or PPUs, and that the shares which had previously been issued to Mr Blank continued unaltered except as to the terms under which they were to be dealt with pursuant to the combined effect of the 2005 Incentive Profit Participation Agreement and the 2005 Shareholders’ Agreement effective as at the date of termination.

1. Mr Blank terminated his employment with effect from 31 December 2006. On 15 March 2007 Mr Blank executed a Declaration of Assignment and General Release as contemplated by the terms governing his entitlements as at the date of termination of 31 December 2006. His Honour summarised that step at [38]-[40]:

Declaration of Assignment and General Release

38 On 15 March 2007, the applicant executed a Declaration of Assignment and General Release (“Declaration”) (see Annex C in the extracts reproduced in [36] above) by which, in consideration for USD160,033,328.25 and CHF80,000, he:

(1) Relinquished “his claim to payments with respect to the PPU and GS allocated in his name together with all preferential and ancillary rights to GI”;

(2) assigned “all GS, registered and/or held in his name together with all preferential and ancillary rights, to GI, and irrevocably [authorised] GI to take over the respective certificates”; and

(3) assigned “all his shares of GH, registered and/or held in his name together with all preferential and ancillary rights to GH”.

39 The form of the Declaration was prepared by staff of GI and provided to the applicant for him to sign in late February or early March 2007. Owing to a mistaken deletion from the proforma declaration contained in Annex C of the IPPA 2005, the Declaration appears to state that the entire consideration to be received by the applicant was to be paid by GH. In fact only CHF80,000, being the par value of the applicant’s shares in GH, was to be paid by GH. The remaining USD160,033,328.25 was to be paid by GI in accordance with the “conditions and limitations” provided in the IPPA 2005 (see cl E of the Declaration).

40 In accordance with the IPPA 2005, the USD160,033,328.25 was payable in 20 instalments over a five year period (together with interest at the six month LIBOR rate for USD on the outstanding balance of the debt), with the final instalment being payable on 31 December 2011.

Between 29 June 2007 and 1 July 2010 Glencore International made 15 instalment payments to Mr Blank, or as directed by him, in accordance with the contractual obligations for amounts to be paid in respect of his entitlements. Those payments were set out in a table at [46] of his Honour’s reasons for judgment and need not be reproduced for present purposes. On 15 January 2008 Mr Blank executed an agreement with Glencore International to alter his repayment schedule to enable Glencore International to apply the first four instalments to pay Mr Blank’s dividend withholding tax liability to the Swiss Federal Tax Authority. His Honour found, and the parties did not otherwise dispute before him, that nothing turned on the fact that the payments were treated as subject to Swiss dividend withholding tax because the characterisation under Swiss law was not relevant to the characterisation of the payments under Australian tax law. On 31 January 2008 Glencore International paid USD30,806,415.70 (AUD33,938,983.92) to the Swiss Federal Tax Authority in respect of Mr Blank’s Swiss dividend withholding tax liability from his entitlements under the arrangements which had been in place since 1994. Mr Blank claimed relief from double taxation on 10 March 2008 pursuant to the Double Taxation Agreement between Switzerland and Australia which limited Swiss withholding tax on dividends to 15%. On 19 May 2008 he received a refund of CHF19,571,879.32 (AUD19,360,846.10) from the Swiss Federal Tax Authority. On 20 November 2008 Glencore International paid a further sum of CHF136,325 (AUD173,464) to the Swiss Federal Tax Authority representing a final adjustment of his Swiss dividend withholding tax liability. AUD14,751,601 was the amount finally paid in Swiss tax on account to Mr Blank’s liability in that jurisdiction. In total $145,944,253.55 was paid to Mr Blank (or as directed by him) between 29 June 2007 and 1 July 2010.

1. The Commissioner assessed all of the amounts paid to Mr Blank as deferred compensation as reward for services in the year they were received by Mr Blank, or dealt with as he directed, irrespective of whether any amount paid had been referable to years of income before Mr Blank had any connection with Australia. Mr Blank contended that the entitlements had been derived in the years in which the GS had been allocated to him but that he was assessable for capital gains upon his disposal of those entitlements as taxable assets consequent upon his termination of employment. The trial judge, consistently with the competing claims, analysed the issue to be resolved as requiring the identification of what had been the reward for service. At [98] his Honour said:

The issue here is to be resolved by identifying what is the reward for service. Is it the contractual right to be paid the Amount conferred by the terms of the IPPA 2005 in substitution for GS entitlements conferred under earlier manifestations of the PPPs, or is it the money constituting the Amount either when it falls due, in this case on 15 March 2007, or later as and when it is paid to the applicant that is the reward for service? In *Abbott v Philbin* [1961] AC 352, the majority of the House of Lords identified the reward or the “perquisite”, as it was referred to in r 1 of Sch 9 of the *Income Tax Act 1952* (UK), dealing with tax under Schedule E, as the option and held that it was its monetary value (if any) at the date the option was granted which represented “the profit or perquisite” of the office. In doing so, the majority rejected the Crown’s contention that the reward (“the profit or perquisite”) was the difference between the market value of the shares acquired at the time of the exercise of the option and the exercise price, in the year that the option was exercised. It is trite that the majority concluded that the option was not incapable of being turned into money or of being turned to pecuniary account within the meaning of those phrases in *Tennant v Smith* [1892] AC 150 merely because the option itself was not assignable (Lord Radcliffe at 378). What is less observed in the cases that have followed and in academic writings is that one of the reasons why the majority decided it was the option which was the reward in the year of grant, and not the profit on exercise in the year of exercise, was because if it was the latter, there may be no relevant relationship between the profit and service in that year or in the year of grant to bring the profit within the charge to tax. The matter was put, perhaps best by Lord Reid, at 372–373:

But if a reward is given in the form of an option and the option is itself the perquisite, it would generally be sufficiently related to the year in which it is given to be properly regarded as a perquisite for that year. If, on the other hand, the option is not the perquisite–if there is no perquisite until the option is exercised and shares are issued, it may be many years later–in what sense would the shares be a perquisite for the year when they were issued. There would be no relation whatever between the service during that year and the giving of the option many years earlier or the exercise of the option during the later year. I do not wish to express any concluded opinion on this point but it does seem to lend support to the conclusion which I have reached on other grounds.

His Honour concluded that the amounts received by Mr Blank represented money derived by him on a receipts basis as and when paid to him or applied on his behalf by Glencore International. His Honour rejected Mr Blank’s contrary submission as being predicated on a premise which his Honour found did not accord with the facts. His Honour said at [96]-[97]:

96 But the applicant says that what was provided as a reward for services as an employee were the GS issued to him, not the proceeds of their subsequent realisation following the termination of his employment. According to the applicant, each GS was a benefit which was capable of being turned to pecuniary account and hence was income according to ordinary concepts as a reward for services or, alternatively, was a benefit “allowed, given or granted” to the applicant in respect of, or for, or in relation directly or indirectly to his employment in the year of income in which they were “allowed given or granted” within the meaning of the former s 26(e) of the 1936 Act.

