IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S144 of 2016

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

BETWEEN:

VAUGHAN RUDD BLANK
Appellant

AND:

COMMISSIONER OF TAXATION
Respondent

APPELLANT'S REPLY SUBMISSIONS

Filed on behalf of: The appellant

Prepared by: Nicholas Mavrakis
Law firm: Clayton Utz, Lawyers

Address for service:
Level 15
1 Bligh Street
Sydney NSW 2000
DX 370 Sydney

Contact details:
Tel: (02) 9353 4000
Fax: (02) 8220 6700
Contact: Nicholas Mavrakis
Email: nmavrakis@claytonutz.com
Ref: 621/16708/80137323

Part I: Internet Certification

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

Part II: Reply

Factual matters (RS [8]–[13]; cf AS [12]–[39])

2. The submission (RS [8]) that the summary at AS [12]–[39] is inaccurate and does not faithfully reflect the findings of the Courts below is without foundation. What the Commissioner describes as "findings" (see also RS [12], [13]) are not findings of *fact*, but conclusions of law as to the character of the appellant's rights. It is to be expected that the appellant challenges those conclusions.

3. RS [9] entirely ignores the 11 years prior to 2005 during which period the appellant was granted *all* of his GS and Phantom Units, and in which period the appellant accumulated an entitlement of US$64.9 million.[1] The submission at RS [10] that the 1500 GS and 100 Phantom Units previously granted "*became* PPUs under the IPPA 2005" (emphasis added) is inaccurate. No transmogrification occurred. The GS continued in existence, but for the purposes of a *definition* in the IPPA 2005 they were defined as PPUs. The assertion at RS [10] (p 3, fifth line) about the rights attaching to the GS – made without reference to any evidence – is incorrect: see AS [19]–[20].

4. As to RS [11], the reason dividends were not generally payable on the GH shares was to ensure the effective distribution of GI's profits through the GS: see the clauses cited in AS [20]. This reinforces, rather than detracts from, the characterisation of the GS as associated rights of the GH shares. In terms of "stapling", the shares in GH and the GS in GI could only be issued, dealt with or disposed of together. Thus, as Pagone J found (RFC [130]), it is accurate to describe the appellant's rights as a bundle of interconnected rights linked or associated with his position as shareholder of GH. No other member of the Full Court concluded otherwise: cf RS [12].

5. RS [13] (and RS [31] which rests upon it) ignores the terms of the Declaration. There was no "finding" by any judge to the effect that the Amount was paid solely in satisfaction of claims to payment under the IPPA 2005: cf RS [13], [31]. Rather, the Amount and CHF80,000 were paid together in consideration for the disposal of the whole of the appellant's bundle of interconnected rights: see RFC [136]. The Commissioner's argument to the contrary is inconsistent with the Declaration and the pro-forma declaration annexed to the IPPA 2005.

Ordinary income: reward for services (RS [15]–[32]; cf AS [41]–[68])

6. RS [15] fails to engage with the key issue for determination: was the reward for service the shares and associated rights on grant or the money ultimately to be paid on exercise of those rights? Importantly, "reward for service" encompasses rewards for service in the past or expected in future (i.e. an incentive), because a benefit granted to an employee as a reward for service of either kind is taxable as ordinary income on grant.[2]

7. RS [16] misrepresents what Kenny and Robertson JJ said at RFC [76]. Their Honours made no reference to the "factual context" of the agreement. In any event, the statement at RS [16] is not a correct statement of principle. Whether a receipt is income must depend on a consideration of the whole of the circumstances (see the authorities cited at AS [46]), which in the present case includes the events occurring in the 11 years preceding the IPPA 2005.

8. Contrary to RS [17], this is a situation where the recitals depart from the true facts. The public documents and evidence showed that the PPP was not established in consideration for future

---

1 See AB Vol 1, p 425.

2 *Laidler v Perry* [1966] AC 16 at 31-32; *Tyrer v Smart* [1979] 1 WLR 113 at 117, 119 and 123. *Abbott v Philbin* [1961] AC 352 and the cases which have followed it are examples of such rewards.

services to be rendered by employees, but rather their past performance, seniority and future potential.[3] In other words, the character of the rights granted under the agreements was compensation for past and/or an incentive for future services. Further, contrary to RS [17], the PPA 1993 and PPA 1999 do not suggest that the grant of a right to share in the profits of GI under those agreements was *in consideration for* future service. Until 1996, there was no vesting period in respect of GS issued to the appellant. None of the agreements were expressed to be contingent on any future obligation of the employee to do anything, let alone work. There was no change to the quantum of the benefit payable if the appellant was terminated for cause, or if his services after the grant of GS/Phantom Units were unsatisfactory or substandard.

