Reconciling the Overlap of Charging Provisions in Regard to Non-Cash Benefits from Employment, Personal Exertion and Business

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Australia's income tax regime contains a number of charging provisions that may apply to non-cash proceeds of personal exertion and business. There is overlap in the operation of these provisions, which in turn requires priority of application rules and anti-double taxation rules. The fact that one of these charging provisions (i.e. fringe benefits tax) is in a separate piece of legislation adds complexity. Further difficulty is added because the various charging provisions contain different valuation rules. This article highlights the problematic areas and anomalies concerning charging provisions as they apply to non-cash benefits, with the aim of attaining some clarity to the operation of the rules. The approach is to use a tabular summary (table) to identify the relevant charging provision (e.g. ss 6-5 and 15-2 of the Income Tax Assessment Act 1997('ITAA 1997')) that applies in regard to various economic activities (e.g. personal exertion that is not employment), and to reconcile the charging provisions where overlap exists. For completeness, the table also identifies circumstances where no charging provision applies to common non-cash benefits obtained by taxpayers (e.g. mere gifts).

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RECONCILING THE OVERLAP OF CHARGING PROVISIONS

1. INTRODUCTION

Australia's income tax regime contains a number of charging provisions in regard to non-cash benefits flowing from personal exertion and business activities of taxpayers.[1] There is considerable overlap or overreach between charging provisions, which in turn requires priority of operation rules and anti-double taxation rules, some of which do not appear to be effective. The fact that one of those charging provisions (i.e. fringe benefits tax regime ('FBTR')) is in a separate piece of legislation, and that there are different valuation rules for the various charging provisions, only compounds problems and produces anomalies.

This article aims to highlight and clarify this unnecessarily complex area of the income tax. The approach is to use a tabular summary (table) to identify the relevant charging provision (e.g. ss 6-5 and 15-2 of *ITAA 1997*) that applies in regard to various economic activities (e.g. employment), and to reconcile the charging provisions where overlap exists.[2] To complete the analysis, the table also identifies circumstances where no charging provision applies to common non-cash benefits obtained by taxpayers that may be viewed as being close to the proceeds of personal exertion or business (e.g. mere gifts, pastime).

The rows in the table in Part 3 of the article identify the various types of 'economic activity', and the columns in the table identify the relevant charging provision under the income tax. The entries in the body of the table contain a one-word response (i.e. YES or NO) to the receipt of a non-cash benefit. Subject to the comments below, a 'YES' entry means that the relevant charging provision applies so that the value of the non-cash benefit enters the relevant tax base under it, which will often be

[1] Given that Australia's FBTR is a surrogate tax on employee benefits, it is appropriate to include that regime as part of Australia's income tax.
[2] *ITAA 1997*.

the assessable income of the recipient. A 'NO' entry means that the relevant charging provision does not apply.

The limitations of a one-word response in a table are obvious, and this is addressed through notes attached to each entry. Accordingly, the notes are crucial to appreciating the qualifications to a one-word response, in determining the priority of application of the relevant charging provision and in identifying the relevant anti-double taxation rule. Further, for some transactions it makes little sense to have a 'YES' entry under two or more charging provisions. Yet, this is the position in the table in regard to certain transactions where there is overlap of charging provisions so that a priority rule is required. This underlines the importance of the contents of each note in Sub-Part 3.1 of the article. For completeness, the notes will also point out whether any charging provision outside of those set out in the table may apply to the relevant benefit (e.g. capital gains tax ('CGT') event) and, importantly, whether a CGT acquisition has occurred.

Arguably, one limitation of the article is that it does not deal in detail with the case law that characterises the various economic activities set out in the rows in the table (e.g. employment, hobby). However, the absence of a detailed treatment of this should not detract from the article, as this analysis is a discrete topic in itself. Its absence does not undermine the main aim and contribution of this article. In any event, Sub-Part 2.3 does provide a sufficient description of, and sufficient references to the case law in regard to, each economic activity. The other limitation is that this article is limited to proceeds of personal exertion and business, and circumstances that fall short of these activities. In a 'closely held entity' (e.g. company, trust), there is the possibility that some cash receipts are the product of a taxpayer's ownership

interest in the operating entity.[3] To deal with this issue in the article would raise another series of issues, and it has been decided not to pursue them here.[4] In addition, the article does not deal with the valuation of particular benefits under the FBTR. Space does not permit this.

Aside from this introduction and the conclusion, the article is in three parts. Part 2 contains an outline of the meaning of a non-cash benefit, as well as a summary of the relevant charging provisions that may apply to non-cash benefits from personal exertion and business; which form the column headings in the table (in Part 3). In addition, Part 2 contains the appropriate classification given by the income tax law to the various transactions and arrangements involving personal exertion, business, etc, and activities contrasted with personal exertion, business, etc. Part 3 contains the table with the yes and no responses. Sub-Part 3.1 contains the notes to, and explanations of, each response in the table. This is where co-ordination and prioritising of the rules is set out.[5]

The overall conclusion of the article is that, whilst the rules in regard to non-cash benefits from personal exertion and business are unnecessarily complex and contain anomalies that

[3] This was the issue in the Full Federal Court in *J & G Knowles & Associates Pty Ltd v Federal Commissioner of Taxation ('FCT')* (2000) 96 FCR 402 (and in the Administrative Appeals Tribunal ('AAT') decision in *J & G Knowles & Associates Pty Ltd v FCT* (2000) ATR 1101; which was remitted to the AAT by the Full Federal Court) and *Starrim Pty Ltd v Commissioner of Taxation* (2000) 102 FCR 194.

[4] The problematic issue of a receipt being the product of an ownership interest as opposed to the product of personal exertion only really arises in the closely held entity context where the principals of the 'business' occupy more than one role or capacity in relation to the relevant entity. This article has a broader focus than that circumstance.

[5] As noted above, the notes will also point out whether any charging provision outside of those set out in the table may apply to the relevant receipt (e.g. CGT event).

should be addressed, the law has developed to the stage where there is a reasonable degree of certainty of application of the rules to non-cash benefits.

2. MEANING OF NON-CASH BENEFITS, CHARGING PROVISIONS AND CHARACTER OF ECONOMIC ACTIVITIES

This part is broken into three sub-parts, namely the meaning of non-cash benefits (Sub-Part 2.1), relevant charging provisions (Sub-Part 2.2)[6] and the character of economic activities (Sub-Part 2.3)[7] set out in the table. For completeness, Sub-Part 2.2 also sets out relevant exempt income rules, non-assessable non-exempt ('NANE') income rules, etc., that are relevant to each charging provision.

2.1 Non-Cash Benefits

This article focuses on 'non-cash benefits'. The central element is that the recipient of the benefit (and the 'payer') contemplates that his or her consideration will not be in the form of money but rather in another form (e.g. property or services). Non-cash benefits can come in a wide variety of forms. Most of the specific categories of benefits dealt with in the *Fringe Benefits Tax Assessment Act 1986* (Cth) ('*FBTAA 1986*') provide examples of non-cash benefits (eg use of cars, use of a dwelling, transfer of property). The case law provides other examples,[8] as do Australian Taxation Office (ATO) rulings.[9] It will be

[6] See the Column headings in table, 125.
[7] See the Rows in table, 125.
[8] *Hayes v FCT* (1956) 96 CLR 47 (gifting of shares) ('*Hayes v FCT*'); *FCT v Cooke and Sherden* (1980) 29 ALR 202 ('*Cooke and Sherden*') (free holiday); *Payne v FCT* (1996) 66 FCR 299, 299 (free flight rewards or airline tickets) ('*Payne v FCT*'); *Case 7/97* 97 ATC 143 (interest-free loan).
[9] Australian Tax Office, *Income Tax: Assessability of Payments Received under the Military Skills Award Programme*, TR IT 2474, 12 May 1988 ('*Income Tax*

appreciated that non-cash benefits can take numerous forms. Some could be described as consumables so that they will last a very short period after being received by the taxpayer. Others may be wasting items (depreciable items) but will still last a considerable period. It is expected that a minority of non-cash benefits will be non-wasting items.

The view taken in this article is that the discharge of a liability for a person is not a non-cash benefit, and is therefore outside the scope of this article. It is submitted that the approach of the Full Federal Court in *Burrill v FCT* to the application of s 21(1) of the *Income Tax Assessment Act 1936* (Cth) ('*ITAA 1936*') supports this position.[10] This is in spite of the fact that one could argue the consideration received is a promise (or service) to meet a liability rather than a cash receipt. For current purposes, waiver of a liability will also not be treated as a non-cash benefit.[11] The fact that a debt waiver is treated as a category of benefit under the

Assessability of Payments Received under the Military Skills Award Programme Ruling'); Australian Tax Office, *Income Tax: Barter and Countertrade Transactions*, TR IT 2668, 13 February 1992; Australian Tax Office, *Fringe Benefits Tax: Sporting Clubs*, TR MT 2032, 30 September 1986.

