

McNeil: Ramifications for Shareholder Receipts

Introduction

1. The decision of the High Court of Australia in *CoT v McNeil* (“*McNeil*”)¹ has evoked a good deal of controversy. The majority consisting of Gummow ACJ, Hayne, Heydon and Crennan JJ held that the value of Sell Back Rights (“*SBR*”) in St George Bank Limited (“*SGL*”) when granted to Mrs McNeil was ordinary income at the time of their creation. One consequence of that conclusion is that there is double taxation upon both the grant and exercise of such rights and section 118-20 of the *ITAA* 1997 does not apply to prevent this.
2. Callinan J who dissented substantially adopted the view of French J in the Full Court namely, that the value of the SBR was not assessable income because the issue of those rights was but one step in a process of the re-organisation and reduction of the capital of SGL in which the taxpayer held shares on capital account. His Honour disputed the approach of the majority in concentrating upon the character of a payment being determined simply and solely by reference to its quality in the hands of the recipient; rather he held that regard should be had to all the circumstances leading to the receipt in the hands of the taxpayer².
3. This paper does not consider the capital gains issues which were dealt with at first instance and upon appeal in the Federal Court but not in the High Court (other than to a very limited extent by Callinan J.). At the hearing of the special leave application before Gleeson CJ and Kirby J most of the legal argument focused on CGT event H2 and the application of *Hepples v FCT*³ which considered its statutory predecessor section 160M(7) of the *ITAA* 1936. Presumably, in granting special leave, their Honours considered this to be the major point in the appeal.
4. Whatever may be the legacy of *McNeil* the issue determined by the High Court was that the value of the 272 SBR acquired by the taxpayer on 19 February, 2001 should be included in her assessable income pursuant to section 6-5 of the *ITAA* 1997 (“section 6-5”). As will be seen the precise identification of the item of income and the timing of its derivation are critical steps in that conclusion.

The Facts

5. The material facts are as follows:
 - On 12 January 2001 SGL announced its intention to carry out an off-market buy-back of ordinary shares through a 1 for 20 issue of SBR to be implemented by the execution of Deeds Poll on that day.
 - Registered shareholders as at 5.00pm on 23 January 2001 (“the record date”) were entitled to participate in the share buy-back.
 - The SBR were listed on the ASX with trading to commence on 19 February 2001 and end on 13 March 2001.

- Where, as in the case of Mrs McNeil, no direction was received to exercise the SBR then the trustee was to hold the “Proceeds” on trust absolutely for the shareholder.
 - The trustee was required to sell the SBR to Credit Suisse First Boston (“CSFB”) and CSFB would become registered as the SBR holder and could sell or exercise the SBR, paying the share of the “Proceeds” to the shareholder.
 - On 19 February 2001 272 of those SBR were granted by SGL to St. George Custodial Pty Ltd (“Custodial”) “for the absolute benefit” of the taxpayer.
 - On 20 February 2001 the trustee sold the 272 SBR received for the benefit of Mrs McNeil to CSFB.
 - On 2 April 2001 Mrs. McNeil received \$574.64 being \$2.12 for each of the 272 SBR, \$62.00 of which the parties agreed was a net capital gain.
6. Thus SGL sought to undertake a reduction of capital by means of the issue of put option rights granted to those who held shares on the record date. It is noteworthy that the trust property held for the taxpayer was the proceeds of sale rather than the SBR themselves.

What is income according to ordinary concepts?

7. The notion of income according to ordinary concepts has proved to be elusive and the cases have not established any clear or comprehensive test. The earlier jurisprudence suggests that the phrase is not a term of art but rather is to be worked out by ordinary concepts and usages of mankind⁴; and the vocabulary of business affairs⁵. As remarked by French J in the Full Court⁶, quoting from Professor Julius Stone, the distinction between what is capital and what is income is an unusually penumbral area⁷.
8. It was common ground in *McNeil* that the grant of the SBR were not dividends according to the statutory concept by reason of there not having been a distribution out of profits by SGL. Prior to *McNeil* little reliance had been placed on section 6-5 (or its predecessor, section 25(1) of the *ITAA* 1936) to treat rights issues as income according to ordinary concepts.
9. The majority judgment made passing reference to the assessable income of a taxpayer including income according to ordinary concepts but did not undertake any analysis of the prior jurisprudence⁸. Thus there was no elaboration of the principles to be applied in distinguishing capital from income in the context of shareholder receipts.

Item of income and timing of derivation

10. The majority described the statutory framework as follows:

*“As an Australian resident, the assessable income of the taxpayer included income according to ordinary concepts derived directly or indirectly from all sources; **in determining the existence of a derivation and when it occurred**, the taxpayer was taken by section 6-5(4) ‘to have received the amount as soon as it (was) applied or dealt with in any way on (her) behalf or as (she directed).’ ” [emphasis added]⁹*

This passage is unduly economical and has insufficient regard to the dual exercise with which the Court was confronted: namely, identification of a discreet item of income and then a determination of when and how it was derived. It seems that the majority have conflated the timing issue with the nature of the proprietary interest giving rise to the putative gain and thus to have deemed a coincidence of derivation and timing.

11. Their Honours made a critical finding namely that as at the date of the grant of the SBR the taxpayer was entitled at least to the observance and performance of the obligations owed to her under the Deeds Poll executed by Custodial and CSFB; and went on to state that the taxpayer’s rights were accrued, not merely executory, and were vested in her which result applied notwithstanding the apparent absence of any consideration moving from her being a legal consequence from the use of covenants in the Deeds Poll¹⁰.
12. The majority regarded the item of property as consisting of a chose in action enforceable by the taxpayer to compel the due administration of a trust of which the SBR (and not the proceeds of sale) were assets but did not clearly differentiate between what was the discreet item of income and the timing of its derivation. The parties agreed that the market value of the SBR at the listing date was \$514.00 however this did not involve any concession by the taxpayer that that amount was a derivation of income, nor as to when and how it was derived.
13. As pointed out by Gibbs J in *Brent v FCT* (“*Brent*”)¹¹ the word “*derived*” is not defined (referring to section 17 of the *ITAA* 1936) and is not necessarily equivalent in meaning to “*earned*”; in its ordinary sense according to the Oxford English Dictionary it means “*to draw, fetch, get, gain, obtain (a thing from a source)*”; and absent specific provision the amount of income is to be determined by the application of ordinary business and commercial principles. His Honour quoted Dixon J, with whom Rich and McTiernan JJ concurred, in *Commissioner of Taxes v Executor Trustee and Agency Company of South Australia Limited* (“*Carden’s Case*”):

*“Speaking generally, in the assessment of income the object is to discover what gains have during the period of account come home to the taxpayer in a **realised or immediately realisable form.**”*¹²
(emphasis added).
14. In *Brent* Gibbs J held that amounts due and payable to the taxpayer for services rendered but not received by her in the financial year in question did not constitute income derived by her during that period; however, his Honour did not find it necessary to refer to the decision of the High Court in *Arthur Murray*, which was

the converse situation namely, a receipt of monies without them having been earned by the taxpayer, where Barwick CJ and Kitto and Taylor JJ endorsed the statement by Dixon J in *Carden's case*¹³.