97 The difficulty I have with the applicant’s submission is that it is predicated on a premise which does not accord with the facts. Whatever the applicant was granted or issued with under earlier manifestations of the PPPs, the applicant was not granted and did not hold anything in the way of a right or interest in property under the IPPA 2005: see cll A.1.1 and A.1.2 which make it clear that AG issued GS to GI not to the applicant; that the applicant did not have any interest whatsoever in the GS; that the applicant did not acquire by reason of the plan or the IPPA 2005 any right in or title to any assets, funds or property of GI, AG or any other subsidiary whatsoever, including any specific funds or assets (including the GS which AG issued to GI). Indeed, under the IPPA 2005 the applicant was granted, and held, nothing more than a contractual right, if one of certain nominated events occurred and if he executed and submitted to GI the Annex C Declaration before a fixed date, to become a creditor of GI on that fixed date for a sum of money quantified by reference to a formula, which debt was payable, together with interest, by 20 equal quarterly instalments.

Critical to his Honour’s conclusion against Mr Blank was his Honour’s analysis that Mr Blank “was not granted and did not hold anything in the way of a right or interest in property” under the 2005 Incentive Profit Participation agreement. Mr Blank challenged the conclusion and that analysis on appeal.

1. Mr Blank’s entitlement to be paid money upon termination of his employment pursuant to the agreements, whether the 2005 agreements or their predecessors, was one of a bundle of interconnected rights. Whatever entitlements Mr Blank had under the participation agreements, including the 2005 participation agreement, they were only effective pursuant to their terms upon his execution of a Shareholders’ Agreement and fulfilling his obligations under the Shareholders’ Agreement which, amongst other things, required that Mr Blank subscribe for, pay for, and hold shares. Clause B.1 of the 2005 participation agreement, by way of example, provided:

B. GH Shares

B.1. Execution and Maintenance of Shareholders’ Agreement ([Glencore Holding])

This Agreement shall only be effective if Employee has executed the Shareholders’ Agreement ([Glencore Holding]) and fulfilled his obligations thereunder, in particular to subscribe and pay the par value for the same number of shares in [Glencore Holding] as the number of PPU the Employee is entitled to have allocated to him hereunder, and for as long as such Shareholders’ Agreement ([Glencore Holding]) remains in force.

Mr Blank duly executed a Shareholders’ Agreement as required by each of the participation agreements, including the 2005 participation agreement. The combined effect of the participation agreements and the Shareholders’ Agreements was to confer upon employees like Mr Blank an entitlement like that of a shareholder except that enjoyment of its fruits was deferred until the termination of his employment. He did not have a bare entitlement to be paid money in the future in consideration for work done or to be done but, rather, an entitlement in the future to share in the profits of an enterprise by reference to his past performance to be calculated by reference to the economic success of the enterprise. His entitlement to receive money upon termination of his employment was specifically linked to his position as a shareholder and his receipt of the money was conditional upon disposing of his shares. The intention of the parties implementing the arrangement was to put employees like Mr Blank in part in the position of shareholder by linking his reward for service with his position as a shareholder for as long as he was also an employee.

1. The method for calculating Mr Blank’s entitlements under the various iterations of the plans had the effect, as was intended, of enabling Mr Blank to share in the profits of the enterprise along with shareholders. Clause A.2 in the 1999 agreement, as his Honour found at [21(7)], provided that the amount to which Mr Blank was entitled with effect from 31 December of each year was a portion of the consolidated profits of Glencore International for that year dependent on the number of GS held by him at that time, and that the amounts aggregated over the period in which Mr Blank held the GS to arrive at the total of his profit participation. That mechanism did not change over time and continued in clause A.2 in the 2005 Incentive Profit Participation agreement which provided:

A.2. Calculation

A.2.1 IPP commences as of the Allocation Date. The first Measurement Date is the one following the Allocation Date.

Only such PPU that have been allocated at the Notice Date for more than 24 months from the Allocation Date shall be vested. This vesting period shall not apply in case of death or permanent disability of Employee.

A.2.2 The basis for the calculation of Employee’s IPP are the audited consolidated financial statements of [Glencore International] prepared in accordance with IFRS.

A.2.3 Net Income for IPP for a particular period shall be divided by the number of PPU allocated and participating during that period to produce the Period Amount. The number of PPU participating in such period is calculated as the number of PPU participating at the Measurement Date and the PPU repurchased during that period. Where such PPU are not held for the whole calculation period, the calculation shall be performed by applying monthly fractions.

The Period Amount calculation shall be reviewed and reported by [Glencore International]’s independent statutory auditors, as being in accordance with this Agreement.

A.2.4 The Periodical IPP for each allocation of PPU to Employee shall be aggregated over the period the Employee holds such PPU from the Allocation Date to and including the Notice Date. For the purpose of this Agreement, notice of termination of employment shall be valid whether made in writing or made otherwise and independent of any contestations or conditions or requirements of the law governing the employment or other engagement of the Employee.

The last Measurement Date is the date of [Glencore International]’s audited consolidated financial statements following the Notice Date.

A.2.5 If, at the Notice Date, the aggregated Periodical IPP of Employee is negative, such amount shall be deemed to be zero. Such negative amount shall be proportionately allocated to the PPU allocated to Employees at the Measurement Date on or following such Notice Date.

The 2005 agreement carried over the entitlements that had accrued to Mr Blank through the definitions of “allocation date” and “IPP” referred to in clause A.2. The 2005 agreement thus ensured that what Mr Blank would be paid pursuant to the 2005 agreement would include the amounts which Mr Blank had become entitled to be paid upon termination of his employment by reference to earlier periods under the earlier agreements.

1. From 2005 the rights equivalent to the GS were to be issued by Glencore to Glencore International and not to Mr Blank. Section A.1 of the 2005 Incentive Profit Participation agreement provided:

A.1 Grant; No Right to Assets

A.1.1. [Glencore International] grants Employee deferred compensation which will be calculated on the basis of the results of [Glencore International] (IPP). Solely for purposes of calculating the amount of IPP, [Glencore] has issued to [Glencore International] GS pursuant to Section 657 CO which shall serve as PPU for the purpose of calculating Employee’s IPP as provided in A.2. below.

A.1.2. The parties to this Agreement acknowledge that the GS issued by [Glencore] and owned and held by [Glencore International] are being issued solely for the purpose of implementing the Plan and calculating the amount of deferred compensation in the form of PPU which shall be allocated to Employee in accordance with the Plan and this Agreement. Employee shall not have nor be deemed to have any interest whatsoever in the GS. Employee shall not acquire by reason of the Plan or this Agreement any right in or title to any assets, funds or property of [Glencore International], [Glencore] or any other Subsidiary whatsoever, including, without limiting the generality of the foregoing, any specific funds or assets (including the GS which [Glencore] has issued to [Glencore International] pursuant to A.l.l).