[10] *Burrill v Commissioner of Taxation* (1996) 67 FCR 519. The Full Federal Court said:

> As Hill J said in *Energy Resources* [*FCT v Energy Resources of Australia Limited* (1994) 54 FCR 25], the distinction [s 21(1)] draws is between payment in cash and payment in kind. We do not think 'cash' is restricted to coins and notes (local or foreign). In our view the phrase 'consideration ... otherwise than in cash' points to a consideration that does not find expression in cash. The consideration in the present case is a promise to pay money. That is not a consideration in kind, and although it is not actually money, it sounds in money.

[11] The benefit in the form of the waiver of a liability seems to have been treated as a cash benefit to the taxpayer in the sense that s 21A of the *ITAA 1936* (non-cash business benefits) was not required in order to include the amount in income as the proceeds of a business in *Integrated Insurance Planning Pty Ltd v Commissioner of Taxation* (2004) 205 ALR 120, 139.

FBTAA 1986[12] does not undermine this because the FBTR is not designed to be, and is not, restricted to non-cash benefits.[13]

There may be situations where a taxpayer has an option to take cash instead of a non-cash benefit. For current purposes, where such a choice exists, and a decision is made to take cash, then this will generally be regarded as cash, and therefore will not be a non-cash benefit. I say generally because the transaction may reveal that a non-cash benefit has accrued to the taxpayer, and then the taxpayer has realised it for a money sum. In this latter situation, a non-cash benefit has accrued to the taxpayer; the realization of the non-cash benefit for money is a separate event.

A distinction made by the ATO should be noted. At paragraphs 11-13 of *Miscellaneous Taxation Ruling* MT 2032, the ATO states:

> 11. For awards to players in the better paid teams a distinction may be drawn between medals, plaques and other trophies given to formally recognise achievements, but not having functional utility, and prizes in the form of valuable and useful goods such as cars, TVs, etc.
>
> 12. The latter are properly subject to tax - either to FBT if provided by the employer club (or associates) or, as is the well-established position, to income tax in the players' hands if awarded by an independent source such as a newspaper award.
>
> 13. Awards in trophy form such as medals, plaques, cups, etc., are subject to neither FBT nor income tax. They do not represent any intrinsic form of remuneration. Their essential function is to recognise and record the particular achievement of the recipient.

[12] s 14.

[13] Ibid ss 20, 30. The FBTR taxes certain cash benefits (e.g. reimbursements, discharge of expense situations, living away from home allowances).

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For the purpose of this paper, the category of items identified by the ATO as not having any intrinsic value will be viewed as being non-cash items that are not a benefit (i.e. they are outside this paper).[14] Finally, the receipt of a non-cash benefit must be expressed in its money value, which means Australian currency.[15]

2.2 Charging Provisions, Exemption Provisions and Anti-Double Taxation Rules[16]

The term "charging provision" normally means that an amount will come within the tax base, or a component of the tax base, under the provision. Section 6-5 *ITAA 1997* is clearly a charging provision on this meaning. In light of s 6-10 *ITAA 1997*, there is some doubt as to whether s 15-2 *ITAA 1997* on its own can be regarded as a charging provision.[17] In spite of this, this article will treat s 15-2 as a charging provision and no further reference is made to s 6-10. Finally, in regard to Australia's FBTR, the definition of a 'fringe benefit' on its own cannot be regarded as a charging provision because, for example, the otherwise deductible rule ('ODR') may reduce the taxable value of the benefit, in many cases to nil. Even if a taxable value for a fringe benefit does emerge, that value must be grossed-up before the FBT rate is applied to determine tax payable.[18] Accordingly, satisfying the definition of a fringe benefit does not necessarily mean that an amount will be subject to the FBT regime. In spite

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[14] See also *Income Tax Assessability of Payments Received under the Military Skills Award Programme Ruling*, [4], where the ATO also makes the distinction between things having no intrinsic value and those that do have intrinsic value in the form of remuneration.

[15] *ITAA 1936* s 21.

[16] Each heading number in sub-part 2.1 corresponds with the number given to the relevant item in the table, 125.

[17] The main argument seems to be that s 15-2 does not contain jurisdictional rules, but that s 6-10 does and that a charging provision must contain jurisdictional limitation rules: ss 6-10(4) and ss 6-10(5).

[18] *FBTAA* 1986, ss 5B, 5C, 66.

of this, the definition of a fringe benefit is the central entry point into the FBT regime (and exclusion of the income tax) and that is the key consideration in this article.

2.2.1 Section 6-5 of the ITAA 1997 (Income)

Section 6-5 states that a taxpayer's assessable income includes 'income according to ordinary concepts', which is called ordinary income. Judges, in deciding cases over the years, have effectively created categories (or schedules) of income according to ordinary concepts. Two of the most important categories of income are dealt with in this article, namely, 'proceeds of personal exertion'[19] and 'proceeds of business'.[20] The question in regard to both categories is usually framed in terms as to whether the receipt is truly a product of, or the proceeds of, personal exertion or the business respectively. This is determined by taking account of all the facts and circumstances surrounding the receipt. No one fact will usually be decisive.

2.2.1.1 Convertibility of a Non-Cash Benefit into Money

An overriding requirement of the income concept is that if a benefit cannot be converted into money, it cannot be income.[21] If a non-cash benefit can be converted into money and it is

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[19] *Commissioner of Taxation v Dixon* (1952) 86 CLR 540 (Dixon CJ and Williams J); *Hayes v FCT*; *Scott v FCT* (1966) 117 CLR 514 ('*Scott v FCT*').

[20] *FCT v Squatting Investment Co Ltd* (1954) 88 CLR 413 ('*Squatting Investment Co*'); *FCT v Myer Emporium Ltd* (1987) 163 CLR 199, 199; *FCT v Montgomery* (1999) 198 CLR 639, 649 [113]-[119]; *Commissioner of Taxation v Stone* (2005) 222 CLR 289, 289 [16]-[19] ('*Commissioner of Taxation v Stone*'). The 'return from property' principle (*Commissioner of Taxation v McNeil* (2007) 229 CLR 656, 656 [21]) and the 'compensation receipts' principle (*Commissioner of Taxation v Smith* (1981) 147 CLR 578); *Liftronic Pty Ltd v FCT* (1996) 66 FCR 175) developed by the courts are not dealt with in this article.

[21] *Cooke and Sherden*, 211-214; *Payne v FCT*, 299. See also Australian Tax Office, *Income Tax: Sportspeople – receipts and other benefits obtained from involvement in sport*, TR 1999/17, 24 November 1999 [54].

otherwise income (e.g. from a recognised income-producing activity), the amount of income is the realisable value of the benefit.[22] Whether the taxpayer actually converts the benefit into money is not relevant, the key is whether it is capable of being converted into money. This approach is consistent with the principle that a 'receipt must be characterised at the time it is derived/received'.[23]

There is some debate about the precise formulation of the non-convertibility principle involving non-cash benefits. Some leading commentators have suggested that the principle is not as stated above. Rather, the principle is, if a non-cash benefit is not capable of being converted into money, there is income (provided the benefit is from a recognised income-producing source/activity), but the income is of a zero amount.[24] For these commentators, the presence of non-convertibility affects the 'amount of income', rather than the 'presence of income'. In this sense, the presence of non-convertibility is a valuation issue rather than a characterisation issue. The wording of ss 21A(1)-21A(4) of the *ITAA 1936* - especially s 21A(2) - would seem to support the 'income of nil amount' view.[25] Section 21A was enacted to ensure that non-cash benefits that were received as a

[22] *Donaldson v FCT* (1974) 3 ALR 516, 533 ('*Donaldson v FCT*'). In *Hayes v FCT*, Fullagar J referred to the market value of the shares received as being the amount of income in the event that receipt of the shares was held to be income to the recipient. In that case, the Australian Taxation Office (ATO) incorrectly assessed the taxpayer on the face value of the shares received under the then relevant income tax provision; s 25(1) of the *ITAA 1936*.

[23] *Constable v FCT* (1952) 86 CLR 402.