15. In *McNeil* the majority did not refer to these three decisions and neither party directed submissions to the Court on this topic. Nevertheless the timing of the derivation of ordinary income by Mrs McNeil was a critical matter and the majority regarded as immaterial that the taxpayer did not receive the net proceeds of sale until 2 April 2001. The agreement of the parties as to the market value of the SBR at the time of grant appears to have distracted attention from the essential task of determining when and how Mrs McNeil derived income according to ordinary concepts.
16. It seems that the majority in *McNeil* regarded the words in section 6-5(4) that a taxpayer is taken “to have received the amount as soon as it is applied or dealt with in any way” on his or her behalf as helping to determine when a taxpayer receives an amount of money or money’s worth. In *Brent Gibbs J* considered the meaning of the words “dealt with” on behalf of the taxpayer in section 19 of the *ITAA 1936* (which contains language additional to that in section 6-5(4)) and held that the provision applied only where there had been a prior accrual of income in the sense of an obligation to pay. His Honour relied upon a passage in the judgment of Rich J in *Permanent Trustee Company of NSW Ltd v FCT* in reaching that conclusion¹⁴. In *McNeil* the obligation to pay the net proceeds of sale of the SBR was to do so on and after 2 April 2001 and not at the time of the grant of the SBR. By parity of reasoning it should be deduced that the concluding words of section 6-5(4) do not establish that Mrs McNeil derived income on 19 February 2001

Passive income

17. The majority¹⁵ placed considerable reliance upon the text of Professor Parsons in expressing that generally a gain derived from property has the character of income including a gain to an owner who has waited passively for that return from property¹⁶. The principle was expounded in developing proposition 12 namely, that “**a gain derived from property has the character of income**” as part of his description of ordinary usage income.
18. The grant of the SBR to Mrs McNeil did not involve any effort on her part: it resulted from her original decision to invest in SGL shares. A critical question is whether an increase in the value of an investment, prior to the realisation of a gain, constitutes the derivation of income at the time of the creation of the right to receive something of value at a future date. In the case of other categories of passive investment income such as dividends, interest, rent and royalties, ordinarily income tax is imposed upon the actual receipt of money or of something exchangeable for money and not at any antecedent point when for example, a dividend is declared or a loan is made.
19. A number of authorities establish that a non-pecuniary receipt can be income if it is convertible into money but if a taxpayer receives a benefit that cannot be turned to pecuniary account it does not constitute income according to ordinary concepts.

In *FCT v Cooke and Sherden* (“*Cooke and Sherden*”) the Full Court of the Federal Court (Brennan, Deane and Toohey JJ) considered whether free holidays made available by a manufacturer to the taxpayers who sold their product were assessable income under sections 25 or 26(e) of the *ITAA 1936*¹⁷ and referred to a statement made by Lord Macnaghten in *Tennant v Smith*¹⁸ that the ordinary concept of income is “*what comes into the pocket*”¹⁹. That case concerned the provision to a bank manager of a right to occupy part of his employer’s premises free of charge. The Full Court in *Cooke and Sherden* drew from *Tennant v Smith* the principle that if a taxpayer receives a benefit which cannot be turned to pecuniary account he has not received income as that term is understood according to ordinary concepts and usages²⁰.

20. The Full Court in *Cooke and Sherden* considered two UK cases dealing with Schedule E of the *Income Tax Act 1952* the first of which was *Heaton v Bell* where the taxpayer was an employee of a company which had introduced a voluntary car loan scheme and the question was whether the free use of the car was a “*perquisite*” of the taxpayer’s employment²¹. In *Abbott v Philbin* the company secretary was granted an option to purchase shares at the then market price and the taxpayer exercised the option after the shares had increased in value. A majority of the House of Lords held that the monetary value of the option when granted was taxable because it was a benefit capable of being turned to pecuniary account in interpreting the phrase “*perquisite or profit whatsoever*”²².
21. In *Cooke and Sherden* it was concluded that *Heaton v Bell* and *Abbott v Philbin* established that it is not necessary that the pecuniary alternative be available by way of direct conversion of the benefit received provided that it was a benefit capable of being turned to pecuniary account. Their Honours went on to observe that inconvertibility limited the connotation of “*profits*” in *Tennant v Smith* and was apt to limit the connotation of “*perquisite*” in *Heaton v Bell*; and reiterated that the inconvertibility of the benefit, which prevents it from falling within the general notion of income, takes it outside the proper ambit of the proceeds of a business²³. The Court held in *Cooke and Sherden* that the benefit consisting of the free holidays was not convertible into money or money’s worth and thus there was no receipt of income according to ordinary concepts for the purposes of section 25(1) of the *ITAA 1936*.
22. The majority in *McNeil* concluded that on 19 February 2001 when the SBR were granted by SGL to Custodial “*for the absolute benefit*” of the taxpayer, as stated in the SBR Deed Poll, there was a derivation of income represented by the market value of her rights namely, the sum of \$514 and cited *Abbott v Philbin* in support of that proposition²⁴. In that case Viscount Simonds considered whether an option to take up shares at a certain price was valuable or at least potentially valuable²⁵ and His Lordship concluded that the test is whether it is something which is by its nature capable of being turned into money²⁶; Lord Reid stated that the test must be what is the nature of the right and not whether the particular option could readily have been turned to pecuniary account at the time of grant; and whether this option could have then been turned to pecuniary account is a question of fact about which there was no finding;²⁷ Lord Radcliffe having referred to the statements of all of their Lordships in *Tennant v Smith* stated that the essential question was whether the option by its nature was capable of being turned into

money by the recipient even though in the ordinary sense of that word they had a value to him²⁸; Lord Keith found it unnecessary to speculate upon the precise scope or effect of what had been said by Lord Halsbury and Lord Watson in *Tennant and Smith* and stated that the application of phrases such as “*turned to pecuniary account*” must be considered in relation to the kind of benefit received in specific cases²⁹; and Lord Denning stated that *Tennant v Smith* showed that a right or privilege which cannot be turned to pecuniary account is not taxable at all³⁰. It would appear that Lord Denning’s proposition is that which found favour with the Full Court in *Cooke and Sherden*.