The effect of these provisions was in part to ensure that Mr Blank did not obtain a proprietary right in the GS which were granted to Glencore International. Mr Blank, however, had already received GS under previous arrangements and those GS had been issued to him personally. Those GS had not been assigned to Glencore or to anyone else. Clause 17 of the 2005 Incentive Profit Participation agreement acknowledged that GS had been issued and were “held directly by employees” and the 2005 Incentive Profit Participation agreement did not seek or purport to effect any change to, or assignment of, the entitlement which Mr Blank had to the GS before the 2005 agreement. The new GS allotted under the 2005 agreement might not have given Mr Blank a right or interest in the GS granted by Glencore to Glencore International but the 2005 agreement did not purport to effect any diminution in whatever proprietary rights Mr Blank may have had before then to the GS that had been issued to him. That he continued to hold proprietary interests in the GS acquired before 2005 is confirmed both by the 2005 agreement as well as the terms of the Declaration of Assignment and General Release which he gave on 15 March 2007 which in terms effected the relinquishment and assigned his rights as holder of GS in his name.

1. One of the bundle of rights which Mr Blank obtained through the various participation agreements was undoubtedly a right which entitled him to be paid money upon termination of his employment, but the entitlement, and its character for fiscal purposes, cannot be divorced from the other terms of the agreement any more than a shareholder’s entitlement to receive a dividend can determine the character of the shareholder’s rights as against a company. Mr Blank had a chose in action upon the grant of the GS and phantom units under the participation agreements similar to that considered in *Abbott v Philbin* [1961] AC 352. That case concerned the assessability under Schedule E to the *Income Tax Act 1952* (UK) of an option granted to a taxpayer in October 1954. The relevant UK taxing provision at the time charged tax on every person exercising an office or employment in respect of, amongst other things, “perquisites or profits”. Mr Abbott had been the secretary of a company when he was granted an option to purchase 2,000 ordinary shares in the company at the price of 68s 6d per share. The price of the option was £20 and was expressed to be non‑transferrable and to expire after 10 years or on the earlier of the death or retirement of the holder. Mr Abbott exercised the option in respect of 250 shares in March 1956 at the option price of 68s 6d per share when the price of the shares was 82s. At issue in the case was the date at which Mr Abbott had derived an amount as “perquisites or profits” within the meaning of Schedule E of the *Income Tax Act 1952* (UK). The revenue contended, as does the Commissioner in the case of Mr Blank (although the Commissioner’s contention is on a fundamentally different basis than was relevant in *Abbott v Philbin)*, that there had been no derivation until the date the options were exercised, whilst Mr Abbott contended, as does Mr Blank in this case, that derivation had occurred when the options were granted. The majority in the House of Lords held that Mr Abbott was assessable under Schedule E when the option was granted because he was then in receipt of an entitlement with monetary value which represented the profit or perquisite of his office. Viscount Symonds explained at 365:

My Lords, I cannot entertain any doubt that, when the company granted the option to the appellant, he acquired something of potential value. I do not think that it matters whether it falls into the category of proprietary or contractual right, or into some dim twilight that divides those juristic conceptions. We are concerned with a taxing statute whose language is to be reconciled with the law of England and Scotland alike, and the chosen words “perquisite or profit whatsoever” are as wide and general as they well could be. I can concede no relevant limitation of their meaning except in the oft cited words of Lord Watson in *Tennant v. Smith* that they denote “something acquired which the acquirer becomes possessed of and can dispose of to his advantage – in other words, money – or that which can be turned to pecuniary account.”

The judgments of Lord Reid and Lord Radcliffe, at 376 and 379 respectively, are to the same effect. One difference between the facts in *Abbott v Philbin* and those in the present appeal is that Mr Abbott received an option to purchase shares in 1954 whereas the right received by Mr Blank was different by the grant of the GS in each of the years 1993 and 1995 to 2003. Each taxpayer, however, was relevantly a receipts taxpayer and the fact that the right given to Mr Blank was not an option would not prevent derivation by him upon the grant of the GS and phantom units if he received something that was assessable.

1. Another difference is that the taxpayer in *Abbott v Philbin* was able to exercise the option at any time from the date of the grant, whilst Mr Blank had a restriction upon the rights he acquired. However, a restriction upon the ability to exercise the option in *Abbott v Philbin* would not have prevented derivation at the time of the grant of the option for Australian tax purposes. In *Donaldson v Commissioner of Taxation (Cth)* [1974] 1 NSWLR 627 Bowen CJ in Eq said at 643-4:

[…] I find myself in general agreement with the argument advanced by counsel for Donaldson that the *Income Tax Assessment Act* is dealing with what “comes in” to the taxpayer, and, generally, with what is enjoyed or capable of being enjoyed by the taxpayer in the income year in question. But these are generalizations which do not greatly assist in the resolution of the present case. I am unable to accept a proposition that the option rights conferred on Donaldson did not “come in” to him or were not enjoyed by him in the year of income. Items rendered assessable income by s. 26 (e) have to be regarded according to their nature, whether they are meals, use of quarters, or option rights. To say the option rights could not be exercised in the year of income is no answer to the application of s. 26 (e). Indeed, it is to confuse the enjoyment of the fruit of the rights with the enjoyment of the rights, a mistake made in argument on behalf of the Crown in *Abbott v. Philbin*. Again, to say rights are non-transferable is no answer to the application of s. 26 (e). Meals which are consumed may be non‑transferable and yet they are within s. 26 (e). What is made assessable income by s. 26 (e) is the value to the taxpayer of the benefit allowed, given or granted to him, that is to say, the rights conferred on him which others lack. Whether they have any value to him, and what that value is, are matters to be determined according to the facts of each particular case, preferably with the assistance of expert evidence, but that does not affect the principle that, where such rights are given they are present rights, though exercisable in the future, and confer an immediate benefit upon the taxpayer which he enjoys as the owner of them.

*Federal Commissioner of Taxation v McArdle* (1988) 89 ATC 4051 applied this analysis in another case involving the exploitation of rights, including stock options and stock appreciation rights in return for a monetary amount. The critical question in each case was whether there had been an assessable receipt by a taxpayer who accounted for tax on a receipts basis.