[24] P Burgess et al, *Cooper, Krever & Vann's Income Taxation: Commentary and Materials* (Thomson Reuters, 6th ed, 2009) [2.250]; R W Parsons, *Income Taxation in Australia: Income, Deductibility and Tax Accounting* (The Law Book Company Limited, 1985) [2.30-2.33].

[25] Parsons, above n 24, [2.32]: one rationale for the principle - no matter which view of the principle is taken - seems to be that the courts are reluctant to tax a particular benefit unless the taxpayer can source funds from the benefit in order to meet a tax obligation on the benefit.

product of a business, and which were not capable of being converted into money, could be included in assessable income.[26]

In spite of the above, it is submitted that the correct position in Australia, at least until the High Court authoritatively decides the matter, is that there can be no income. The authority in Australia is the Full Federal Court decision in *Cooke and Sherden*.[27] The principle was applied in *Payne v FCT*.[28] In both of these cases, the non-convertibility principle is couched in terms of denying the existence of income.[29]

Various questions arise in regard to the meaning of non-convertibility. For example, is a non-cash benefit to be treated as not convertible into money merely because there is a contractual provision preventing its conversion? Or, should the non-convertible test focus on practical limitations to conversion (e.g. difficulty of finding a buyer of a consumable) and ignore legal restrictions, especially contrived ones?

First, in light of the decisions in *Cooke and Sherden* and *Payne v FCT*, it is clear that non-convertibility can arise purely from contractual obligations surrounding the giving of the benefit. It is also submitted that the same holds true if non-convertibility arises through a legal rule other than under a

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[26] *Cooke and Sherden*.

[27] Ibid 211(free holiday won by business taxpayers, and which could not be converted into money, was held not to be income).

[28] *Payne v FCT*, 299 (receipt of flight rewards under a frequent flyer program).

[29] On the face of it, there is no practical difference between: (a) a non-cash benefit not having the character of income and (b) a non-cash benefit having the character of income but having a taxable value of nil. In both cases, there is no amount assessed as income. The issue will only become important where a specific charging section dealing with non-cash benefits provides its own valuation rule, but fails to override the non-convertibility principle. In these cases, the 'income with nil value' approach will be important to the ATO. Where the legislature has dealt with non-cash benefits through a specific charging section, the legislature has ensured that the non-convertibility principle has been overridden.

contract. The consequence of this is that a benefit that is inherently convertible into money (e.g. non-wasting property) can be made non-convertible through contractual stipulations of the parties. Secondly, it is submitted that where a benefit, from a practical viewpoint, is not convertible into money, it should be treated as a non-convertible benefit. This is in spite of the absence of a legal restriction on convertibility. The receipt of a cooked meal at a remote location may provide an example.

2.2.1.2 Otherwise Deductible Rule

There is no express ODR that operates in regard to s 6-5 *ITAA 1997*. Briefly, an ODR prevents 'over-taxation'" of a benefit by reducing the taxable value of the benefit by the amount of the deduction the recipient of the benefit would have obtained had she or he incurred and paid to obtain the benefit. Another way of putting it is that the benefit is used or consumed in the course of an income-producing activity of the recipient, rather than in private consumption. It will be appreciated that the ODR operates on a 'notional expenditure event', and not an actual expenditure event.

The absence of an ODR in regard to s 6-5 *ITAA 1997* does not necessarily result in over-taxation. First, most non-cash benefits are provided in the context of employment and these will be subject to the FBTR, which does have express ODRs for most types of non-cash benefits. Secondly, even if a non-cash benefit was assessable under s 6-5, it is submitted that the High Court decision in *Buckingham v FCT* contains a judicial 'equivalent' of an ODR in the employment or services context, so as to prevent over-taxation.[30] Justice Evatt made the following dicta comments in regard to meals provided to the captain of a trading ship while the ship was at sea and which the ATO was seeking to tax. His Honour said:

[30] (1934) 3 ATD 37, 39.

> Assuming, as I do therefore, that the full value of the meals should be regarded as part of his assessable income, but that a deduction has to be made by reason of the fact that solely by reason of the nature of the employment, the alleged 'income' disappears so soon as it appears, then the only deduction which is applicable must be the full value of the meals consumed.[31]

A couple of observations are worth making. First, it may not strictly be an ODR because Evatt J appears to be talking about giving an actual deduction through a deduction section rather than reducing assessable income through a charging section. However, this does not matter because the end result is the same. Secondly, the scope of this judicial ODR is not clear, and it may only apply to reduce the amount of income where the non-cash benefit is consumed fairly quickly after receipt. When a non-cash benefit has 'more permanency', the judicial ODR will not apply even though the benefit is used by the recipient for income production. What may assist in these circumstances though, is the rule in s 40-185 of the *ITAA 1997* in regard to the cost base of a depreciating asset. Section 40-185 provides that the cost base of a depreciating asset to a taxpayer includes the amount that was included in the taxpayer's assessable income on receipt of the non-cash benefit. This then allows the taxpayer to take (actual) deductions for the decline in value of the item, which effectively achieves the same outcome as most current ODRs, except that the reduction in the tax base is achieved over time.[32] Section 40-185 provides the deemed cost base inclusion no matter which assessable income

[31] Ibid.

[32] The once-only expenditure requirement in ODRs throughout the income tax essentially means that in regard to non-cash benefits that are capital in nature, the ODRs will not apply to reduce the taxable value of a non-cash benefit. This is in spite of the fact that the non-cash benefit is used for income production. This is where a rule like that in s 40-185 *ITAA 1997* is particularly useful because it overcomes the unfairness of the revenue requirement embedded in the current ODRs. See sub-part 3.2.3 for a discussion of this in the context of fringe benefits.

section applied. There is no rule equivalent to s 40-185 in the CGT regime, but this is of little consequence because most non-cash benefits having a degree of permanence are likely to meet the definition of a depreciating asset.[33]

2.2.1.3 Exempt Income, NANE Income

Section 23L(1) of the *ITAA 1936* states that income that is derived by way of the provision of a 'fringe benefit' is not assessable income, and it is not exempt income (i.e. NANE income).[34] Section 23L(1) is sufficient to exclude fringe benefits under the *FBTAA 1986* from the recipient's assessable income under s 6-5 of the *ITAA 1997*. Section 23L(1A) of the *ITAA 1936* states that income derived by way of the provision of a benefit, that would be a fringe benefit if not for the benefit being an exempt benefit, is exempt income of the recipient. Section 23L(1A) is sufficient to exclude benefits that are exempt benefits under the *FBTAA 1986* from the recipient's assessable income under s 6-5 of the *ITAA 1997*.[35]

[33] The relevant part of s 40-30(1) *ITAA 1997* states that a depreciating asset is an asset that has a limited effective life and can reasonably be expected to decline in value over time. It is also worth noting that the apportionment rule in the depreciating asset regime (s 40-25(2)) can deal with the circumstance where the non-cash benefit is only partly put to income-producing use. It is worth noting that *ITAA 1997* s 112-37 does provide an acquisition cost equal to the assessable income inclusion but this section only operates in regard to the receipt of a put option.

[34] Somewhat importantly, an amount of NANE income does not absorb (reduce) a prior-year tax loss before that loss can be used as a deduction against future assessable income (taxable income): *ITAA 1997* ss 36-15(3), 36-20.

[35] Because s 23L(1A) of the *ITAA 1936* makes exempt benefits under the *FBTAA 1986* exempt income, rather than NANE, exempt benefits are required to absorb a prior-year tax loss before a taxpayer can use such a loss as a deduction against future assessable income: *ITAA 1997* s 36-15(3).

Where a fringe benefit or exempt benefit would not be income (e.g. non-cash benefit that is not convertible into money), s 23L *ITAA 1936* is not required to prevent double taxation because s 6-5 will not include the amount in any event, because the benefit is not income.[36]

2.2.2 Section 15-2 of the ITAA 1997 (Employment or Services Rendered)

In order for s 15-2 of the *ITAA 1997* to include an amount in a taxpayer's assessable income, three (or four) conditions need to be satisfied. They are:

> (a) The "benefit" must come within the definition of only one of the items listed.[37] They are: allowances, gratuities, compensation, benefits, bonuses and premiums;[38]
>
> (b) The "benefit" must have been provided to the taxpayer;[39] and

[36] Even if a non-cash benefit that cannot be converted into money is income of a zero amount - a position this article rejects (Sub-Part 2.2.1.1) - no double taxation will arise because a zero amount will be included in assessable income under *ITAA 1997* s 6-5.

[37] *Taxation Case B18* (1970) 70 ATC 78, 81.