23. In his written submissions in the High Court the Commissioner argued that Mrs McNeil received money or money’s worth on 19 February 2001 consisting of a beneficial interest in trust assets being the SBR or a chose in action entitling her to due administration of the trust. Alternatively, it was submitted that she received money on 2 April 2001. It can be deduced that the Commissioner’s legal representatives were acutely aware that, absent actual receipt of monies by Mrs McNeil on 19 February 2001, they had to contend that she received a benefit which was convertible to money on that date. It would not suffice to establish that the SBR had a market value (agreed between the parties) on 19 February 2001 unless Mrs McNeil could have traded the SBR on the ASX and received the proceeds of sale on that day.
24. To overcome this formidable obstacle the Commissioner submitted that *Abbott v Philbin* established that the market value of stock options granted to an employee at the time of their issue was assessable income. As has been seen that case depended upon the construction of the *Income Tax Act 1952* and is not an authority for the general proposition relied upon by the Commissioner. Reliance was placed additionally upon *Donaldson v FCT* where Bowen CJ in Equity had to consider whether the value at the time of issue of stock options granted to an employee was a “*benefit... allowed, given or granted*” pursuant to section 26(e) of the *ITAA 1936*³¹. Counsel agreed that section 26(e) applied only to items of income according to ordinary concepts and there was no examination as to whether the taxpayer had received money or money’s worth at the time of grant.
25. The taxpayer submitted that consonant with the recognised categories of passive income from property (dividends, interest, rent, royalties and annuities) it was entirely inappropriate to substitute an unformulated and vague test of “*benefit*” which could apply to a multitude of ordinary commercial transactions.
26. The majority decision necessarily depends upon an acceptance of the Commissioner’s submission that the taxpayer received a “*benefit*” on 19 February which was convertible into money or money’s worth on that day. The obligations created by the covenants in the Deeds Poll are entirely inconsistent with that position because trading in the SBR on the ASX did not cease until 13 March and payment of the net proceeds of the sale of the SBR was due on 2 April.
27. It is difficult to comprehend why the majority in *McNeil* cited *Abbott v Philbin* towards the end of their reasons to justify the conclusion that Mrs McNeil derived income at the time of grant which was represented by the market value of her

rights particularly given that their Honours did not undertake any analysis of the facts or the reasons expressed by their Lordships in that case³².

28. The majority judgment does not satisfactorily determine the issue as to the nature and timing of the ownership of the SBR. The covenants which were entered into on 12 January were contingent upon the grant of the SBR on 19 February to Custodial which depended in turn upon their listing on the ASX. A critical question not answered by the majority is who owned the SBR as at 19 February having regard to the arrangements entered into between SGL, Custodial and the record date shareholders.
29. Whilst it would have been open to the majority to find that a trust relationship had arisen from the obligations contained in the covenants,³³ their Honours eschewed any recourse to the principles of equity³⁴. It appears that the parties were prepared to accept that there was a trust for due administration and the majority concluded that on 19 February the SBR were granted by SGL to Custodial “for the absolute benefit” of Mrs McNeil. It is not unreasonable to expect that the majority would have scrutinised the sequence of events being the creation of the item of property, its ownership immediately after creation and the intended beneficiary of any dealing in the property from that time in order to determine the fiscal consequences arising therefrom but this exercise was not undertaken.
30. It is submitted that on 19 February Mrs McNeil had a conditional right to receive the proceeds of the sale of the SBR on 2 April and that the agreed market value of the SBR had not been realised or converted to money or something exchangeable for money at the time of their creation.

Reliance on *Eisner v Macomber*

31. In the context of a gain to an owner who has waited passively for a return from property the majority cited the opinion delivered by Pitney J in *Eisner v Macomber* (“*Eisner*”)³⁵ which had been quoted with approval by the High Court in a number of cases including *Read v Commonwealth of Australia* (“*Read*”)³⁶ and *CoT v Montgomery* (“*Montgomery*”)³⁷. The majority stated that the metaphor of severance and like expressions used by Pitney J identified the core meaning of “*income*” relating to a gain from property³⁸. *Eisner* is indeed authority for a proposition contrary to that relied upon in *McNeil* which gives prominence to the notion of income including profit gained through a sale or conversion of assets but not an appreciation in their value without a realisation thereof.
32. In *Read* the Court considered whether an increase in the value of a trust which was distributed by the issue to each holder of additional units under a commercial unit trust scheme was “*valuable consideration received*” or “*profits earned*” within the meaning of section 18 of the *Social Security Act, 1947* (Cth). The majority consisting of Mason CJ and Deane and Gaudron JJ held that an increase in the value of an asset does not amount to capital profit because there is mere potential to achieve a gain and it is not until a gain is realised that it is earned, derived or received. The majority judges relied upon the opinion of Pitney J in support of that proposition³⁹.

33. *Montgomery* concerned payments made to a firm of solicitors as an inducement to them to enter into a lease of commercial premises to be used to conduct their business. There the majority consisting of Gaudron, Gummow, Kirby and Hayne JJ held that the inducement payments should be characterised as revenue received. The partners in *Montgomery* used and exploited their capital including their goodwill in the course of carrying on their business in order to obtain receipt of the payments and the majority stated that the passage quoted from *Eisner* showed that income is often the product of exploitation of capital⁴⁰. The correctness of that proposition should not be doubted. However, it does not reflect that the exploitation referred to by Pitney J extended to a gain from the sale or conversion of a capital asset of a business. The majority stated in the same paragraph that an amount received on disposal of capital assets would be on capital account. One distinguished commentator has observed extra-judicially that this reveals a sleight of hand⁴¹.
34. In quoting from the opinion of Pitney J in *Eisner* the majority in *McNeil* appears to have inadvertently overlooked a crucial phrase in his judgment which states:
- “... provided it (income) be understood to include profit gained through a sale or conversion of assets.”
35. Earlier decisions of the US Supreme Court (where Pitney J delivered the opinion) namely *Stratton’s Independence v Howbert*⁴²; and *Doyle v Mitchell Bros Co*⁴³ explain the statutory context in which Pitney J made his observations. These cases demonstrate the danger of the application to Australian income tax legislation of observations germane to a foreign regime⁴⁴. What does emerge from *Eisner* is that both income and capital gains may be “income” according to the *Revenue Act 1916*⁴⁵ which included stock dividends in the definition of income.
36. It is doubtful whether the fruit and tree metaphor emanating from *Eisner* assists greatly in analysing whether gains derived from property can be income. Fruit may ripen on a tree and be exploited, but not without the active intervention of the owner of the tree. When a company issues bonus shares or rights to sell shares or to acquire further shares the fruit is ripening and becoming more or less valuable but there is no receipt of a measurable gain unless and until the trees are sold or the fruit is harvested by disposal of the valuable rights so acquired. Indeed in *Eisner* Pitney J pointed out that far from being a realisation of profits of the shareholder a bonus issue tends rather to postpone such realisation because the fund represented by the new stock has been transferred from surplus to capital and no longer is available for actual distribution⁴⁶. The metaphor and passages from the judgment of Pitney J are cited to support the proposition that conceptually capital gains are not severable from the underlying capital assets and thus cannot constitute income within the ordinary charging provisions of the Australian income tax legislation. However, it is submitted that *Eisner* establishes the contrary proposition namely that income and capital gains may constitute “income” according to the US statute.
37. In *Eisner* the US Supreme Court reasoned that the issue of stock dividends (the US equivalent of bonus shares) was a readjustment of stockholders’ interests and

not a realisation of profits of the stockholder. The majority judgment in *McNeil* stated that there is no sound analogy between the receipt of bonus shares and the taxpayer's position in *McNeil*⁴⁷ quoting the judgment of Viscount Finlay in *IRC v Blott*⁴⁸ to the effect that the shareholder's proportional interest in the business of the company is re-expressed and the proportionate share in the business of the company is increased by the additional capital.