1. The Commissioner sought to distinguish these cases on the basis that they each involved the disposal by the taxpayer of property rather than, as the Commissioner contended in this case, the satisfaction of a contractual right to be paid a sum of money. Mr Blank’s contractual right to receive money, however, is not to be isolated from the other rights and entitlements that necessarily accompanied that right. Nor is it accurate to say that Mr Blank simply received money in 2007 in discharge of an earlier entitlement to be paid money in the future. The amounts payable to Mr Blank pursuant to the declaration signed by him on 15 March 2007 were expressed to be payable (consistently with the terms of the participation agreements at all times) upon him (a) relinquishing to Glencore International all of his claim to payment with respect to the PPU and the earlier GS allotted to him in his name, together with all preferential and ancillary rights, (b) assigning all GS registered or held in his name together with all preferential and ancillary rights to Glencore International and irrevocably authorising Glencore International to take over the respective certificates of the GS registered or held in his name, and (c) assigning all of his shares in Glencore Holding which were registered or held in his name together with all preferential and ancillary rights to Glencore Holding and irrevocably authorising Glencore Holding to take over the respective certificates.
2. Mr Blank disposed of the entire bundle of rights he had accrued on 15 March 2007 when he executed the declaration of assignment and general release. The declaration of assignment and general release was in the following terms:

**Declaration of Assignment and General Release**

by

Vaughan Blank, 4 Pacific Street, Watsons Bay, New South Wales 2030 Australia (Employee)

A. The Employee confirms the termination of his employment or other engagement with AG or one of the Subsidiaries. Notice of termination has been received as of December 31, 200~~7~~ 6

B. In consideration of the sum of

USD 160’033’328,25 (US Dollars Onehundredsixtymillionthirtythreethousandthreehundredtwentyeight 25/00) [Paid by GI]

and

CHF 80’000 –

(Swiss Francs Eighty thousand 00/00)

to be paid by Glencore Holding AG (GH), the Employee hereby

1. relinquishes his claim to payments with respect to the PPU and GS allocated in his name together with all preferential and ancillary rights to GI;
2. assigns 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;

c) assigns all his shares of GH, registered and/or held in his name together with all preferential and ancillary rights to GH, and irrevocably authorizes GH to take over the respective certificates.

C. Per A.4. of the Incentive Profit Participation Agreement and B.3.5 of the Profit Participation Agreement, GI is currently required to collect and pay to the Swiss tax authorities the Swiss withholding tax, which is 35% of 55% of the principal amount of Employee’s total IPP. This represents 35% of 55% of the USD consideration in B above and will be withheld from each instalment payment or any lump sum payment, as applicable. AG and/or GI may be required by law to collect and pay other amounts, which if applicable, will be withheld from each instalment payment.

D. GI and GH are entitled to set-off against the claim of the Employee as per B. above, any and all claims GH, GI or any of its direct or indirect subsidiaries may have at any time against Employee irrespective of any assignment by Employee of rights and claims under the Incentive Profit Participation Agreement or the Profit Participation Agreement to a holding company, trust, foundation or otherwise.

E. Payment of the total sum indicated under B. above shall be effected after any set-off or withholding in such instalments and on such dates and under such conditions and limitations as provided for in the respective agreement of the Employee with GI, AG and GH, in particular the Incentive Profit Participation Agreement and in the Shareholders’ Agreement (GH).

F. With the exception of the payment of the total final consideration referred to in B. above, the Employee herewith explicitly releases and discharges GI, GH and any subsidiaries or affiliates of such companies (hereinafter the Companies) from any and all liabilities and/or responsibilities, both contractual or in tort, in connection with any employment, loan, profit participation or other contractual relationship between the Employee and any of the Companies.

G. If not already terminated by separate notice of termination or for other reasons, the undersigned hereby terminates his Incentive Profit Participation Agreement with GI and his Shareholders’ Agreement (GH) with GH, effective at the date hereof.

This or any other termination of the Incentive Profit Participation Agreement does not affect the confidentiality obligations as per C.9 thereof which shall continue to be effective for an undetermined period of time

H. This declaration of assignment and general release shall be governed by and construed and interpreted in accordance with the substantive laws of Switzerland.

Place and date: Signature:

Sydney, 15 March 2007 [Signed]

The Employee

One of the rights within that bundle (as was also the case in *Federal Commissioner of Taxation v McNeil* (2007) 229 CLR 656) was a right to be paid money.

1. *Abbott v Philbin* has been cited with approval in Australia, including by the High Court in *Federal Commissioner of Taxation v McNeil* (2007) 229 CLR 656, 671 [51]. In that case the court accepted, albeit as the common position of both parties, that the taxpayer had derived income upon the grant to her of the right to sell shares. In *McNeil* the taxpayer had a right to receive money as part of a put option under a scheme to buy back the shares of a company. The taxpayer, Mrs McNeil, had held shares in St George Building Society Limited which had been converted into ordinary shares in St George Bank Ltd in 1992. On 12 January 2001 the bank announced an off-market buy-back of ordinary shares under a scheme giving shareholders, including Mrs McNeil, a put option by which they could require the company to purchase shares at the market price on 19 February 2001. The relevant terms were set out in the joint judgment at [5]:

For every twenty ordinary shares held at the record date and rounded down to the nearest whole number, SGL on 19 February 2001 (the listing date) would issue to St George Custodial Pty Ltd (Custodial) as trustee for the shareholder one “sell-back right”. This would yield 272 sell-back rights for the taxpayer. The term “buy-back” was used from the perspective of SGL, while “sell-back” was used from the perspective of shareholders. Each sell-back right was to be a put option to oblige SGL to buy back one share for $16.50.

The majority of the court held that the grant of the sell-back rights to Mrs McNeil on the listing date constituted the derivation of income by her. At [51] in the reasons for judgment of the majority their Honours said:

For the reasons stated earlier in these reasons, the Commissioner’s submissions that the majority of the Full Court erred should be accepted. In particular, on the listing date, 19 February 2001, when the taxpayer’s sell-back rights were granted by SGL to Custodial “for the absolute benefit” of the taxpayer, as stated in the Sell Back Right Deed Poll, there was a derivation of income by her represented by the market value of her rights of $514. That conclusion makes it unnecessary to consider the income nature of the receipt of the proceeds on 2 April 2001.

The derivation for Australian income tax purposes in *McNeil* made it unnecessary in that case for the Court to consider the income nature of the receipt of the proceeds received subsequently by her on 2 April 2001.

1. The Commissioner contended that Mr Blank, as a taxpayer accounting on a receipts (as distinct from an accruals) basis, only derived money as income upon its receipt. That may be accepted as a generally accurate statement of principle where money is the reward for service of a receipts taxpayer, but it does not follow from the general principle that the right to receive money as part of a bundle of rights is not part of the bundle derived upon receipt of the bundle rather than only upon the later payment of the money. In that context, the Commissioner relied upon the following passage at [2.15] from Parsons RW, *Income Taxation in Australia: Principles of Income, Deductibility and Tax Accounting* (The Law Book Company Ltd, Sydney, 1985):

One aspect of [the distinction between cash accounting and accruals accounting] may be noted here: there is no derivation on a cash basis if the taxpayer merely comes to have a right to receive money. There must be an actual or constructive receipt of the money. Where the taxpayer is on an accruals basis in relation to the item, the arising of a right to receive money may however be a derivation. Generally where there is a right to some benefit or to property other than money there cannot be a derivation, whether the taxpayer is on an accruals or cash, until the benefit or property has come to be vested in the taxpayer.