[38] Given that 'benefit' is a word of very wide connotation (*Taxation Case F18* (1974) 74 ATC 91, 93), most non-cash benefits will come within the term benefit in *ITAA 1997* s 15-2. With respect, the decision in *AAT Case V60* (1988) 88 ATC 434 (taxpayer required to live in employer-provided accommodation as a condition of employment but who preferred to live in own home was held not to have obtained a benefit from the employer-provided accommodation) must be regarded as questionable, or at least limited to the facts.

[39] The requirement of 'allowed, given or granted to him' in the old s 15-2 (s 26(e) of the *ITAA 1936*) of the *ITAA 1997* was not satisfied in *Payne v FCT* because the benefit obtained by the taxpayer accrued to her by reason of her contractual rights under the frequent flyer program with Qantas, rather than being provided to her by Qantas or the employer. The second condition also was not satisfied in *Constable v FCT* (1952) 86 CLR 402. It is submitted that the

> (c) The "benefit" must have been provided in respect of employment, or in respect of services rendered.[40]

It is not enough to merely satisfy one or two of the conditions for the section to apply.[41]

2.2.2.1 Non-Convertibility Doctrine

Section 15-2 of the *ITAA 1997* does not require non-cash benefits to be convertible into money in order for an assessable income inclusion to arise. Relevant authorities for this point include *Donaldson v FCT* and *FCT v McArdle*.[42] The failure of Foster J in *Payne v FCT* (frequent flyer benefits) to rely on the non-convertibility doctrine as the basis for holding that s 26(e) of the *ITAA 1936* did not apply to tax the benefits also, by

words 'provided to you' in s 15-2 of *ITAA 1997* have the same meaning as the words 'allowed, given or granted to him' in old s 26(e) *ITAA 1936*: see s 1-3.

[40] The majority judgments of Wilson, Brennan and Toohey JJ in the High Court case of *Smith v FCT* (1987) 164 CLR 513 are the most authoritative statements on the 'in respect of employment' concept in s 26(e) of the *ITAA 1936* (now *ITAA 1997* s 15-2) (i.e. the benefit must be a product, incident or consequence of the employment). See also the comments of the Full Federal Court in *J & G Knowles & Associates Pty Ltd v FCT* (2000) 96 FCR 402, 402 [22]-[29] in the context of the 'in respect of employment' requirement under the definition of a fringe benefit in the *FBTAA 1986* (i.e. there must be a discernible and rational link between the benefit and employment, there must be a sufficient or material connection between the benefit and employment). There is no reason to think that the in respect of employment requirement in s 15-2 *ITAA 1997* will differ from that in the definition of a fringe benefit in *FBTAA 1986*. The Full Federal Court decision in *Commissioner of Taxation v Holmes* (1995) 58 FCR 151 ('*FCT v Holmes*') contains a discussion of the test in regard to the connection required between a payment (benefit) and services rendered before s 15-2 *ITAA 1997* can apply (i.e. there must be a real connection between the payment and the services rendered): 151 [27]-[28].

[41] *Constable v FCT* (1952) 86 CLR 402; *Payne v FCT*.

[42] (1988) 89 ATC 4051, 4052; See also *Case D23* (1972) 72 ATC 140, 148; *Case H54* (1976) 76 ATC 458, 461; *Case P46* (1982) 82 ATC 218, 220; *Case F18* (1974) 74 ATC 91, 93-94.

implication, supports this.[43] It is submitted that the valuation formula in s 15-2 of the *ITAA 1997*, namely, value to the taxpayer, is the thing that overrides the non-convertibility doctrine.[44]

2.2.2.2 Taxable Value

The assessable income inclusion is the 'value to the taxpayer' at the time of receipt of the benefit.[45] First, unlike for some benefits under the *FBTAA 1986*,[46] this valuation formula is not the cost of the benefit to the provider. Secondly, unlike s 6-5 *ITAA 1997*, it is not the realisable value of the benefit.[47] A focus on the words 'value to the taxpayer' alone implies that the subjective circumstances and desires of the taxpayer are paramount in determining value.[48] If this were the case, factors that are peculiar to the taxpayer and the benefit received could depress the value

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[43] The following comment on the old *ITAA 1997* s 15-2 (s 26(e) of the *ITAA 1936*) by the ATO must be taken to be incorrect:

> Where the benefit cannot be converted to money's worth, such as the case with non-transferable airline tickets, no amount can be assessable under section 25 or paragraph 26(e) unless it falls for consideration as a non-cash business benefit under section 21A of the ITAA.

Australian Taxation Office, *Income tax and fringe benefits tax: Benefits received under frequent flyer and other similar consumer award type programs*, TR 93/2, 7 January 1993, [16]. TR 93/2 was withdrawn on 16 June 1999.

[44] It is worth noting that if a non-cash benefit cannot be converted into money, this fact is likely to depress the s 15-2 *ITAA 1997* value compared to the same benefit that is capable of conversion because objectively, the convertible benefit has a wider range of 'uses' to the taxpayer.

[45] *FCT v McArdle* (1988) 89 ATC 4051, 4058; *Case 9* (1956) 7 CTBR (NS) 47, 54-56; *Taxation Case F18* (1974) 74 ATC 91, 94.

[46] See, eg, s 10 of the *FBTAA 1986* (operating cost method for permitting use of a motor vehicle, but note that s 10 also requires the inclusion of notional costs); s 23 (amount of expense payment); s 43(a) (external property benefit).

[47] *Taxation Case P46* (1982) 82 ATC 218, 220.

[48] *Case 83* (1952) 2 CTBR (NS) 463; *Case 65* (1963) 11 CTBR (NS) 396, 398; *Taxation Case D23* (1972) 72 ATC 140, 147; *Taxation Case D59* (1972) 72 ATC 364, 367; *Taxation Case F18* (1974) 74 ATC 91, 93; *Taxation Case L10* (1979) 79 ATC 59, 60; *Taxation Case P80* (1982) 82 ATC 390, 393. See also R H Woellner et al, *Australian Taxation Law 2014* (CCH Australia, 24th ed, 2014) [4.160].

of a given benefit,[49] and make the task of valuation difficult. It is noted that the fact the task of valuing a benefit is difficult does not mean that s 15-2 *ITAA 1997* does not apply.[50]

The authors of *Australian Taxation Law 2014* suggest that Bowen CJ in *Donaldson v FCT* applied a semi-objective test in order to reduce the implications of, or the problems associated with, a purely subjective test.[51] The test set out by his Honour of value to the taxpayer was 'what a prudent person in [the position of the taxpayer] would be willing to give for the rights [benefit] rather than fail to obtain them.'[52] However, it appears that his Honour was merely drawing on the principle that is applied in the land resumption jurisprudence where the term 'value to the owner' is the critical guide in determining compensation payable to a landowner whose property has been compulsorily purchased by a government agency.[53] It is submitted that the value to the owner test in the land resumption jurisprudence encompasses a mixture of subjective and objective considerations.[54] In the end, all the circumstances surrounding receipt of the benefit are relevant in determining value including any restrictions on the ability to convert the benefit into money.

2.2.2.3 Otherwise Deductible Rule

Like s 6-5 of the *ITAA 1997*, there is no express ODR rule for s 15-2 of the *ITAA 1997*. Again, this does not necessarily lead to over-taxation of a benefit. The comments in Sub-Part 3.2.1.2 concerning the ODR in regard to s 6-5 are equally relevant to s 15-2, and are hereby incorporated, including the point about s 40-

[49] See, eg, *AAT Case T76* (1986) 86 ATC 1076, 1089; and the cases cited therein.
[50] *Donaldson v FCT*.
[51] Woellner et al, above n 48.
[52] *Donaldson v FCT*.
[53] See Bowen CJ's reference to *Pastoral Finance Association Limited v The Minister* [1914] AC 1083 in *Donaldson v FCT*, 533.
[54] See the commentary and cases cited in Alan Hyman, *The Law Affecting Valuation of Land in Australia* (The Federation Press, 3rd ed, 2004) 273-302.

185 of the *ITAA 1997* (deemed cost equal to the assessable income inclusion).