9. The statement at RS [20] concerning *FCT v Dixon* is misleading. That a payment is made by a person other than the employer is not determinative, but a very relevant consideration against an income character: *Hayes v FCT* (1956) 96 CLR 47 at 52, 57.

10. Like RS [15], RS [21] does not grapple with the issue for determination. It was the rights upon grant to the appellant which had the character of income as compensation for past and/or an incentive for future services. The payments received in 2008 and later years were not also income but merely the fruits of realisation of the earlier rights.

11. RS [22]–[23] distract attention from the correct question. Whether rights are "of a proprietary nature" is not a relevant question. It is sufficient that the shares, GS, Phantom Units and associated contractual rights were a "benefit". In any event, the shares, GS, Phantom Units and associated contractual rights were of a proprietary nature. The GS are akin to a preference share (see AS [19]) and the associated contractual rights and Phantom Units are choses in action. The submission at RS [23] that the GS *became* PPUs is factually incorrect: see [3] above.

12. RS [24] is wrong on two counts. *First*, the 100 Phantom Units were a benefit (and, if it matters, a chose in action) granted in the 2003 year. The analysis in respect of the GS applies equally to them. *Secondly*, in any event, if the 100 Phantom Units are to be treated differently from the 1500 GS so that the 100 Phantom Units were not income at the time of grant, it would simply result in the portion of the Amount attributable to the 100 Phantom Units (5.29%[4]) being ordinary income; the remaining 94.71% of the Amount would not be income when received.

13. RS [25] contains numerous errors. *First*, to describe what the IPPA 2005 and previous agreements conferred on the appellant as an "executory and conditional promise to pay money at a future date" is misconceived. The reference to an "executory ... promise" is either wrong or purely rhetorical. If it is used to convey the notion that GI's promise was made in exchange for a promise of future services by the appellant it is wrong. If it is used to convey that GI's obligation to make payment was performable in the future it is tautological. Further, GI's promise (and the appellant's correlative right) under the IPPA 2005 was not "conditional". As at 2005 all of the PPUs had satisfied the two year "vesting period". At the time the IPPA 2005 was entered into, GI was unconditionally committed to paying the appellant, albeit at a future time, a sum of money referrable to the past and future profits of GI. The Commissioner's submissions to the contrary elide the elementary distinction between the present enjoyment of a presently existing right and the future enjoyment of a presently existing right. It is true that in respect of the earlier agreements, the 1,300 GS granted after 1995 and the 100 Phantom Units had a two year "vesting period" at the time of grant (although this did not apply in case of death or permanent disability). However, as demonstrated by *Donaldson* and *McArdle,* that limited conditionality does not deny the character of the rights as income at the time of grant.

---

3 AB Vol 2, pp 557, 571, 609, 630; Hubmann, [9] (AB Vol 2, p 441); TJ [14].

4 The portion attributable to the 100 Phantom Units is US$8,467,871, being 1/16 of the annual amounts in 2003, 2004, 2005 and 2006: see AB Vol 1, p 425.

14. *Secondly*, the assertions at [RS 25(a)–(b)] ignore the fact that Mrs McNeil was never granted "sell-back rights". "Her" sell-back rights were held by a trustee who *from the time of grant* was obliged to sell them to a merchant bank who would account to the trustee: see the paragraphs of the reasons referred to in AS [63] and see also [24]–[27]. From the time of grant Mrs McNeil only ever had a chose in action representing a right to receive a sum of money in the future.

15. *Thirdly*, apart from *McNeil*, the recent decision of the UK Supreme Court in *UBS AG v Revenue & Customs*[5] is inconsistent with the proposition that a right to receive money in the future cannot be income at the time of grant. In that case, employees of a bank received redeemable preference shares instead of cash bonuses but with a right to "encash" the shares by redeeming them once certain restrictions were lifted. The employees were held, on the authority of *Abbott*, to be assessable on the value of the shares at the time of grant, notwithstanding that their only material right was to receive a payment of money in the future (i.e. dividends and redemption proceeds), and not on the redemption monies when received except as a capital gain (i.e. effectively the same approach as that taken by Pagone J in the present case).

16. RS [27] inappropriately seeks to narrow the circumstances in which it can be said that a benefit is capable of being turned to pecuniary account. It is enough if the taxpayer could have found someone willing to pay money for the rights: see *Abbott* at 366, 371, 379; *Donaldson* at 644. The unchallenged expert evidence was that the rights had value to the taxpayer at the time of grant which is sufficient for the purposes of s 26(e): AS [67], footnote 51.

17. RS [28]–[30] rest on the argument that the appellant's rights were "executory and conditional". Since that argument is incorrect (see [13] above), the argument falls away.