In *Brent v Federal Commissioner of Taxation* (1971) 125 CLR 418 the High Court held that the taxpayer had only derived income when she received money paid to her as the reward for her personal services. An accruals taxpayer, in contrast, must bring to account amounts which accrue before receipt: see *Henderson v Federal Commissioner of Taxation* (1970) 119 CLR 612. The passage from Professor Parsons, however, does not state a general rule that a receipts taxpayer does not derive the monetary component of a bundle of rights (including a future right of payment of money) when the bundle of rights are received. The time of derivation for a receipts taxpayer, such as Mr Blank, depends upon the correct identification of what he received as the reward for his service. Mr Blank’s entitlement to be paid money was one of a number of interconnected, and inseparable, rights derived as part of the package of rights and obligations received upon the several grants of GS, phantom units and PPU over the years of employment.

1. The Commissioner also relied upon *Tagget v Federal Commissioner of Taxation* (2010) 188 FCR 128 in support of the proposition that Mr Blank was assessable at the time of his receipt of the money and not at the earlier time of receipt of the GS, phantom units and PPU. In *Tagget*, the Full Court considered the time of derivation of the receipt of a parcel of land which had been transferred to the taxpayer in 2005 pursuant to a deed executed in 1998 which was subject to future contingencies. The value of the parcel of land in 1998 was $450,000 but when transferred to him in 2005 it had a value of $1.2 million. The Full Court held that the taxpayer had derived the parcel of land when received in 2005 rather than in 1998. The Court distinguished *Abbott* and said at [30]‑[31]:

The appellant’s case is not analogous to *Abbott*. There, the House of Lords held that the value of the perquisite received by the taxpayer should be taken in the year when the options were granted because it was in that year that the options were income. The options were unconditional, and could be exercised at any time without any further voluntary act of the grantor. In the present case, the exercise of the rights which the appellant received under the deed of November 1998 was conditioned upon certain stages having been reached in the development, and commercial exploitation, of Tanglewood Estate. As pointed out on behalf of the Commissioner, as it happened, the appellant was never in a position unilaterally to call for the transfer of Lot 157. What matters for present purposes is that, in November 1998, he was not in a position to have done so. He was in the position of a person to whom conditional executory promises had been made, under which he would be remunerated for services rendered. Whether he would ever receive the contemplated remuneration was, in 1998, entirely a matter for the future.

At base, there were only two questions which arose before the primary judge: in what year was the relevant item of income derived within the meaning of s 6-5(2) of the 1997 Act, and what was the amount of income so derived. A taxpayer who files returns on a cash receipts basis is assessed on the cash received by him or her in the year of assessment because it is the receipt of the cash which constitutes a derivation of income for the purposes of s 6-5(2) of the 1997 Act: see *Federal Commissioner of Taxation v Dunn* (1989) 20 ATR 356 at 363 and *Barratt* at 224-225. In the case of such a taxpayer, it will not be to the point that the right to receive the income accrued in an earlier year. Neither will it make a difference that, in some earlier year, a promise to pay the money may have been made by reference to subsequently occurring events.

The Commissioner emphasised these passages in support of the proposition that Mr Blank, as a taxpayer accounting on a receipts basis, did not derive money until the money was received. However, it should first be noted that what was brought to account in *Tagget*, on the receipts accounting basis, was not money, but the value of the parcel of land: the taxpayer received land upon the transfer, not money. The case, therefore, is authority for the proposition that a taxpayer derives assessable income upon receipt of a reward for service whether or not the reward was in the form of money. Secondly, however, it was significant that the taxpayer in *Tagget* had not been in the position to call for the transfer of the lot in 1998. The rights conferred upon Mr Tagget in 1998 had been conditioned upon future events which, unless and until they occurred, would not have entitled him to call for the parcel of land. That circumstance can be distinguished from those of Mr Blank who could have called for payment upon termination of employment at any time he chose. The restriction upon the time he could receive the money was not a restriction bearing upon his derivation of the GS or the phantom units. His enjoyment of the fruits of what he received upon the grant was postponed to an event within his control, but the GS and the phantom units had been derived upon their respective grant to him at the time of the grant. The final 300 GS were in no different position.

1. The Commissioner’s alternative submissions to support the assessments as ordinary income are to be rejected for the reasons given by his Honour at first instance. The Commissioner contended that his Honour ought to have concluded that the amounts payable to Mr Blank were ordinary income in accordance with the principles in *Federal Commissioner of Taxation v Myer Emporium Ltd* (1987) 163 CLR 199 or as income from property in reliance on *Federal Commissioner of Taxation v McNeil* (2007) 229 CLR 656. His Honour rejected these grounds for upholding the assessment by saying at [94]:

I do not propose to consider the second and third grounds because, in my view, they have no arguable merit. It is sufficient to dispose of the second ground to say that the applicant was not carrying on any business to which the first, as distinct from the second, strand of reasoning in *Myer Emporium* might attach (see *S P Investments Pty Ltd v Commissioner of Taxation* (1993) 41 FCR 282 at 297 per Hill J, with whom Burchett and O’Loughlin JJ agreed). It is sufficient to dispose of the third ground to say that the GH analogy is not only irrelevant, but wrong. The relevant company is GI and the applicant held no interest in that company, if it ever held such an interest, upon execution of the Declaration on 15 March 2007.

The principle to emerge from *Myer Emporium* may be seen to have two strands. The first is that a receipt from a transaction involving the acquisition of property may be business income from a transaction with a profit making purpose notwithstanding that the transaction is outside of the ordinary business activity of the taxpayer and that the transaction is not an incident of the business. That may be so where a profit making purpose is stamped upon the receipt by the transaction giving rise to the receipt. The receipt in Mr Blank’s case, however, was from the disposal of the rights which had accrued through participation in plans from 1994 and not from the carrying out by him of any profit making scheme of the kind within the principles considered in *Myer Emporium*. The application of the first strand of the reasoning in *Myer Emporium* is also defeated in this case by the fact that Mr Blank, unlike the taxpayer in *Myer Emporium*, was not conducting a business. The second strand in *Myer Emporium* may produce an assessable receipt where there has been an assignment of a right to receive interest without the assignment of the loan debt giving rise to the interest: see *S P Investments Pty Ltd v Commissioner of Taxation* (1993) 41 FCR 282, 290. That strand has no application to the circumstances of Mr Blank because any receipt by him of income was in consideration for the disposal of the whole of those entitlements through which the right to income arose. His Honour was also correct to reject the application of *McNeil* for the reason given at [94].

1. The decision of the High Court in *McNeil* that Mrs McNeil had derived income according to ordinary concepts upon the grant of the sell-back rights (including the entitlement to receive an amount of money) made it unnecessary for the Court to consider the operation of the capital gains tax provisions: see at [17]. A conclusion in this appeal that the payments to Mr Blank were not assessable as ordinary income would, in contrast, call for a consideration of the application of the capital gains tax provisions upon his disposal of the bundle of rights which had accrued to him.
2. Mr Blank held assets which he disposed by the declaration. The parties were in agreement that Mr Blank was assessable upon the disposal of his rights if he were not otherwise assessable upon the receipt of money as deferred payment of income. Section 104-25(1) provides that CGT Event C2 happens if, among other things, a taxpayer’s ownership of an intangible CGT asset ends by the asset:

(a) being redeemed or cancelled; or

(b) being released, discharged or satisfied; or

(c) expiring; or

(d) being abandoned, surrendered or forfeited.