2.2.2.4 Exempt Income, NANE Income

Section 15-2 *ITAA 1997* does not apply if the value of a non-cash benefit is included in assessable income under s 6-5 *ITAA 1997* because it is ordinary income.[55] There is no rule in s 15-2 that excludes the value of a non-cash benefit from inclusion in the recipient's assessable income under s 15-2 where the recipient receives a fringe benefit or an exempt benefit under the *FBTAA 1986*. The old s 15-2 (s 26(e) of the *ITAA 1936*) did contain express rules to exclude fringe benefits and exempt benefits from inclusion in the assessable income of the recipient of the benefit.[56] There is however a note under s 15-2 *ITAA 1997* stating that s 23L of the *ITAA 1936* provides that fringe benefits are NANE income.[57] The assumption, and one that is not necessarily sound, is that s 23L of the *ITAA 1936* will operate to exclude both fringe benefits and exempt benefits from s 15-2 of the *ITAA 1997*. One problem with ss 23L(1) and 23L(1A) of the *ITAA 1936* is that they only apply if an item is income derived. Where a fringe benefit or exempt benefit is not income, ss 23L(1) and 23L(1A) cannot apply to prevent 'double taxation'. (Strictly, where exempt benefits are involved, there is no double taxation that needs to be prevented; it is more the aim of preserving the exemption provided under the *FBTAA 1986* through the exempt benefit).[58]

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[55] *ITAA 1997* s 15-2(3)(d).

[56] *ITAA 1936* ss 26(e)(iv), 26(e)(v).

[57] *ITAA 1997* ss 2-45 and 950-100(1) state that notes form part of this Act (which includes the *ITAA 1936* and the *ITAA 1997).* However, *ITAA 1997* s 2-35 makes it clear that a note is not an operative rule. Accordingly, the status of the note under *ITAA 1997* s 15-2 is merely a helpful comment for the benefit of the reader of the income tax law.

[58] Some would challenge the label 'double taxation' in circumstances where a gain is being taxed in the hands of two entities, which is the case with a fringe

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A non-cash benefit that cannot be converted into money provides an example of a fringe benefit that is not income.[59] If the term 'income' is defined to mean an amount of assessable income, instead of income on ordinary concepts, then s 23L(1) of the *ITAA 1936* can perform its full anti-double taxation role, and s 23L(1A) of the *ITAA 1936* could fulfil its preservation of exemption role. There is no doubt that a word need not have the same meaning everywhere it appears in a piece of legislation.[60] Interpreting income in s 23L to mean an amount of assessable income would give effect to the apparent purpose of s 23L, namely, to prevent the double taxation of an economic gain, albeit the double taxation involves separate taxpayers (i.e. provider of benefit and recipient of benefit). Further, to restrict the word income in s 23L to income on ordinary concepts would result in prevention of double taxation where a benefit can be converted into money, and would tolerate double taxation where a benefit cannot be converted to money. It is submitted that such differential outcome could not have been intended by parliament.

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benefit (i.e. provider and recipient of a benefit). This author takes the view that the label 'double taxation' is appropriate in these circumstances.

[59] As noted in Sub-Part 2.2.1.1, this article rejects the suggestion that a non-cash benefit that cannot be converted into money is income of a zero amount. Instead, this article accepts that such benefits are not income. If the former characterisation were correct, s 23L of the *ITAA 1936* would clearly apply to perform its anti-double taxation role, etc.

[60] The word 'income' in ss 97 and 98 of the *ITAA 1936* is not restricted to income on ordinary concepts. Rather, the term income in these sections also encompasses a net amount that subtracts expenses from income on ordinary concepts (e.g. 'surplus' and 'surplus income': *FCT v Totledge Pty Ltd* (1982) 40 ALR 385, 393; 'distributable net income': *Cajkusic v Commissioner of Taxation* (2006) 155 FCR 430, 430 [22]-[27]; 'distributable income': *Bamford v Commissioner of Taxation* (2009) 176 FCR 250, 250 [43]). Further, based on the High Court decision in *Commissioner of Taxation v Bamford* (2010) 240 CLR 481, 481[36]-[42], the receipts side of this net amount equation is not limited to income receipts. See also, *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1 (Gibbs CJ and Mason J); *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of* Taxation (1981) 147 CLR 297 (Gibbs CJ and Mason and Wilson JJ).

Finally, it may be very important that s 23L performs an anti-double taxation role because there does not seem to be an entrenched judicial principle of universal application against double taxation,[61] and s 6-25 of the *ITAA 1997* is of no assistance in the present circumstances.[62]

2.2.3 Definition of a "Fringe Benefit" in s 136(1) of the FBTAA 1986

The *FBTAA 1986* has 12 categories of specified fringe benefits (e.g. car benefits, property benefits, loan benefits) and a residual category. Satisfying the definition of 'fringe benefit' in s 136(1) of the *FBTAA 1986* is a necessary pre-requisite to the imposition of fringe benefits tax, no matter what type of benefit is involved. Briefly, the key 'positive limbs' of the definition of a 'fringe benefit' are:

(a) A benefit is provided;[63]

(b) The benefit is provided to an employee;[64]

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[61] In *Executor Trustee & Agency Co of SA Ltd v FCT* (1932) 48 CLR 26, Dixon J stated that: 'No interpretation of a taxing Act should be adopted which results in the imposition of double taxation unless the intention to do so is clear beyond any doubt'. On the other hand, in *Deputy Commissioner of Taxes v Executor Trustee and Agency Co of South Australia Ltd* (1938) 63 CLR 108, his Honour accepts the notion that there is no reason to exclude from a taxpayer's assessable income the double income inclusion that occurs when a taxpayer changes from an accruals basis of derivation to a cash basis of derivation in a subsequent year where fees earned in the accruals year are received in the cash year. See also, Evatt J's comments in *Richardson v FCT* (1932) 48 CLR 192 concerning the levy of tax on separate individuals in regard to the same income.

[62] Section 6-25, an anti-double taxation rule, will not apply to prevent double taxation because s 6-25 only applies where an amount is included in a taxpayer's assessable income twice by different assessable income provisions.

[63] The definition of 'benefit' in s 136(1) of the *FBTAA 1986* is extremely wide (*National Australia Bank Ltd v FCT* (1993) 46 FCR 252, 254) and will cover non-cash benefits related to employment.

[64] Broadly, the term 'employee' is defined to mean someone entitled to receive salary or wages under an employment contract. A benefit can be provided to an

(c) The benefit is provided by the employer;[65] and

(d) The benefit is provided in respect of the employment of the employee.[66]

2.2.3.1 Salary or Wages Exception

After the positive limbs, the definition of a "fringe benefit" contains a list of exceptions (negative limbs). The most important one is salary or wages. Salary or wages is also defined in s 136(1) of the *FBTAA 1986*. Paragraph (a) of the definition states that salary or wages means: (1) a payment from which an amount must be withheld (by payer) under a provision in Schedule 1 to the *Taxation Administration Act 1953* (Cth) ('*TAA 1953*'), and which is listed in the Table in the s 136(1) *FBTAA 1986* definition of salary or wages and, (2) the payment must be assessable income. Schedule 1 to the *TAA 1953* contains the PAYG withholding rules. In particular, s 12-35 in Schedule 1 to the *TAA 1953* is relevant, as s 12-35 is listed in the Table in the s 136(1) *FBTAA 1986* definition of salary or wages.

Section 12-35 of the *TAA 1953* mentions 'salary', 'wages', 'commission', 'bonuses' or 'allowances'. In spite of being distinct terms, salary or wages usually means the amount paid to an employee for undertaking their normal employment duties and normal hours of work (i.e. normal remuneration).[67] Importantly,

associate of an employee and still be a fringe benefit. Sub-Part 2.3 explains why the associate issue will not be dealt with in this article.

[65] Broadly, the term 'employer' is defined to mean someone obliged to pay salary or wages under an employment contract. A benefit can be provided to an employee by an entity other than the employer, and still be a fringe benefit. Sub-Part 2.3 explains why the analysis of such circumstances will not be dealt with in this article.

[66] Readers are referred to the comments in nn 41 in regard to the 'in respect of employment' discussion there.

[67] *Mutual Acceptance Co Ltd v FCT* (1944) 69 CLR 389 (DixonJ); *AAT Case 1/97* (1996) 97 80 ATC 4424ATC 101, 109.

salary or wages are required to be paid in money.[68] This strongly suggests that the receipt of a non-cash benefit (e.g. use of employer's car) will not amount to salary or wages in s 12-35.