38. It is far from clear why bonus shares should be regarded as being conceptually different from rights issues. When a company appropriates profits to pay up and distribute bonus shares by way of allotment of shares and the issue of share certificates the shareholder has no claim or title to any money and is given no choice regarding the appropriation. True it is that a shareholder may refuse to accept the allotment of the shares but the application of the funds to pay them up has been predetermined by the company. Upon this analysis the shareholder does not receive money nor derive income as concluded by Dixon CJ in *FCT v W E Fuller Pty Ltd*⁴⁹. Sir Owen Dixon's analysis was upheld in *Gibb v FCT* where Barwick CJ and McTierman and Taylor JJ agreed that it was settled law that an issue of bonus shares could not according to ordinary principles be regarded as the receipt of income by the shareholder⁵⁰.
39. The majority in *McNeil* did not refer to a statement by Professor Parsons that the notion of the reframing of the shareholder's interest is the more likely characterisation of the issue of bonus shares and of rights or options to shareholders and not any detachment from the shares as produce; and further that if a distribution out of profits is an element of the ordinary usage notion of a receipt that is income, it is hard to see how that requirement could be said to be satisfied⁵¹.

Nature of rights issues

40. Whilst leaving open the question whether the grant of the SBR partially satisfied Mrs McNeil's right to a return of capital their Honours went on to say that it was the character of the grant of rights to the shareholders which was decisive and not the reduction of capital effected by SGL⁵². In formulating the issue in that fashion the answer tends to beg the question.
41. In *Ord Forrest Pty Ltd v CoT* ("*Ord Forrest*")⁵³ the nature of renounceable rights was considered. That case concerned whether the allotment of shares for a value in excess of the allotment price was for inadequate consideration and thus a disposition of property under the *Gift Duty Assessment Act* (Cth). Stephen J at first instance stated that the grant of the rights was an effectuation of the contract of membership and that any cash return was within the congeries of rights in personam⁵⁴. Upon appeal Gibbs J spoke of an effectuation of a provision of the contract of membership relying upon passages in the judgments of Dixon J and Williams J in *Archibald Howie*⁵⁵. In the view of Mason J the granting of such a right is itself a satisfaction of the existing shareholder's rights under the Memorandum and Articles of Association⁵⁶.
42. The CGT provisions of the *ITAA* 1936 and of the *ITAA* 1997 were drafted upon the premise that renounceable rights are capital assets and prior to their

introduction the application of section 26(a) of the *ITTA* 1936 to profits made from the sale of shares arising out of a rights issue was considered in *FCT v Miranda* (“*Miranda*”)⁵⁷ and in *Macmine Pty Ltd v FCT* (“*Macmine*”)⁵⁸.

43. In *Miranda*⁵⁹ a company made a rights issue on a one for one basis and the offer contained directions for the sale of a shareholder’s entitlement without the shareholder taking up the shares. The taxpayer sold some shares and later his remaining shares and the rights making a profit on each transaction. The Commissioner issued assessments under the first limb of section 26(a) upon the profit from the sale of the shares and the rights. Rath J undertook an extensive examination of pertinent authorities, including *Ord Forrest*, and held that the rights to take up shares was property which was independent of and different from the shares originally acquired. Thus the rights were not acquired for the requisite profit making purpose.
44. *Macmine* concerned a sale of rights of redeemable preference shares and whether proceeds from the sale of those rights could be regarded as profits within the first limb of section 26(a). Gibbs J considered *Miranda* and noted that Rath J had held that rights to take up new shares to which a shareholder became entitled by virtue of an existing shareholding constituted property different from the existing shares and that it did not follow from the fact that the original shares were acquired for a profit making purpose that the rights were so acquired. Further when such a shareholder sells the rights instead of taking up the shares, it cannot be said that the shareholder has made a profit which has arisen from the sale of property acquired by him for such purpose within the meaning of the section.⁶⁰ In *Macmine* the Commissioner did not seek to challenge the correctness of the views of Rath J in *Miranda* and whilst Gibbs J did not expressly adopt those views he stated that he did not imply any disagreement.
45. In *Miranda* and *Macmine* the analysis of the nature of the renounceable rights which were taken up by the shareholder proceeded upon the basis that at the time of the grant of the rights there was no severance or detachment from the underlying investment which gave rise to there being income according to ordinary concepts and those rights were treated as capital assets.
46. There exists an unresolved controversy as to the true nature of an option to purchase: namely, whether it is a contract to sell upon condition that the other party will within the stipulated time bind himself to perform the terms of the offer embodied in the contract or whether it is an offer together with a contract that the offer will not be revoked during the time, if any, specified in the option. The former view was expressed by Griffith CJ in *Goldsborough Mort & Co Ltd v Quinn*⁶¹ and the latter by Latham CJ in *Commissioner of Taxes (Q) v Camphin*⁶². As pointed out by Gibbs J in *Laybutt v Amoco Australia Pty Limited*⁶³ it is usually immaterial which view is adopted and there may exist a third category being the grant of an option so called. Not surprisingly the parties in *McNeil* were not concerned with this jurisprudential debate, which frequently arises in the context of real estate transactions, however the authorities reveal the importance of the character of the right created by the contractual documents.

47. What is it about the granting of a put or call option to an existing shareholder to sell or acquire further shares in a company that can give rise to an identifiable item of income prior to the acceptance of the offer constituting the exercise of the option and the subsequent disposal of those rights or of any shares so acquired? As noted the majority in *McNeil* identified the item of property vested in Mrs McNeil as being her right to enforce the obligations created by the covenants in the Deeds Poll which was a chose in action and not the subject of any evidence as to its value⁶⁴.
48. Upon one view of the matter the grant of the SBR to Mrs McNeil arose out of her relationship with SGL as a shareholder and not from any pre-existing right to receive something from the company according to the constitution of SGL or otherwise. Thus the ownership of the shares created an opportunity for Mrs McNeil to participate in the capital reduction but only if she chose to do so.
49. It is clear from the majority judgment in *McNeil* that their Honours regarded the grant of the SBR to Mrs McNeil on 19 February 2001 as not representing any portion of her rights as a shareholder under the constitution of SGL⁶⁵. What counted against her was the enforceability of the covenants in the Deeds Poll and the fact that the SBR were tradeable on the ASX notwithstanding that trading ended at the close of business on 13 March and payment of the net proceeds of the sale of SBR was not made until 2 April.
50. The decision of the Full Court of the Federal Court in *Allina Pty Ltd v FCT* ("*Allina*")⁶⁶ establishes that the grant of an option does not produce property which comes from nor is sourced in the property which is the subject matter of the option; and that the act of creation establishes a separate item of property which flows from the act of the grantor enforceable against the grantor whether in respect of other property which is then owned by the grantor or not. It follows that the act of grant is not an effectuation or satisfaction of any of the rights of the shareholder in relation to shares already owned if one has regard only to the new contractual arrangements and not to the constitution of the company.
51. In *Allina* the Full Court was concerned with the meaning of the word "*acquired*" in section 160ZH(9)(a) of the *ITAA* 1936. The taxpayer was granted rights to subscribe for ordinary shares at a premium and later sold those rights at the then market value yielding a net return. The Commissioner assessed the taxpayer on the basis that the proceeds of the sale of the rights represented a capital gain within the meaning of Part IIIA of the *ITAA* 1936. The Full Court (Lockhart, Burchett and Gummow JJ) made detailed reference to the judgments of Gibbs J and Mason J in *Ord Forrest*⁶⁷ and noted that similar views were expressed by the High Court in *FCT v St Helen's Farm (ACT) Pty Ltd* ("*St Helen's Farm*")⁶⁸. Their Honours stated that *Ord Forrest* and *St Helen's Farm* established that a disposition of property connotes the transfer or disposition of something to somebody which was in existence before it was disposed of and does not describe the creation of something that did not exist before its creation. By parity of reasoning the Full Court held in *Allina* that there was no disposition of property when the right to subscribe for further shares in the company was granted to the taxpayer.