The declaration made by Mr Blank in 2007 resulted in his ownership of the choses in action ending and thereby the happening of CGT Event C2. That, in turn, calls for the determination of the cost base.

1. Section 104-25(3) provides that a taxpayer makes a capital gain from the happening of a CGT Event C2 if the capital proceeds from the ending of the asset are more than the asset’s cost base. The parties agreed, as noted by his Honour at first instance at [49], that the cost base is the market value of Mr Blank’s rights at the time he became an Australian resident on 2 January 2002: 1997 Act,s 855-45(2). The parties, however, adduced conflicting evidence about that value. Mr Blank’s expert, Mr Lonergan, assessed the value at AUD$103 million, whilst the Commissioner’s expert, Mr Samuel, assessed the value at approximately AUD$20 million. His Honour did not finally determine the market value of Mr Blank’s rights at the time he became an Australian resident saying at [107]-[112]:

107 On the view I have reached as to the second head of assessability, the outstanding issue under this fourth head, namely, the market value of the applicant’s contractual rights under the PPPs at the time he became a resident of Australia on 2 January 2002, does not arise.

108 However, a considerable part of the hearing was devoted to this issue. The only evidence from either side that was tested by the other side was valuation evidence given by the respective expert valuers. Considerable argument was mounted from both sides on the back of that testing, and in deference to that evidence and argument, in the event that this issue is enlivened on appeal because my view on the second head of assessability is held to be wrong, I think I should express my views as to the merit of the methodologies and conclusions reached by each valuer.

109 I have considerable reservations about the premises of Mr Samuel’s methodology which, while it professed to adopt the hypothesis of a knowledgeable, willing but not anxious buyer and a knowledgeable, willing but not anxious seller acting at arm’s length (elaborated by the judgment of Isaacs J in *Spencer v The Commonwealth* (1907) 5 CLR 418 at 441) departed from that hypothesis by denying, implicitly if not expressly, the ability of such parties to do so on reasonable terms and conditions: see *Mordecai v Mordecai* (1988) 12 NSWLR 58 at 69 per Hope JA, with whom Samuels and Priestley JJA agreed, including, inter alia, those “which a hypothetical prudent purchaser would entertain, if he desired to purchase it for the most advantageous purpose for which it was adapted” per Isaacs J in Spencer at 440–441. This has more recently been referred to as the “highest and best use” of the asset to be valued: *Boland v Yates Property Corporation Pty Ltd* (2007) 167 ALR 575 at [271]–[274] per Callinan J.

110 The denial has manifested itself in Mr Samuel’s opinion as to the market value of the applicant’s contractual entitlements under the PPPs as at 2 January 2002 by valuing the forward looking component of the entitlements at nil, as if the applicant terminated his employment as at that date. Mr Lonergan’s valuation predicates that the hypothetical parties would be free to negotiate a price as at 2 January 2002 which would allow for inclusion of a going forward component, and in a series of questions I put to Mr Samuel, he agreed that this could be done on a deferred or rebate basis by reference to the date of termination of employment without creating another asset which might require the hypothetical price to be split between two discrete assets.

111 I prefer Mr Lonergan’s methodology for obvious reasons; it not only accords with reality, but is supported by the authorities. However, I prefer the input of Mr Samuel’s figures into Mr Lonergan’s methodology. Mr Samuel conceded in cross-examination if that were done, his valuation would more likely approximate a maximum of AUD77 million as opposed to Mr Lonergan’s AUD103 million.

112 While I have only dealt with this issue on a summary basis in the circumstances of the conclusion I have reached in relation to the second head of assessability, had it been necessary for me to determine the issue, the likelihood is that I would have arrived at a figure closer to Mr Samuel’s figure of AUD77 million than Mr Lonergan’s figure of AUD103 million.

Mr Blank, on appeal, did not press the higher end of the valuation which Mr Lonergan had made but submitted that the Full Court should conclude that the market value was AUD$77 million being the lower end of the range within which his Honour had expressed a tentative view at [112].

1. The issue which divided the parties at trial, and the main point of difference between the valuers in this respect, was the extent to which a valuation of Mr Blank’s contractual rights should assume that the hypothetical purchaser of the rights at 2 January 2002 would secure reasonable terms and conditions to ensure that Mr Blank would continue in employment for some agreed period. Mr Samuel’s valuation was based upon the view that such terms could not be implied into the hypothetical transaction whilst Mr Lonergan valued the right upon the hypothesis that such terms would be struck between the hypothetical buyer and the hypothetical seller.
2. In *Mordecai v Mordecai* (1988) 12 NSWLR 58 Hope JA (with whom Samuels and Priestley JJA agreed) said at 69 in application to the facts in that case of the well-established principle in *Spencer v The Commonwealth* (1907) 5 CLR 418 that it “would be reasonable and probably necessary for the [hypothetical] vendor of the goodwill of the business to offer appropriate restrictive covenants”. In *Spencer* Isaacs J had said at 441 that the hypothetical prudent purchaser should be assumed to seek to purchase “for the most advantageous purpose for which [the land in that case] was adapted”: see also *Boland v Yates Property Corporation Pty Ltd* (2007) 167 ALR 575, [271]-[274]. In *Deputy Commissioner of Taxation v Gold Estates of Australia (1903) Ltd* (1934) 51 CLR 509 the High Court accepted the observation which had previously been made by Isaac J saying (at 515) in respect of the valuation of land:

The principle expressed in the definition of “unimproved value,” as interpreted by the decisions of this Court, requires the hypothesis that the land is available for sale by a seller who is really willing to sell it, and to do so upon reasonable terms and conditions. The question then to be asked is not whether at a given moment he could actually find some definite buyer at a particular price. The existence of a person desirous of buying the land at a fair price must be assumed. “The all important fact … is the opinion regarding the fair price of the land, which a hypothetical prudent purchaser would entertain” (per Isaacs J., as he then was, *Spencer v. The Commonwealth*). The supposition must be made that a sale is not forced, and that the owner is willing to sell on reasonable terms, and negotiates with a person willing to buy, that the one is not so anxious to sell and the other to buy, as to disregard the effect of any business consideration, and that each is equipped with knowledge of the existing relevant circumstances. But knowledge does not include any uncommon gift of foresight. The question then is what would such a reasonably prudent buyer be prepared to offer to induce such a bona fide seller to part with the land (cf. *Commissioner of Land Tax v. Nathan*). It is evident that in times of changing and uncertain conditions the correct use of the criterion may produce an estimate materially different from the application of a method of valuation which looks rather to the availability of buyers than the price which a reasonable seller would demand and the hypothetical buyer would give. In the settled conditions of June 1929, the adoption of the correct method or standard of valuing may have had much less importance.