It is submitted that the terms, 'commission', 'bonuses' and 'allowances' in s 12-35 of the *TAA 1953* also require the 'advantage' to be paid in money form. To not require this would be inconsistent with the approach to interpreting salary or wages, and would tend to leave little scope for the operation of the *FBTAA 1986* because once an advantage is found to be one of salary, wages, commission, etc, the taxation of the advantage is moved into the income tax, and not the *FBTAA 1986*. In any event, the standard definitions tend to support the idea that they involve money. The term 'commission' usually means an amount payable to a person (e.g. salesperson) in return for services provided, where the amount payable is in proportion on a percentage basis, to the value of sales made by the person or value of the transaction executed by the person, etc.[69] The term bonus usually refers to 'something given or paid over and above what is due and payable for … services. Often it is paid out of profit realised, in reward to those whose services have contributed to the making of the profit …'[70] The term 'allowance' in the context of an employment relationship usually means 'a grant of something additional to ordinary wages for the purpose of meeting some particular requirement connected with [the

[68] Section 323(1) of the *Fair Work Act 2009* (Cth) requires employers to pay employees in relation to the performance of work in money, which can include cash, cheque or electronic funds transfer to an account of the employee.

[69] *Mutual Acceptance Co Ltd v FCT* (1944) 69 CLR 389 (Dixon J).

[70] *Murdoch v Commissioner of Pay-roll Tax (Vic)* (1980) 143 CLR 629, where Mason, Murphy and Wilson JJ approve of McInerney J's description in *Commissioner of Pay-roll Tax (Vic) v Trustees of Estate of Adams (Deceased)* (1980) 80 ATC 4085, 4087. See also the description of a bonus by Kitto J (generally means 'a gratuitous addition to contractual remuneration'2 in *Attorney-General (Cth) v Schmidt (No 2)* (1963) 109 CLR 169, 172-173; also cited by Gibbs J with approval in *Murdoch v Commissioner of Pay-roll Tax (Vic)* (1980) 143 CLR 629.

employment] or as compensation for some unusual conditions of [the employment].'[71]

Subject to the comments below about exempt benefits, a non-cash benefit will remain a fringe benefit because the salary or wages negative limb does not remove it from the definition of fringe benefit. It is also noted that a non-cash benefit can still be a benefit received in respect of employment even if the benefit is not in the nature of income (e.g. cannot be converted into money).[72]

2.2.3.2 Exempt Benefits Exception

Exempt benefits are also taken out of the definition of a fringe benefit,[73] and they can be found in various parts of the *FBTAA 1986*.[74] Examples of exempt benefits where 'non-cash benefits' are involved are: (a) use of certain motor vehicles where private use is limited (e.g. travel from home to work);[75] (b) property benefits consumed on employer's premises on a working day;[76] (c) residual benefit in the form of child-care on employer's premises;[77] (d) property benefit in the form of a work-related item (e.g. portable electronic device);[78] and (e) entitlement to use an airport lounge membership.[79]

2.2.3.3 Taxable Value of Fringe Benefit

[71] *Mutual Acceptance Company Ltd v FCT* (1944) 69 CLR 389.
[72] *FBTAA 1986* s 148(1)(g).
[73] Ibid s 136(1)(g) (definition of 'fringe benefit').
[74] Some exempt benefits are contained within the division dealing with each category of benefit, and others are contained in *FBTAA 1986* Part III Division 13 (Miscellaneous exempt benefits).
[75] *FBTAA 1986* s 8(2).
[76] Ibid s 41(1).
[77] Ibid s 47(2).
[78] Ibid s 58X.
[79] Ibid s 58Y.

Each category of fringe benefit and the residual category have their own valuation rules, but some valuation rules are common to some categories of benefits. For some benefits there is a one-step valuation rule; for others there are two-steps; and for others there can be three-steps. The first step (and where there is only one-step) is referred to as the prima facie taxable value rule in this article. Where there are two-steps, the second step is usually referred to as a recipient's contribution or recipient's payment and, where present, this reduces the prima facie taxable value of the benefit by the amount of the recipient's payment. Where there are three-steps, the third step is referred to as the ODR and, where satisfied, this further reduces the taxable value of a benefit (Sub-Part 2.2.3.4).

Broadly stated, prima facie taxable value rules (step one) fall into the following categories: (a) cost to the employer,[80] (b) market value,[81] (c) saving to the employee,[82] and (d) statutory formula.[83] The recipient's contribution rule (step two) reduces the prima facie taxable value of a benefit where the employee has contributed to the cost of the benefit.[84] This rule is present in many categories of benefits.[85]

2.2.3.4 Otherwise Deductible Rule

The *FBTAA 1986* does contain a number of ODRs. The role of an ODR is to reduce the prima facie taxable value of a benefit (step three) as determined under the appropriate valuation rule.

[80] Ibid ss 10 (car benefit), 15 (debt waiver benefit), 23 (expense payment benefit), 39 (tax-exempt body entertainment benefit), 43(a) (external property benefit).
[81] Ibid ss 26 (housing benefit), 39D (car parking benefit).
[82] Ibid ss 18 (loan benefit), 33 (airline transport benefit). This category can give a similar result to that of market value.
[83] Ibid ss 9 (car benefit), 36 (board meal benefit).
[84] Ibid s 136(1) (definition of 'recipients [sic] contribution').
[85] Ibid ss 9(1), 10(2) (car benefits), 23 (expense payment benefit), 33 (airline transport benefit).

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An ODR is present in regard to a number of fringe benefits (e.g. loan benefits,[86] expense payment benefits,[87] property fringe benefits,[88] and residual benefits[89]). However, not all benefits subject to the FBTR contain an ODR mainly because an ODR is not required in all circumstances to prevent over-taxation arising, and the nature of a particular benefit does not encompass circumstances where an ODR is required (e.g. there can be no consumption of the benefit in the course of any activity).

Put briefly, the taxable value of a fringe benefit will be reduced if, had the employee incurred and paid to acquire the benefit (instead of having been given the benefit), the employee would have obtained a deduction for that cost. The reduction in taxable value is the amount of this notional deduction.[90]

One arguably unfair aspect of the ODRs in the *FBTAA 1986* is that they can only apply to reduce the taxable value of a benefit where the whole of the 'hypothetical expense' would have been deductible to the recipient of the benefit (employee) in the year of 'incurrence' (i.e. once-only deduction); if some of the deduction would have been obtained in a future income year, the ODR is not satisfied.[91] Obtaining a decline in value deduction under the depreciating asset regime will usually not qualify because the

[86] Ibid s 19.
[87] Ibid s 24.
[88] Ibid s 44.
[89] Ibid s 52.
[90] See, eg, *National Australia Bank Ltd v FCT* (1993) 46 FCR 252 , where bank employees provided with subsidised loans would have obtained deductions for interest on the loans because the loan funds were used for income production; *Re Pollak Partners Pty Ltd and Deputy Commissioner of* Taxation (1998) 98 ATC 2213, where employee trainers provided with a benefit in the form of lunch at a local hotel would have been able to obtain a deduction for the cost of the lunch, because it was a requirement of employment to discuss the training material with trainees over lunch.
[91] *FBTAA 1986* s 136(1) (definition of 'once-only deduction').

deduction is not limited to the year of incurrence.[92] It is also important to note that s 40-185 of the *ITAA 1997* (deemed cost base for asset) cannot assist because no amount was included in the employee's assessable income through receipt of the benefit (depreciating asset).[93]

2.2.3.5 Exempt Income, NANE Income

As noted in Sub-Parts 2.2.1.3 and 2.2.2, where a fringe benefit or an exempt benefit has been provided, s 23L of the *ITAA 1936* is designed to exclude the benefit from the recipient's assessable income.

2.2.4 Section 6-5 of the ITAA 1997, in Conjunction with Section 21A of the ITAA 1936

2.2.4.1 Section 21A is not a Charging Provision, Role of s 21A, Etc

Unlike ss 6-5 and 15-2 of the *ITAA 1997*, s 21A of the *ITAA 1936* is not a charging provision. That is, s 21A of the *ITAA 1936* does not include an amount in a taxpayer's assessable income. The main role or function of s 21A is to overcome the non-convertibility doctrine in regard to 'non-cash business benefits' derived by a business taxpayer under Australia's income tax.[94] This 'limited role' of s 21A is consistent with its history of addressing a particular 'mischief' (i.e. introduced to overrule the principle in *Cooke and Sherden*).[95] However, s 21A also goes on

[92] *ITAA 1997* s 40-80(2) does provide an immediate deduction for the cost of a depreciating asset where certain conditions are satisfied (e.g. cost does not exceed $300).

[93] Of course, the taxable value of the benefit enters the FBT base of the employer (provider). It is hard to see how this is not a deliberate and intended outcome.

[94] *ITAA 1936* s 21A(1). See also the comments of Deputy President AM Blow in *AAT Case 7/97* (1997) 97 ATC 143, 145.