52. The majority in *McNeil* did not consider that the conceptual distinction made in *Allina* was important but preferred to advert to and rely upon the fruit and tree metaphor used by Pitney J in *Eisner*. The parties did not refer to *Allina* in their written submissions to the High Court. It is submitted that the grant of a put or call option in relation to shares in a company necessarily involves the creation of a new item of property that was not owned by the grantor at the time of its creation which is independent of and not an incident of the share;⁶⁹ and furthermore that the grant of a put or call option to sell or acquire shares does not involve the transfer of something that existed before the grant although property can be acquired by a person without there being a disposition of that property by another person.
53. The creation of value does not per se produce income because it is only when there has been a realisation of the valuable right by sale, conversion or otherwise, which may not be at a time coincident with such creation, that there is the requisite derivation of income. From the timing perspective it is premature to consider the act of creating a valuable conditional right as being income prior to the shareholder exercising the right and subsequently turning it to account. The majority judges in *McNeil* sidestepped this issue by describing the right of Mrs McNeil to enforce the covenants in the Deeds Poll as being accrued, not merely executory, and vested in her and did not consider whether the newly created rights, which did not arise out of any existing property, were capable of being turned to pecuniary account at the material time.
54. The granting of rights to buy or sell shares or rights to acquire as yet unissued shares may take many forms; often such grants are on favourable terms or present an opportunity to the grantee to purchase at a discounted price. Whether or not such purchases or opportunities give rise to the derivation of assessable income will depend upon the terms governing the grant of the rights and the means by which those rights are dealt with in default of performance by the grantee according to the contractual provisions. For example, the grant of non-renounceable rights to acquire as yet unissued shares may be viewed as being materially different because the grantee is under contractual compulsion to acquire the rights. The transaction which was the subject of the *McNeil* litigation, which may be described as a reverse rights issue, has been rarely utilised since 2001 and renounceable rights issues are more commonly encountered.

Receipt by shareholder and context of transaction

55. In *McNeil*⁷⁰ it is stated that as a matter of general principle whether a particular receipt has the character of the derivation of income depends upon its quality in the hands of the recipient and not the character of the expenditure by the other party in reliance upon *GP International Pipecoaters Pty Ltd v FCT* ("*Pipecoaters*")⁷¹. This general proposition is not contentious when confined to comparable factual situations. However, the majority failed to advert to what was said by Kitto J in *Squatting Investments v FCT* that there should be a consideration of the whole of the circumstances surrounding a particular transaction⁷². That approach accords with the view taken by the High Court in *Western Gold Mines NL v CoT (WA)* ("*Western Gold Mines*")⁷³ and more recently in *Montgomery*⁷⁴ where the majority quoting from Dixon and Evatt JJ in *Western Gold Mines* stated

that “it is necessary to make both a wide survey and an exact scrutiny of the taxpayer’s activities”⁷⁵.

56. *Pipecoaters* concerned the treatment of monies paid being establishment costs equal to the estimated cost of the taxpayer constructing the plant necessary for the taxpayer to perform a contract⁷⁶. The Court (Brennan, Dawson, Toohey, Gaudron and McHugh JJ) endorsed the statement of principle made by Windeyer J in *Scott v FCT* that whether a receipt is income depends upon its quality in the hands of the recipient⁷⁷. In *Pipecoaters* the Court emphasised that whether or not an expenditure by the payer is of a capital nature does not determine how the receipt by the payee should be viewed; and further that the nature of the expenditure made by the taxpayer in the construction of the plant was not relevant. It is not easy to discern how those principles articulated by the High Court in *Pipecoaters*, where the main issue was the character of the receipt of monies paid pursuant to a contract to provide services, are decisive of a resolution of the central issues in *McNeil*.
57. The majority in *McNeil* accepted the submission of the Commissioner that whilst the SGL share buy-back scheme explained the involvement of SGL and the genesis of the conferral of the entitlement upon the taxpayer for revenue purposes the scheme did not explain the character of the SBR. Further their Honours viewed as immaterial the fact that the taxpayer held her SGL shares on capital account. It is submitted that the majority did not provide any cogent reasons as to why the grant of the SBR to the taxpayer should be analysed in splendid isolation contrary to well established authority.

Source of Funding

58. By focusing on the quality of the receipt in the hands of Mrs McNeil the majority appears to have regarded as peripheral to a resolution of the main issue a number of High Court cases culminating in *CoT v Slater Holdings Ltd* (“*Slater Holdings*”)⁷⁸: namely, that attention should be focused upon the profit character from the perspective of the company of the source from which the distributions are made and not upon the shareholder’s position.
59. In *Slater Holdings* a company limited by guarantee having no share capital paid monies to the taxpayer company the source of such payment being as to one-third net capital gains, one-third a gift and one-third being revenue profits. The High Court held that for the purposes of section 44(1)(a) of the *ITAA* 1936 the amount received by the taxpayer was a dividend being a distribution of money paid wholly out of profits in respect of each of the three sources of the payment.
60. The leading judgment in *Slater Holdings* was that of Gibbs CJ with whom Mason, Brennan, Deane and Dawson JJ agreed. The Chief Justice considered a number of earlier High Court authorities dealing with the definition of “dividend” and the development of provisions in the *ITAA* 1936 and its statutory predecessors. In *FCT v Blakely* (“*Blakely*”)⁷⁹ two shareholders of the company being husband and wife appropriated the assets of the company and discharged its liabilities whereupon the company ceased to carry on business although no liquidator was appointed. The majority (Fullagar J, with whom Dixon J agreed) held that no part

of the amount received should be regarded as a dividend because what was received was capital. Latham CJ dissented and stated that the criterion for assessability under section 44 was not whether what was received by a shareholder was income to him in the sense of something detached from his capital asset consisting of his shares but whether what he received came from the profits of the company⁸⁰.