It follows that the valuation to be undertaken of the contractual rights at 2 January 2002 should assume a sale and purchase on reasonable terms. In this context it was correct to assume that the hypothetical purchaser would secure from the hypothetical vendor, and that the hypothetical vendor would readily grant to the hypothetical purchaser, a term that Mr Blank would continue in employment for some agreed period: a bargain to sell rights dependent upon continued employment could not otherwise be made. His Honour was correct, therefore, to reject Mr Samuel’s approach and to accept Mr Lonergan’s approach as according “with reality, [and] supported by the authorities”. His Honour, however, may fairly be understood to have rejected the opinion of Mr Lonergan of the value of the rights hypothetically purchased in preference to Mr Samuel’s valuation based upon that methodology as expressed by Mr Samuel during cross-examination. In those circumstances the evidence of Mr Samuel should be accepted and the figure of AUD$77 million can be taken as the cost base on the evidence before the Court.

1. It becomes unnecessary in my view to consider the Commissioner’s challenge to the conclusions of the primary judge concerning the timing of the derivation of two amounts which were payable to Mr Blank in 2007 but which were not paid until 2008. His Honour’s conclusions flowed from his findings that Mr Blank was a receipts taxpayer who had derived amounts when paid as deferred income and that he was not taxable upon a capital gain from the receipt of an amount upon the disposal of an asset. An issue which arose on that basis was whether the amount to be taxed included payments which fell due in the 2007 year but which had been withheld from payment by Glencore International to be applied in discharge of Mr Blank’s obligations to the Swiss tax authorities. His Honour held that Mr Blank had not derived the amounts which had become payable but which had not been received because, for the unpaid amounts to be assessable, there “must be an agreement, direction or other conduct by the creditor” for there to be a constructive receipt and his Honour found that there was no such agreement, direction or other conduct by Mr Blank in the 2007 year: *Blank v Commissioner of Taxation (No 2)* [2014] FCA 517, [44]. His Honour was correct in making that finding: see *Brent v Federal Commissioner of Taxation* (1971) 125 CLR 418, 430-1. Furthermore, the Commissioner accepted that Glencore International did not pay the amounts to the Swiss tax authorities on Mr Blank’s behalf until the 2008 income tax year. During the 2007 income tax year there was, therefore, simply the non-payment of an amount due to a taxpayer who for the purposes of this argument is assumed to be a receipts taxpayer. On that basis there would not have been derivation of the amount by Mr Blank as an assessable receipt of income in the 2007 year.
2. It is also unnecessary to consider the issues concerning the application of s 23AG of the 1936 Act.Mr Blank had applied to his Honour for leave to reopen his case to rely upon s 23AG but his Honour refused leave on the sole basis that Mr Blank’s reliance upon s 23AG could not succeed: *Blank v Commissioner of Taxation* *(No 2)* [2014] FCA 517, [41]. The Commissioner contended on appeal that his Honour was correct in his conclusion in light of his Honour’s reasoning on the construction of s 23AG but, significantly, the Commissioner also contended that leave should not have been granted in any event on the grounds (rejected by his Honour) that the Commissioner would have been prejudiced in the conduct of the case if leave had been granted.
3. Much of the debate about the application of s 23AG was about whether it permitted an apportionment or attribution of the income derived by Mr Blank (assuming the amounts to be income rather than a capital gain) as between foreign and non‑foreign service. Section 23AG(1) relevantly provided:

Where a resident, being a natural person, has been engaged in foreign service for a continuous period of not less than 91 days, any foreign earnings derived by the person from that foreign service is exempt from tax.

It was contended before his Honour that the section relevantly required the excision from Mr Blank’s assessable income of so much of the amounts received by him upon his termination of employment and the making of the declaration as had been derived by him from foreign service. Mr Blank submitted that his Honour found that between 1991 and 2007 Mr Blank had been engaged in service as an employee of companies within the Glencore Group for a total period of 5,511 successive days of which 3,686 successive days involved service in foreign countries and 1,825 days involved service in Australia. Accordingly, it was submitted by Mr Blank, that approximately 66.88 percent of the amounts payable to him upon termination and the making of the declaration and assignment was attributable to, and derived from, foreign service that was effectively exempt under s 23AG(1).

1. His Honour rejected Mr Blank’s submission on the basis that the apportionment sought by Mr Blank was “neither appropriate nor possible” on the facts. The question of the correctness of his Honour’s view arises upon the assumption that the amount was assessable when received as deferred income by Mr Blank as a taxpayer assessable on a cash receipts basis. In that context, his Honour said at [30]‑[40]:

30 Notwithstanding the Commissioner’s arguments to the contrary, I am of the view that the Amount qualifies as “foreign earnings”, if only on the basis that it represents deferred compensation of the applicant as a reward for his services as an employee (see R [102]) and therefore constitutes “earnings”, being one of the classes of income qualifying as “foreign earnings”.

31 However, the Amount is not exempt from tax under s 23AG(1) because the Amount is not derived by the applicant from foreign service; the applicant, by his own submissions, seems to accept as much; indeed, it seems to be common ground that the Amount is derived by the applicant from both foreign service and service (in Australia) that is not foreign service, and that is not sufficient to qualify the Amount for exemption from tax under s 23AG(1).

32 The applicant’s answer to that is that the Amount can be apportioned as between foreign service and service that is not foreign service and the only issue is the basis upon which that apportionment should be carried out. In the applicant’s words:

Apportionment based on the period of foreign service is the natural method of apportionment in a case such as the present where there is an undissected lump sum derived from a combination of an employee’s service both in and out of Australia.

33 The applicant further observed that apportionment based on the number of days in foreign service compared to the number of days not in foreign service was previously accepted by the Commissioner in Lopez v Commissioner of Taxation (2005) 143 FCR 574 at [75]. The Full Court did not express any view on the Commissioner’s acceptance of an apportionment principle where the earnings in question were for foreign service and for service that is not foreign service. The conclusion it reached that no error of law had infected the reasoning of the primary judge made it unnecessary for the court to do so. At [90] the court said:

The conclusion we have reached makes it unnecessary to consider the arguments addressed to apportionment of the Consultancy and Management Fee in the event that it were held to have been received by the appellant in the capacity of an employee of [the Japanese corporation].

34 In my view, there are a number of difficulties with the applicant’s answer.

35 First, as noted above, the operative exemption from tax is created by s 23AG(1); it requires the foreign earnings to be derived from foreign service; this means, in my view, exclusively from foreign service and not from service which is in part foreign service and in part service which is not foreign service.

36 Secondly, the only way in which some portion of the Amount can qualify for exemption is if that portion can be said to be derived exclusively from foreign service. It is not possible to identify any portion of the Amount as being derived exclusively from foreign service because the Amount was not calculated by reference to days of service. The Amount was “calculated on the basis of the results of GI (IPP). Solely for the purpose of calculating the amount of IPP, AG has issued to GI GS pursuant to Section [sic] 657CO which shall serve as PPU for the purpose of calculating the Employee’s IPP as provided in A.2. below: Clause A.1.1. of the instrument pursuant to which the IPPA 2005 was constituted — see R [36]. The Amount is a “single, undissected amount” to use the words of the High Court in McLaurin v Federal Commissioner of Taxation (1960-1961) 104 CLR 381 at 391, and its apportionment is not appropriate: “In such a case the amount must be considered as a whole: Du Cros v Ryall (1935) 19 TC 444 at 453”.