[95] Somewhat strangely, because of *ITAA 1936* s 21A(4) (provider of benefit does not obtain a deduction for the cost because the expenditure is 'entertainment'),

to provide a valuation rule for such benefits (i.e. what is the amount of assessable income).[96] Perhaps not surprisingly, s 21A also provides a valuation rule for non-cash business benefits that would in fact be convertible into money. The words 'whether or not convertible to cash' in brackets in the introductory part of s 21A(2) is the authority for this. Accordingly, s 21A seems to go further than just addressing the problem that confronted the ATO in *Cooke and Sherden* so that the section becomes an exclusive code for all non-cash business benefits. To be clear though, s 21A only applies where the benefit is a product of a business.[97]

Among other things, the application of s 21A of the *ITAA 1936* depends on a taxpayer deriving a 'non-cash business benefit'. Where the taxpayer has been given an item of property that is not money, or provided with services, it is clear that such property or services are non-cash business benefits. It is suggested that s 21A will not apply to the receipt of cash or cash equivalent,[98] in spite of the fact that the definition of a non-cash business benefit incorporates the term 'property'. Therefore, s 21A should not apply to allowances, bonuses, reimbursements or discharges of liabilities of monetary amounts. The comforting thing for the ATO is that if a discharge of a liability is held to be a benefit that is not convertible into money, s 21A can apply to prevent under-taxation.

2.2.4.2 Taxable Value of Non-Cash Business Benefit

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the taxpayers in *Cooke and Sherden* may again not be taxed today if the same facts arose.

[96] *ITAA 1936* s 21A(2).

[97] Strangely, this is confirmed through the definition of 'income derived by a taxpayer' in s 21A(5) of the *ITAA 1936*: s 21A(1). It is interesting to note that Deputy President AM Blow in *AAT Case 7/97* (1997) 97 ATC 143 did not refer to this requirement in reaching the conclusion that *ITAA 1936* s 21A applied to the loans made by a principal to agents where the relationship was one of independent contractors.

[98] A cash equivalent encompasses a direct deposit into a bank account, electronic transfer of funds into a bank account, etc.

The first step in determining the taxable value is the arm's length value of the benefit. This means the amount the taxpayer would have paid to obtain the benefit from the provider in an arm's length dealing.[99] Where the benefit is not convertible into money, restrictions on conversion are disregarded in determining the arm's length value.[100] The second step is the recipient's contribution rule; where the taxpayer contributes to the cost of the benefit, the taxable value will be reduced by this contribution.[101] The third step is the ODR (see below). A fourth step is the deduction denial for entertainment expenditure. In short, if the provider of the benefit was denied a deduction for the cost of the benefit because the expenditure was entertainment, the recipient will reduce the s 21A taxable value by the amount of the non-deductible entertainment expenditure.[102]

2.2.4.3 Otherwise Deductible Rule

Section 21A does contain an ODR,[103] and this ODR is similar in operation to those in the *FBTAA 1986* (e.g. requires a once-only deduction). It is also worth remembering s 40-185(1) of the *ITAA 1997*. This section gives a deemed cost for commencing to hold a depreciating asset equal to the assessable income inclusion that arose on receipt of the asset (benefit).

2.2.4.4 Exempt Income, NANE Income

Where the total of a taxpayer's non-cash business benefits under s 21A of the *ITAA 1936* do not exceed $300 in an income

[99] *ITAA 1936* ss 21A(2), 21A(5) (definition of 'arm's length value).
[100] Ibid s 21A(2)(b).
[101] Ibid ss 21A(2)(a), 21A(5) (definition of 'recipient's contribution').
[102] *ITAA 1997* s 32-5 provides the deduction denial for entertainment expenditure.
[103] *ITAA 1936* s 21A(3).

year, the amount is exempt income.[104] If the s 21A amount is more than $300, no amount is exempt (i.e. whole amount is assessable).

2.3 Transaction/Arrangement/Activity

Each heading number in this Sub-Part corresponds with the number given to the relevant item in the table in Part 3. It is also noted that the categories of transactions, etc, follow on from the categories created by the income tax rules in the relevant charging provisions.

The notes in Part 3.1 to each entry in the table deal with the particular problems raised by relevant characteristics of the benefit (e.g. convertible into money). It is assumed that the recipient of the benefit is the 'taxpayer' (i.e. taxpayer is the one involved in the relevant transaction).[105] For the most part, it is also assumed that the provider of the benefit is the party that obtains the benefit of the recipient's 'services'. The idea here is to avoid the troublesome issues that arise where a third party provides benefits to the recipient.[106] I say for the most part because for a small number of arrangements that need to be dealt with in this

[104] Ibid s 23L(2).

[105] The provision of receipts to 'associates' of the taxpayer raises a new set of problems, including the problem of identifying the relevant employee in regard to which a benefit was provided, as is required from the decision in *Commissioner of Taxation v Indooroopilly Children Services (Qld) Pty Ltd* (2007) 158 FCR 325. To deal with them in this article would greatly expand the length of the article.

[106] For example, there would be difficulty in satisfying the definition of a fringe benefit in *FBTAA 1986* s 136(1), where a third party provides the benefit: *FBTAA 1986* s 136(1)(e), (ea) (definition of 'fringe benefit'). Further, there may also be a difficulty in satisfying the 'in respect of employment' requirement in *ITAA 1997* s 15-2 where a third party provides the benefit: *Payne v FCT*, 301. In light of the decision of the Full Federal Court in *Federal Coke Co Pty Ltd v FCT* (1977) 15 ALR 449, there may also be a difficulty in satisfying the income concept. To deal with these issues in this article would greatly expand the length of the article.

article, benefits may come from a third party (e.g. recognition of an achievement).

2.3.1 Proceeds for, or Product of Personal Exertion, which is Employment

This category focuses on the activity of personal exertion that is performed within an employment relationship. For all salary and wage earners in Australia (i.e. employees under an employment contract), this is the appropriate characterisation.

The case of *Kelly v FCT*[107] provides an example of a receipt that was the product of personal exertion that was employment. Arguably, the payments in *Dean & Another v FCT*[108] also provide an example of a receipt that was the product of personal exertion that was employment.

2.3.2 Proceeds for, or Product of Personal Exertion, which is not Employment and not a Business

This category must accommodate the situation where the activity does not amount to an employment relationship, but it also falls short of being a business. This can include the situation where the recipient does have employment, but the benefit is not connected with their employment.[109] There is considerable case law on the factors to take into account in determining whether a relationship between a worker and an entity that needs work done is one of employment or one of independent contractor.[110] While

[107] *Kelly v FCT* (1985) 80 FLR 155, where an Australian rules footballer received a $20,000 payment for winning the best and fairest player in the Western Australian Football League from a TV station, in addition to match payments of $150 per game from his club

[108] *McLean v FCT (No 2)* (1997) 78 FCR 140, where payment was made to senior employees by ultimate holding company of employer in order to get senior employees to agree to continue in the employment for 12-months.

[109] The facts in *FCT v Holmes* provide an example of this situation.

[110] For a recent case that collects many of the authorities, see *Roy Morgan Research Pty Ltd v Commissioner of* Taxation (2010) 184 FCR 448. *On Call*

this distinction assists in determining whether or not an employment relationship exists, it does not assist in determining whether an independent contractor's activities amount to a business.

The line between a business and a mere independent contractor is not clear. Logically, the notion of an 'independent contractor' and a 'business' are not mutually exclusive (i.e. the two labels can apply to the same circumstance). Similarly, and the relevant point for this article, the line between 'services rendered' and a 'business' is unclear.[111] It is clear that the absence of employees is not enough to deny the presence of a business. The High Court's approach in *Commissioner of Taxation v Stone* and *Spriggs v FCT; Riddell v FCT*[112] provides considerable support for this, as in both cases a conclusion of a business was reached, yet there were no employees of either 'business'. A similar point can be made in regard to number of clients, that is, the presence of a very small number of clients did not prevent the High Court in both cases reaching the conclusion of a business. It appears that the threshold for a business is fairly low.

In the end, determining whether an activity that is not employment falls short of being a business requires consideration of all the usual indicators of what activity might amount to a business. The following cases, most of which involve isolated services, provide examples of receipts that are for services rendered but which do not involve employment, and are likely to fall short of a business:

Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (2011) 279 ALR 341 also provides a good discussion of the factors that are relevant to the issue.

[111] In *Integrated Insurance Planning Pty Ltd v Commissioner of Taxation* (2004) 205 ALR 120, Nicholson J effectively held that the gain made by the taxpayer in regard to the relationship between an agent and a general insurance company was both the product of services rendered (140-141) and a business (138).