61. In *FCT v Uther* (“*Uther*”) Kitto J⁸¹ in dissent advanced criticisms of the judgment of Fullagar J in *Blakely* which Gibbs CJ in *Slater Holdings* found “*compelling*”⁸². The amendments to the legislation in 1934 and in 1936 made shareholders of a company which is a going concern assessable to tax on a principle fundamentally different from that of the previous legislation so that the criterion for the inclusion of a shareholder’s receipts from the company was no longer their income character when considered from the shareholder’s point of view but the profit character from the company’s point of view of the source from which distributions were made. In *Uther* the majority (Taylor and Menzies JJ) approved the decision of Owen J at first instance who had followed the majority decision in *Blakely*.
62. The cases briefly analysed above show that judges of the High Court have fundamentally disagreed about what is the correct question to formulate in order to determine if a shareholder receipt is income namely whether there has been detached an amount from the profits of the company and liberated to the shareholders (the company approach) as opposed to whether there was a realisation (in whole or part) of the shareholder’s asset or was the asset left intact with a resultant increment to its value without altering its essential character (the shareholder approach).
63. *McNeil* demonstrates that section 6-5 has an operation in the field of shareholder receipts although it has lain dormant for some time. The decision leaves open whether the common law requires that for any shareholder receipt to be assessed as income it be paid out of profits and detached or severed by the company from funds or assets representing any profit. One view of the matter is that section 6-5 imposes taxation on amounts received by shareholders which are a return **on** their investment and not a return **of** the investment in whole or in part.
64. It is submitted that the majority in *McNeil* appear to have disavowed the approach taken in *Slater Holdings*, although it may be contended that impliedly the majority have confined the reasoning in *Slater Holdings* to the interpretation of the dividend provisions in the *ITAA* 1936 and as not applying to income according to ordinary concepts.
65. *McNeil* involved an authorised return of capital pursuant to section 257B of the *Corporations Act* and the amount paid by SGL to those shareholders who exercised the SBR was debited to its share capital account. In *Hill v Permanent Trustee Company of NSW Limited* (“*Hill*”) the Privy Council had to consider whether a dividend declared and paid by a company described as “*a distribution of capital assets in advance of the winding up*” should be treated as income of a trust estate⁸³. In delivering their advice their Lordships stated:

“*A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorised*

reduction of capital. Any other payment made by it by means of which it parts with moneys to its shareholders must and can only be made by way of dividing profits. Whether the payment is called "dividend" or "bonus", or any other name, it still must remain a payment on division of profits."⁸⁴

66. This passage makes clear that any payment made by a company to a shareholder may be only either a dividend or a return of capital. In *McNeil* it was common ground that the grant of the SBR was not a dividend and according to the Privy Council in *Hill* the transaction must have been a return of capital. The taxpayer relied upon *Hill* in the High Court, however the majority made no reference to the decision in their judgment.

Effectuation or severance

67. In *McNeil* the High Court was presented with two competing submissions namely whether the SBR were an effectuation or satisfaction of the existing congeries of rights in personam of a shareholder or were items of property severed or detached from those existing rights. The majority concluded that neither approach was correct because they held that the proprietary interest emanated from the covenants in the Deeds Poll and did not represent any portion of the taxpayer's rights under the constitution of SGL⁸⁵.
68. The concept of an effectuation or satisfaction of existing rights assumes that a company is under a legal obligation, whether arising out of the constitution or by force of a valid and binding resolution of its shareholders, to grant the put or call options or to issue the bonus shares. This seems to describe a process whereby there is an evolution from a mass or heap of rights which because of their intrinsically varying nature lead to the conferral on a shareholder of further rights which extinguish or discharge (wholly or partially) those existing rights and substitute fresh rights in lieu thereof. The submission conflicts with the reasoning in *Allina* which treated rights issues as creating a proprietary interest distinct and separate from existing property.
69. The notion of severance or detachment is premised upon some portion of an existing asset or proprietary interest being removed from the underlying asset or property by means of the creation of a new and independent right or interest. It should be observed that it is not helpful to speak of the new right or interest as being an incident of the property or asset to which a number of rights and obligations already attach as was pointed out by Rath J in *Miranda*⁸⁶.
70. The mere adding of value to property or an asset does not produce a taxable gain until there has been a sale conversion or other dealing that realises or brings home that additional value. Thus, whilst there may be severance or detachment of a right or proprietary interest, the time at which that right or interest can be turned to pecuniary account is a separate matter.
71. It may have been too simplistic for the critical issue in *McNeil* to have depended upon a stark choice between the effectuation and satisfaction of existing rights on the one hand and a severance or detachment of new rights on the other hand. It is

submitted that a preferable analysis is to consider whether the issue of bonus shares or the grant of rights to sell shares already issued or to acquire further shares is a reframing or re-expression of the interests of a shareholder because the proportionate interest of the shareholder in the business of the company is increased by additional capital or is decreased by a reduction of capital whatever may be the specific name given to the rights attaching to the shares which are acquired or cancelled in order to effect the capital alteration.

72. This approach has the desirable effect of being consistent with the analysis of Pitney J in *Eisner*⁸⁷ and of Viscount Finlay in *Blott*⁸⁸. The issue of bonus shares or of further shares pursuant to a call option, where such issue applies to all shareholders in a company, should be viewed as merely increasing the proportional interest in the business of the company by way of re-expression in the terms used by the majority in *McNeil*⁸⁹. The benefit, and the sole benefit received by Mrs McNeil as at 19 February 2001, was the opportunity to sell back to SGL some of her shares and, if she did so and others did not, to have a smaller interest in the business of the company. In other words the net effect of the proposed sell-back transaction via a put option was the converse of an issue of bonus shares. This may be illustrated by a company with an issued capital of 100 shares having 20 shareholders each owning 5 shares granting a one for 5 put option to each shareholder to sell one share back to the company. If say, only two of the twenty shareholders exercised the put option then those two shareholders would own 4/98ths of the undertaking (<5%) and not 5% as they did prior to the exercise.
73. In summary therefore the dichotomy found in the effectuation/satisfaction and severance/detachment concepts may have been inapposite. It is submitted that the better view is that a bonus issue or a rights issue to acquire further shares or to sell back shares is the reframing or re-expression of a shareholder's rights which is reflective of a shareholder having either an increased or decreased interest in the undertaking of the company.

Nature and purpose of capital reduction and impact on shareholder

74. The grant of the SBR to Mrs McNeil has been described here as a put option or a reverse rights issue and provided the taxpayer with an opportunity to participate in the proposed capital reduction by SGL. The majority in *McNeil* stated that it was the character of the grant of rights to the shareholder and not the reduction of capital effected by SGL pursuant to the new statutory processes provided by the Corporations Law which was decisive⁹⁰. This was contrary to the approach taken by the majority judges in the Full Court and by Justice Callinan.
75. It is submitted that it was not appropriate for the majority judges to virtually ignore the context in which the SBR were granted to Mrs McNeil and not to analyse whether, having regard to the alternatives available to her, the SBR amounted to a reframing of her interests as a SGL shareholder. From the perspective of SGL the announcement of the capital reduction scheme was no more than an expression of its interest as a potential purchaser in acquiring shares from its existing shareholders. That expression of interest is not different in principle from any potential buyers of SGL shares indicating such an interest

through the ASX, the announcement of a takeover bid pursuant to Chapter 6 of the *Corporations Act*⁹¹ or the publication of any on-market or off-market buy-back programme. It is only when a shareholder accepts an offer whether from the company, a bidder for shares on-market or from third party interests (such as private equity) that there may be said to be an alteration of the existing rights of the shareholder which may or may not realise a gain to the shareholder. The critical question remains whether the making of the offer brings home to the offeree a receipt of income at the time when the offer is made.