Myer Emporium (RS [33]–[38]; cf AS [69]–[71])

18. RS [33] first sentence, misstates the "important proposition" in *Myer Emporium* (at 211.2) derived from *Californian Copper* and *Ducker* by transposing the words "otherwise than in the ordinary course of a business" for the actual words in the text which are "otherwise than in the ordinary course of the carrying on of *the taxpayer's* business" (emphasis added). The latter words indicate clearly, as do the decisions in *Californian Copper* and *Ducker*, that the proposition being stated is limited to a taxpayer who is conducting a business. Similarly, RS [33] second sentence takes out of context the distinction drawn in *Myer Emporium* (at 213.5) between the sale of an asset for a profit where the decision to sell is taken after its acquisition rather than at the time of the acquisition – the context is where the assets are "investments ... initially acquired as part of a business": see the sentence commencing "Secondly". RS [33] third sentence, consequently cannot stand – the "latter circumstance" referred to is in fact a sale by a taxpayer conducting a business. Further, the passage relied on from *Myer Emporium* (at 210.2) concerning "a business operation or commercial transaction", when read in context, is concerned with a taxpayer who is conducting a business as were the taxpayers in *Californian Copper* and *Ducker* (the two principal cases relied on).

19. RS [34] consequently rests on a false premise – *Myer Emporium* simply does not apply to this taxpayer. If *Myer Emporium* states a general principle applicable to a taxpayer not conducting a business, then *Abbott*, and the cases which have followed it, were wrongly decided – the "profit" made on exercise of options granted to a taxpayer by his or her employer would be ordinary income as the only purpose in acquiring the options is to realise a gain from exercising them. Yet *Abbott* has been accepted as correct in this Court and in subsequent decisions of the House of Lords and the UK Supreme Court.

---

5 [2016] 1 WLR 1005 at [4], [8], [12], [15], [94] and [98].

ETPs (RS [39]–[49]; cf AS [72]–[77])

20. Contrary to RS [46], the accepted test[6] for determining whether a payment is "in consequence of" the termination of employment for the purposes of s 27A(1) of the ITAA 1936 (and also s 82-130(1)(a) of the ITAA 1997) is that stated by Goldberg J in *Le Grand v FCT* (2002) 124 FCR 53 at [33], and applied by Edmonds J – the payment must be one which "follows on from, and is an effect or result, in a causal sense, of [the termination]": TJ [105]. Goldberg J's test, which requires a causal connection, is a synthesis of the earlier authorities on the meaning of the corresponding phrase in s 26(d), and reflects the ordinary dictionary meaning of the words "in consequence of" which is "as a result of".[7] There is no reason why the ordinary meaning should not apply in this statutory context, rather than the glosses suggested at RS [46]. Further, the general presumption that the re-enactment of an expression used in a statute after judicial consideration by superior courts is an endorsement of that judicial interpretation should apply to s 82-130(1)(a).[8]

21. The question then becomes what is the nature of the requisite causal connection? A simple "but for" approach is rejected by (a) the reasoning of Northrop and Fisher JJ in *Paklan Pty Ltd v FCT* (1983) 67 FLR 328 at 348.3 when concluding that the "retiring sums" paid in that case did not satisfy the causal nexus required by s 26(d)), (b) Goldberg J's conclusion in *Le Grand* at [33] that "the issue cannot be determined by seeking to identify the 'occasion' of the payment"[9]; and (c) the comments in *Forrest v FCT* (2010) 78 ATR 417 at [91]. The term *operative* (or *effective)* cause is used to refer to the concept of causation discussed in *March v E & MH Stramare Pty Ltd*[10] which requires that the cause of the payments be determined in a common sense way and not simply by applying a "but for" approach or by asking whether retirement provides the occasion for the payments: cf RS [48]. Whether that is so is a question of fact.

22. Looking at the matter in a common sense way, the operative cause of the payments of the Amount was not termination of the employment but rather the successive grants of rights to the appellant, the profitable performance of the Glencore Group over the period the rights were held and his execution of the Declaration to relinquish those rights: see AS [76]. Termination of his employment merely provided the occasion for the payments, as it provided him with the opportunity to give the Declaration, but that was an opportunity which already existed independently of the termination of his employment: see PPA 1999 cl A.10; IPPA 2005, cl 13, "Notice Date"; TJ [21(8)], [105].

23. Further, if contrary to the appellant's submissions the Court concludes that the payments were "in consequence of the termination" of employment, it will be necessary to remit to the Full Court the determination of whether a part of those payments is non-assessable by reason of s 83-235.

Commissioner's proposed cross-appeal: time of derivation (RS [50]–[55])

24. RS [52] mischaracterises what was found below. All judges found that as a matter of fact it was not until January 2008 (i.e. well into the 2008 income year) that the appellant made an agreement with GI for GI to pay the first four instalments owing but unpaid under the IPPA 2005 to the FTA.[11] The findings were supported by the documentary evidence and the appellant's unchallenged

---

6 *Dibb v FCT* (2004) 136 FCR 388 at [15]–[16] (FC); *FCT v Pitcher* (2005) 146 FCR 344 at [39]–[46]; *Forrest v FCT* (2010) 78 ATR 417 at [79]–[82] (FC); *Bond v FCT* [2015] FCA 245 at [33]-[37].