37 Thirdly, s 23AG(1) does not contain the words “to the extent to which” the foreign earnings are derived from foreign service, such as to accommodate a dissection or apportionment of the kind contemplated by s 51(1) of the 1936 Act, according to some reasonable method: see Ronpibon Tin No Liability v Federal Commissioner of Taxation (1949) 78 CLR 47 at 55.

38 In Federal Commissioner of Taxation v Slater Holdings Ltd (1984) 156 CLR 447, Gibbs CJ obviously thought the absence of these words was significant, in relation to the operation of s 44(1)(a) of the 1936 Act, when his Honour observed at 458–459:

There were two possible grounds for holding that the distributions in Federal Commissioner of Taxation v Blakely (1951) 82 CLR 388 and Federal Commissioner of Taxation v Uther (1965) 112 CLR 630 were not assessable income. The first, which appears to have been accepted by Fullagar J. in the earlier case, is that the receipt in the hands of the shareholder was capital in nature, representing as it did, the value of the shareholder’s interest in the company. … The second possible ground was that the distribution was not made out of profits … [W]hat appears to be implicit in the judgment of Taylor J. in Federal Commissioner of Taxation v Uther is the suggestion that to come within s 44(l)(a) the distribution must have been made wholly out of profits; it is not enough that there is a distribution of a mass of assets which contains profits. This view may be supported by the fact that the section does not refer to “dividends to the extent to which they were paid to him by the company out of profits”, since, in the light of the construction given to s 51 of the Act, the inclusion of the phrase “to the extent to which” would no doubt have allowed a dissection or apportionment to be made of the distribution: cf. Ronpibon Tin NL and Tongkah Compound NL v Federal Commissioner *of Taxation* (1949) 78 CLR 47 at 55.

39 In Slater Holdings, the relevant question was whether the distribution was made “out of profits”; in the present case, it is whether the foreign earnings are derived “from foreign service”. Very different conclusions might be reached if the relevant words were “could reasonably be taken to be attributable to profits derived by the company” or “foreign earnings derived by a person that are reasonably attributable to that foreign service”: cf., Federal Commissioner of Taxation v Sun Alliance Investments Pty Ltd (in liq) (2005) 225 CLR 488 at [79]–[83].

40 Fourthly, the fact that the Parliament provided for a partial exemption in s 23AG(2) when s 23AG was first inserted into the 1936 Act where the continuous period of foreign service was less than 365 but not less than 91 days, calculated by reference to the proportion of the number of days service as a fraction of 365 multiplied by the foreign earnings, may suggest that if an apportionment of the kind now pressed by the applicant was intended, it would have been provided for in the statute. Tellingly, it was not.

It is plain that to apply s 23AG(1) as if it permitted apportionment is, at best, problematic. The reason his Honour decided against the grant of leave, however, was that his Honour considered the facts of the case to make apportionment “neither appropriate nor possible”. At [41] his Honour said:

Unfair as it may seem, I am of the view that apportionment of the Amount into two portions, one being exclusively for foreign service and the other being exclusively for service in Australia, so as to enable the former to trigger the exemption from tax afforded by s 23AG(1), is neither appropriate nor possible

His Honour explained at [36] that the amount received by Mr Blank was a single undissected amount which was not capable of apportionment and there is, with respect, no error in finding that no apportionment was possible where the amount was seen as assessable upon receipt as his Honour held.

1. The Commissioner had also submitted to his Honour, and maintained on appeal, that he would suffer prejudice if Mr Blank were allowed to reopen the case. His Honour had rejected the Commissioner’s submission saying at *Blank v Commissioner of Taxation (No 2)* [2014] FCA 517, [21]:

Seventhly, no relevant prejudice will be occasioned to the Commissioner if the court permits further argument other than costs, which can be assuaged by appropriate costs orders: see De L v Director-General at 217; although the Commissioner disputes this. The Commissioner, unlike other litigants, has no personal interest in the outcome of the litigation. He serves the public interest by seeking to properly administer the tax law (cf., s 8 of the 1936 Act). He suffers no prejudice from the mere fact that the grant of leave may result in the taxpayer being able to claim a benefit to which he is entitled (cf., Brown v Federal Commissioner of Taxation (1999) 99 ATC 4516 at [51] per Hill J (no prejudice to Commissioner from extension of time to object unless the effluxion of time adversely affects the Commissioner’s ability to defend the assessment) (affirmed on appeal in Federal Commissioner of Taxation v Brown (1999) 99 ATC 4852); Trustees of Post Office Staff Superannuation Scheme v Commissioner of Taxation (1999) 94 FCR 268 at [28] per Hill J (quantum of deduction irrelevant to extension of time application)). In contrast to ordinary inter partes litigation, the interests of justice are best served by allowing, in an appropriate case, a taxpayer to re-open his case to correct an inadvertent omission which, if refused, would result in the incorrect application of the tax law to the facts of the case. Indeed, similar considerations apply where it is the Commissioner rather than the taxpayer who wishes to amend his case due to inadvertent error. See, for example, Federal Commissioner of Taxation v American Express Wholesale Currency Services Pty Ltd (2010) 187 FCR 398 at [128], [186]–[197].

The Commissioner submitted on appeal that the prejudice that would be occasioned by Mr Blank being given leave was of a different kind from that considered, and rejected, by his Honour. The Commissioner’s submission to his Honour was not that he would suffer prejudice of the kind that a private litigant might suffer in like circumstances but that the conduct of the case, and therefore its correct outcome, would be compromised by allowing Mr Blank to re‑open his case to rely upon s 23AG and the facts upon which that section depended.

1. The Commissioner maintained the submission on appeal that the case would have been conducted differently before his Honour had the issues concerning s 23AG been raised at trial and pointed to matters about which Mr Blank would have been cross-examined and other evidence that may have been led if the issue had been raised at trial. The way the case had been conducted at trial did not call for any factual investigation going to the apportionment or attribution of any part of the amount received by Mr Blank to his foreign service either before or after 2 January 2002, and that there was, similarly, no exploration about the facts necessary to enliven the exemption in s 23AG(2) had s 23AG(1) been relied upon by Mr Blank from the outset. Sub-section 23AG(2) also raised for consideration the extent to which payments to Mr Blank were exempt from tax in Switzerland and that was not a topic explored either by cross-examination or by direct evidence. The submission by Senior Counsel for the Commissioner about prejudice to the Commissioner’s case if Mr Blank had been granted leave, therefore, has substance and, therefore, I would refuse leave on that basis had it been necessary.
2. Accordingly, I would allow the appeal to remit the objection decision for Mr Blank to be assessed upon a capital gain.

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| I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Pagone. |

Associate:

Dated: 29 October 2015