76. Whilst SGL provided the means by which money was ultimately received by Mrs McNeil (by acting as paying agent) SGL did not pay the proceeds of sale directly to her. In any event the nature of the pricing of the buy-back programme whilst providing value did not as at the date of the grant of the SBR give rise to any receipt of monies by Mrs McNeil. The granting to a shareholder of an option to sell shares to a company or to buy further shares in that company may or may not result in an alteration of the shareholder's proportionate interest in the company depending upon whether the shareholder accepts the offer made by the company. Whilst such rights are enforceable as at the time of the grant it is only at the expiry of the option period that it can be ascertained whether the shareholder's proportionate interest in the undertaking of the company has been affected; it may remain the same or it may have increased or decreased.

Re-expression of shareholders' rights and capital effusion

77. The congeries of rights which a shareholder possesses include contingent and prospective rights arising out of the constitution of the company, the general law and the *Corporations Act*. Those rights vary and mature over time and in the case of bonus and rights issues the contingent right created thereby becomes a distinct and separate item of property; however as already pointed out those rights may not be exercised or realise a gain to the shareholder. It is submitted that the better view is that bonus shares and rights are inherently capital in nature so that the SBR issued to Mrs McNeil were a re-expression of her right to participate in the return of capital of SGL. However as already explained the additional question to pose is whether once the rights have been exercised there is any and if so what gain realised as a result of the shareholder's rights having been reframed or re-expressed. It is only after the rights have been taken up that one can ascertain the position.
78. Had Mrs McNeil exercised the SBR and received the buy-back price in consideration for the cancellation of her shares, it would seem to be beyond question that the consideration received would have been on capital account. Furthermore had she sold any of her shares prior to the record date it would seem that no part of the proceeds of that sale would have been included in her assessable income as ordinary income under section 6-5⁹².
79. In summary the grant of the SBR should be seen as a capital effusion and neither the satisfaction or effectuation of rights or interests which Mrs McNeil held at the moment in time prior to their grant nor the detachment or severance of new rights from already existing rights.

Conclusions

What did McNeil decide?

80. The essential conclusion reached by the majority in the High Court was that shareholders such as Mrs McNeil who were eligible to call for the SBR but did not do so had derived income of \$1.89 for each SBR to which they were entitled. As noted by reason of the operation of section 118-20 it was not necessary for the majority to consider the capital gains issues in Parts 3-1 and 3-3 of the *ITAA 1997*⁹³. Callinan J briefly considered the CGT issues and agreed with Dowsett J in the Full Court that there was no CGT event H2 because the issue of the SBR did not result in the receipt by the respondent of money or an entitlement to receive money. *McNeil* was not a test case although Mrs McNeil was taken as a representative taxpayer of the class of shareholders eligible to be granted SBR as part of the SGL buy-back scheme but who did not call for the transfer of legal title. The majority did not deal with the position of shareholders who held SGL shares as trading stock or revenue assets in contradistinction to Mrs McNeil who held such shares as a capital asset. Indeed the majority eschewed any regard for Mrs McNeil's shareholding strategy.

81. Because the majority did not enter upon any analysis of the earlier jurisprudence as to what is income according to ordinary concepts the distinction between what is capital and what is income remains blurred and is even more penumbral.

82. The majority found that the SBR which the taxpayer enjoyed and which were turned to account on her behalf did not represent any portion of her rights as a shareholder under the constitution of SGL but were generated by the execution, and subsequent performance, of covenants in the Deeds Poll⁹⁴. That is the obligations arising out of the Deeds Poll created the item of property from which income was derived. The Deeds Poll were executed on 12 January 2001. It must follow from that analysis that the majority viewed the SBR as new items of property which were created independently of the congeries of rights in personam which Mrs McNeil as a SGL shareholder possessed prior to the execution of the Deeds Poll. Thus it is difficult to understand how it can be concluded that those accrued rights which were vested in Mrs McNeil on 19 February 2001 can be described correctly as being produce of her shares and severed or detached therefrom. The analysis by the majority suggests that there is no causal connection between the rights attaching to the SGL shares held by Mrs McNeil prior to the execution of the Deeds Poll and the granting of the SBR.

Is McNeil correctly decided?

83. To the extent that the majority decision rests upon the opinion of Pitney J in *Eisner* it is respectfully submitted that there has been a failure by the Court to understand exactly what that case decided and the principle enunciated therein. Whilst in *Read* and in *Montgomery* the High Court quoted the opinion of Pitney J the decisions reached in those cases are not supportive of the application of any general principle which the majority in *McNeil* sought to apply. There has been selective reliance upon *Eisner* and a failure to appreciate the importance of the proposition that income according to the US *Revenue Act 1916* may include profit

gained through a sale or conversion of assets but not a gain accruing to capital nor an increment in the value of an investment without a realisation of such gain or increment.

84. This paper advances the proposition that there is no conceptual difference between the issue of bonus shares and the grant of rights to acquire further shares or to sell shares already issued in a company and that the correct approach is that rights issues should be viewed as a re-expression or reframing of the existing rights of a shareholder and are a capital effusion. The majority in *McNeil* did not provide any cogent reasons as to why rights issues should be treated differently from bonus share issues.
85. It appears that the majority in *McNeil* may have conflated the two essential tasks of identifying an item of property that can be characterised as income and the timing of its derivation. As at 19 February 2001 Mrs McNeil had received nothing of value nor had she taken any step to sell or convert any underlying gain that may be said to have attached to her shareholding in SGL. There was agreement inter partes as to the market value of the SBR on 19 February 2001 but this does not bear upon the central question as to when Mrs McNeil became entitled to receive money or something exchangeable for money. The realisation of any gain could not occur until the time had passed for her to exercise her rights or choose not to do so and in the latter case steps had been taken by Custodial and CSFB to dispose of those rights by no later than when trading of the SBR on the ASX ceased.
86. By focusing upon the quality of a receipt in the hands of the shareholder the majority ignored a long line of authority in the High Court which indicates clearly that there should be a consideration of the whole of the circumstances and the context in which the particular transaction took place so as to properly understand the legal and corresponding fiscal character of the subject transaction.
87. In the context of shareholder receipts the majority did not determine whether for the purposes of determining what is income according to ordinary concepts there is a requirement for the source of the distribution to be out of profits nor whether the reasoning in *Slater Holdings* mandated such a conclusion. It seems that the majority in *McNeil* did not regard the profit character from the company's perspective of the source from which the distribution was made as being critical or even important.
88. If *McNeil* is confined to the enforceability by Mrs McNeil of the covenants in the Deeds Poll then the majority decision correctly identifies an item of property. However, it is submitted that the majority judgment does not properly analyse what was the nature and value of those rights when they were created nor whether they were convertible into money or money's worth at such time. Thus there appears to be error because in order for income to be derived for the purposes of section 6-5 it should have come home and in the case of a gain it should have been completely made⁹⁵. The deeming of the receipt of an amount dealt with according to direction requires that there be a prior accrual of income and a non-pecuniary receipt can be income only if it can be converted into money at the material time.