7 Oxford English Dictionary (online edition) meaning 4c: Macquarie Dictionary (5th Ed), meaning 6. The ordinary meaning of the phrase "as a result of" imports a relation of cause and effect: *Fagan v The Crimes Compensation Tribunal* (1982) 150 CLR 666 at 673; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525.

8 See, eg, *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at [15]-[16].

9 The common sense approach to causation requires an event to be more than just the occasion for a result in order to be a cause of it: *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] QB 375, 406.

10 (1991) 171 CLR 506 at 515-7. See, eg, *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 6-7; *Halloran v Minister Administering National Parks Act 1974* (2006) 229 CLR 545 at [81], [96]; *Banque Bruxelles* at 406.

11 AB Vol 4, p 1156 [44] (Edmonds J), 1214 [95] (Kenny and Robertson JJ), 1247 [146] (Pagone J).

evidence.[12] By so doing, the appellant constructively received in the 2008 income year the four instalments paid by GI to the FTA on the appellant's behalf. Thus, in truth, the consequence of the conclusion of the courts below is entirely to the opposite effect of that asserted at RS [52].

25. RS [53] further mischaracterises Edmonds J's finding. His Honour's finding was made in terms of variation to the payment terms under the IPPA 2005. The fact that the *unvaried* payment terms (AB Vol 1, p 432) under the IPPA 2005 required GI to withhold and pay 19.25% (55% x 35%) from each instalment actually paid to the appellant is not to the point. *If* GI had paid 80.75% of the two instalments due to him in the 2007 year and paid the balance to the FTA, there would have been a constructive receipt by the appellant of the entire amount of those instalments. But this did not occur. The instalments were not paid in the 2007 year, nor was any money paid to the FTA in that year. The submission (RS [54]) that there was an "earmarking"/"devotion" in the 2007 year of the two instalments due in that year is contradicted by the evidence and the concurrent findings of fact.

Cost base issue (RS [56]–[67]; cf AS [78]–[82])

26. The appellant makes the following points in response to the Commissioner's proposed cross-appeal. *First*, contrary to RS [63], a promise by the hypothetical seller to stay in employment so as to preserve the value of the asset being sold is analogous to a restrictive covenant in a sale of business contract. The restrictive covenant is entered into to prevent the seller from acting in a way which would destroy the value of the asset sold.

27. *Secondly*, such a promise is not a new asset: cf RS [60], [64]. Rather it is one of the terms and conditions upon which the underlying asset is sold. For example, in assessing the market value of goods, one does not separately determine the value of the vendor's "covenants" to give good title and that the goods are in merchantable quality. Instead one determines the *price* at which the hypothetical parties would agree to sell/buy the asset, assuming the existence of reasonable terms and conditions appropriate to the asset being sold/bought.

28. *Thirdly,* having regard to the nature of the asset being sold it is entirely reasonable to hypothesise such a term. In *Donaldson*, Bowen CJ in Eq plainly thought it was an obvious term: see 644. As Pagone J noted (RFC [145]) without such a term a bargain to sell rights the fruits of which are dependent on future employment could not be made. The hypothetical seller would be unwilling to sell the rights on a basis which attributed zero value to the forward looking component.

29. *Fourthly*, the submissions at RS [64]–[65] misunderstand the evidence. The valuation of $77m adopted by Pagone J was premised on an expected period of future employment of 5 years and an expected compound annual growth rate of profits of 17.7%: cf RS [64]. Both inputs were amply supported by the evidence. Mr Lonergan's opinion was that this was the minimum expected period of future employment having regard to all of the circumstances. The growth rate of 17.7% was the historical average for the Glencore Group of companies over the entire period for which data was available. Mr Lonergan's valuation had used longer periods of employment (up to 10 years) and higher growth rates (up to 38%) and it is these higher figures which Edmonds J may properly be understood to have rejected. Further, Mr Samuel's valuation was $22m, not $20m.

Dated: 25 July 2016

M Richmond
T: (02) 9223 7473
mrichmond@elevenwentworth.com.au

T O Prince
T: (02) 9151 2051
prince@newchambers.com.au

---

12 AB Vol 1, pp 267 [40], 428–435. The "2007" date on the letter which is relied upon at RS [53] is contradicted by the fact that it refers to the agreement of the FTA which was not received until January 2008, in relation to an agreement which on the appellant's unchallenged evidence was not entered into until January 2008. The better view is that the "2007" simply refers to the calendar year (GI's accounting period) in which the appellant's holding in GI was purchased.