Footnotes:

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- ¹ *CoT v McNeill* (2007) HCA5 22 February 2007.
- ² Supra note 1, at paragraph [55].
- ³ *Hepples v FCT* (1991-1992) 172 CLR 492.
- ⁴ *Scott v CoT* (1935) 35 SR (NSW) 215 at 219 per Jordan CJ.
- ⁵ *Arthur Murray (NSW) Pty Limited v FCT* (1965) 114 CLR 314 at 320 (“Arthur Murray”).
- ⁶ *CoT v McNeil* (204) 144 FCR 54 at paragraph [42].
- ⁷ Legal System and Lawyers’ Reasoning, Julius Stone, Maitland, 1968, at page 340.
- ⁸ Supra note 1, at paragraph [15].
- ⁹ Supra note 1, at paragraph [15].
- ¹⁰ Supra note 1, at paragraph [27].
- ¹¹ *Brent v FCT* (1971) 125 CLR 418 at 427.
- ¹² *Commissioner of Taxes v Executor Trustee and Agency Company of South Australia Limited* (1938) 63 CLR 108 at 155.
- ¹³ Supra note 8, at page 329.
- ¹⁴ *Permanent Trustee Company of NSW Ltd v FCT* (1940) 2 AITR 109 at 110-111.
- ¹⁵ Supra note 1, at paragraph [21].
- ¹⁶ Income Taxation in Australia: Principles of Income, Deductibility and Tax Accounting, RW Parsons (1985), at paragraph 2.231.
- ¹⁷ *FCT v Cooke and Sherden* (1980) 10 ATR 696.
- ¹⁸ *Tennant v Smith* (1892) AC 150.
- ¹⁹ Supra note 18, at page 164.
- ²⁰ Supra note 17, at page 704.
- ²¹ *Heaton v Bell* (1970) AC 728.
- ²² *Abbott v Philbin* (1961) AC 352.
- ²³ Supra note 17, at page 705.
- ²⁴ Supra note 1, at paragraph [51].
- ²⁵ Supra note 22, at page 365.
- ²⁶ Supra note 22, at page 366.
- ²⁷ Supra note 22, at page 371.
- ²⁸ Supra note 22, at page 378.
- ²⁹ Supra note 22, at page 382.
- ³⁰ Supra note 22, at page 387.
- ³¹ *Donaldson v FCT* (1974) 1 NSWLR 627.
- ³² Supra note 1, at paragraph [51].
- ³³ Jacob’s Law of Trusts in Australia, JD Heydon and MH Leeming, 7th Edition, at paragraph 606.
- ³⁴ Supra note 1, at paragraph [27].
- ³⁵ *Eisner v Macomber* 252 US 189 (1920).
- ³⁶ *Read v Commonwealth of Australia* (1988) 167 CLR 57.
- ³⁷ *CoT v Montgomery* (1999) 198 CLR 639.
- ³⁸ Supra note 1, at paragraph [21].
- ³⁹ Supra note 36, at page 67.
- ⁴⁰ Supra note 37, at page 663.
- ⁴¹ Justice Richard Edmonds, Recourse to Foreign Authority in Deciding Australian Tax Cases, Paper delivered to Australian Tax Teachers’ Association, January 2007.
- ⁴² *Stratton’s Independence v Howbert* 231 US 399 (1913).
- ⁴³ *Doyle v Mitchell Bros Co.* 247 US 179 (1918).

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- ⁴⁴ The Ironic Legacy of *Eisner v Macomber*, Rick Kreever, (1990) 7 Australian Tax Forum 191.
- ⁴⁵ Revenue Act, September 8, 1916, section 2, 39 Stat. 757.
- ⁴⁶ Supra note 35, at page 211.
- ⁴⁷ Supra note 1, at paragraph 38.
- ⁴⁸ *IRC v Blott* (1921) 2 AC 171 at 195.
- ⁴⁹ *FCT v W.E.Fuller Pty Ltd* (1959) 101 CLR 403 at 407.
- ⁵⁰ *Gibb v FCT* (1966) 118 CLR 628 at 632.
- ⁵¹ Supra note 16, at paragraph 2.242.
- ⁵² Supra note 1, at paragraph [36]
- ⁵³ *Ord Forrest Pty Ltd v CoT* (1974) 130 CLR 124.
- ⁵⁴ Supra note 53, at page 131.
- ⁵⁵ Supra note 53, at pages 150 and 151.
- ⁵⁶ Supra note 53, at page 157.
- ⁵⁷ *FCT v Miranda* (1976) 6 ATR 367.
- ⁵⁸ *Macmine Pty Ltd v FCT* (1979) 24 ALR 217.
- ⁵⁹ Supra note 57.
- ⁶⁰ Supra note 58, at pages 226 and 227.
- ⁶¹ *Goldsborough Mort and Co Ltd v Quinn* (1910) 10 CLR 675 at 678.
- ⁶² *Commissioner of Taxes (Q) v Camphin* (1937) 57 CLR 127 at 132.
- ⁶³ *Laybutt v Amoco Australia Pty Limited* (1974) 132 CLR 57 at 73.
- ⁶⁴ Supra note 1, at paragraph [27],
- ⁶⁵ Supra note 1, at paragraph [23].
- ⁶⁶ *Allina Pty Ltd v FCT* (1991) 21 ATR 1320.
- ⁶⁷ Supra notes 55 and 56.
- ⁶⁸ *FCT v St Helen's Farm (ACT) Pty Ltd* (1981) 146 CLR 336.
- ⁶⁹ Supra note 57, at page 376.
- ⁷⁰ Supra note 1, at paragraph [20].
- ⁷¹ *GP International Pipecoaters Pty Ltd v FCT* (1990) 170 CLR 124 at 136.
- ⁷² *Squatting Investments v FCT* (1953) 5 AITR 496 at 520.
- ⁷³ *Western Gold Mines NL v CoT (WA)* (1938) 59 CLR 729.
- ⁷⁴ Supra note 37, at page 663.
- ⁷⁵ Supra note 73, at page 740.
- ⁷⁶ Supra note 71.
- ⁷⁷ *Scott v FCT* (1966) 117 CLR 514 at 526.
- ⁷⁸ *FCT v Slater Holdings Ltd* (1984) 156 CLR 447.
- ⁷⁹ *FCT v Blakely* (1951) 82 CLR 388.
- ⁸⁰ Supra note 79, at page 397.
- ⁸¹ *FCT v Uther* (1965) 112 CLR 630 at 638 to 640.
- ⁸² Supra note 78, at page 457.
- ⁸³ *Hill v Permanent Trustee Company of NSW Limited* (1933) AC 720.
- ⁸⁴ Supra note 83, at page 731.
- ⁸⁵ Supra note 1, at paragraph [23].
- ⁸⁶ Supra note 57, at page 376.
- ⁸⁷ Supra note 35.
- ⁸⁸ Supra note 48.
- ⁸⁹ Supra note 1, at paragraph [38].
- ⁹⁰ Supra note 1, at paragraph [36].
- ⁹¹ Corporations Act, 2001 Commonwealth.

⁹² *McNeil v CoT* (2004) 206 ALR 44, at paragraphs [32] and [41].

⁹³ *Supra* note 1, at paragraph [14].

⁹⁴ *Supra* note 1, at paragraph [23].

⁹⁵ *Supra* note 37, at page 663.