[112] *Spriggs v Commissioner of Taxation* (2009) 239 CLR 1.

1. *Brent v FCT*: payment received by taxpayer for making herself available for interview by journalists, disclosing relevant facts of her life with her husband (Ronald Biggs, one of the Great Train Robbers) and lending her name to the stories written by the journalists;[113]

2. *FCT v Holmes*: salvage reward payment received by a marine engineer who was part of the crew (employee) on an anchor handling tug and supply vessel that came to the assistance of an oil tanker that had sent out a Mayday message as it was floating towards shore;

3. *Brown v FCT*: payment received by the taxpayer from a development company in Australia for introducing (and for providing other services) a Japanese development company, who wished to purchase suitable land in Australia, to a development company in Australia that had land available for sale;[114] and

4. *Stone v FCT* in the Full Federal Court: receipts of sponsorship monies from commercial firms and receipts of appearance fees for attending functions by the taxpayer who was a high profile sportswoman.[115]

2.3.3 Proceeds of, or Product of a Business

[113] *Brent v FCT* (1971) 125 CLR 418.
[114] *Brown v Commissioner of Taxation* (2002) 119 FCR 269.
[115] *Stone v Commissioner of Taxation* (2003) 130 FCR 299. In light of the High Court decision this case, it is also likely that the receipt of the sponsorship monies is also the product of the business that the taxpayer was held to have been carrying on.

RECONCILING THE OVERLAP OF CHARGING PROVISIONS

For all operators of businesses in Australia, this will be the appropriate characterisation. The discussion in Sub-Part 2.3.2 about the difficulty of distinguishing between a taxpayer that is merely rendering services, as opposed to operating a business, is incorporated here. The following cases provide examples of receipts that may be the product of a business:

1. *Squatting Investment Co* provides an example of a receipt that was the product of the taxpayer's business, rather than a mere gift given on personal grounds;[116]

2. *Cooke and Sherden* seems to provide an example of a benefit that was the product of the taxpayers' business;[117]

3. *Commissioner of Taxation v Stone* provides an example of a taxpayer who was held to be in the business of 'turning her athletic activities to account for money', or in the business of 'deriving financial reward from competing and winning in the athletics arena';[118] and

4. *Case V6*.[119]

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[116] Case involved voluntary payment received in 1949, by a taxpayer who conducted a business of wool growing, in consideration for, or as an extra payment for, the supply of wool to the Australian government during 1939-1946 under a compulsory wool purchase program.

[117] Case involved benefit received by taxpayers' operating a business of buying and selling soft drinks door-to-door.

[118] Case involved a high profile sportswoman (javelin thrower) who pursued commercial sponsorships and obtained three commercial sponsors, who had made some paid appearances at functions and who had employed a manager.

[119] *AAT Case V6* (1987) 88 ATC 140. This case involved a taxpayer who operated a news-agency business won a motor vehicle from the publisher of a newspaper, under an incentive program, for achieving the largest growth in sales of relevant papers above a target level.

2.3.4 Proceeds of, or Product of, a Personal Relationship between Giver and Receiver (i.e. Mere Gift)

The central idea here is that the benefit is received because of the personal relationship between the giver and the recipient. The most common everyday examples of this are non-cash 'transfers' between family members. But even where family members are involved, especially in a family business situation, there may be times where it is not clear whether the benefit is given on personal grounds.

This category can also arise outside of the family situation. *Scott v FCT*[120] and *Hayes v FCT*[121] provide examples where the receipt or benefit was the product of a personal relationship between the giver and the taxpayer (i.e. mere gift). Even if benefits involve a series of regular or periodical 'mere gifts', they remain mere gifts.[122]

It is suggested that this situation will not arise often in regard to business taxpayers. It is also suggested that the decision and reasoning in *The Federal Coke Company Pty Ltd v FCT* (compensation receipt of parent company diverted to taxpayer) is not a case of a mere gift.[123]

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[120] Case involved a trusted family solicitor who received a large voluntary payment from a long-term client and friend.

[121] Case involved a successful businessman who voluntarily gave an accountant shares in a public company, in circumstances where the accountant had at various times worked for the businessman and was also a personal friend. The facts in *Christie v FCT* (1956) 96 CLR 59 involved the same donor and similar facts to those in *Hayes v FCT*.

[122] *Stone v FCT* (2002) 196 ALR 221, 242 (Hill J).

[123] *Federal Coke Co Pty Ltd v FCT* (1977) 15 ALR 449. The better explanation for the non-income conclusion is that the receipt could not be related to an income-producing activity of the taxpayer.

2.3.5 Reward as a Mark of Esteem, Recognition of an Achievement or Respect for Receiver[124]

The central idea is fairly easy to state, but distinguishing this categorisation from a situation of proceeds of personal exertion on certain facts may be difficult.[125] The reason is that usually, the benefit that is supposedly a mark of esteem or recognition of an achievement will follow upon a period of sustained service or the provision of quality service by the recipient of the benefit.[126] Where the service is given voluntarily, there should be little trouble in concluding the benefit will be a mark of esteem, etc. In addition, where the 'service' involves a sustained activity that involves some payment, but is viewed as a mere pastime, hobby, etc (see Sub-Part 2.2.6 below for examples), there should be little difficulty in concluding the benefit is a mark of esteem, etc. One common feature of benefits under this category is that they are very likely to be one-off benefits. That, after all, is usual in recognising someone's achievement(s).

The English case of *Moore v Griffiths (Inspector of Taxes)*[127] provides an example of such a case. In Australia, the judgment of Windeyer J in *Scott v FCT* provides a number of examples of such situations. They are: (1) gift in a will given to a servant in the employment of the deceased prior to death where the servant had

[124] It is worth remembering that the ATO has stated that things like trophies, medals, plaques, etc, are not regarded as an intrinsic form of remuneration and do not have functional utility. These items are not treated as a benefit for the purpose of this article.

[125] It can be taken that there is no distinction between a mark of esteem, recognition of an achievement or respect for receiver. Accordingly, these three situations are treated as one in this article.

[126] There is an argument that the taxpayer's circumstances in *Kelly v FCT* (1985) 80 FLR 155 should have been characterised under this category, however it was not characterised under this category.

[127] [1972] 3 All ER 39, involving payment made by the English Football Association to a player, who was part of the England World Cup squad that won the Soccer World Cup in 1966.

been fully remunerated for their work and the will expressed the gift as being for long and faithful service; (2) gift in a will by a grateful testator to a doctor, or gift given before death to the doctor; (3) members of a society who made a gift to a person who had rendered services to the society; and (4) reward given to a person who had found lost property.

The facts in Class Ruling CR 2002/83 could also fit within this category.[128] The facts in Taxation Ruling IT 2145, in which payment of an amount of $40 000 under the BHP Award for the Pursuit of Excellence program is made to a person who has excelled in their field (e.g. engineering), could also fit within this category.[129]

2.3.6 Proceeds of a Pastime, Hobby, Recreation or an Activity that falls short of being a Business

This category covers activities that can be viewed as a pastime, hobby or recreation (e.g. playing sport on the weekend, playing chess, most gambling activities, lotteries, collecting and

[128] This case involved cash prizes awarded to scientists, teachers of science, etc under the various categories of the Science Awards provided by the Prime Minster. See also Australian Tax Office, *Income Tax: Science Prize: The Australian Council of Deans of Science University Science Teaching Prize*, CR 2003/71, 1 July 2003 ('*Income Tax: Science Prize Ruling*') for another example of this category (The Australian Council of Deans of Science University Science Teaching Prize of $30,000, presented to recognise a Scientist who has made an outstanding contribution to science education in Australia).

[129] It is worth noting that in both Australian Tax office, *Income Tax: Science Prize Ruling* and Australian Tax Office, *Income Tax: BHP awards for the pursuit of excellence – whether assessable income*, IT 2145, 19 March 1985, the term windfall gain is also used to describe the circumstance of the recipient winning the relevant prize.

swapping collectibles).[130] Class Ruling CR 2009/42[131] provides an example of a taxpayer engaging in a pastime or a hobby.[132] On a similar basis, most participants in 'weekend sport' (e.g. Australian Rules football players, rugby league players) who receive a similar level of payment for playing as that received by referees, as outlined in Class Ruling CR 2009/42, provide other examples of this category.

The characterisation in this note can also cover situations that cannot reasonably be called a pastime, hobby or recreation, as the taxpayer is clearly trying to make money from the activity. In other words, the taxpayer is trying to conduct a business (and

[130] Gambling on poker machines was not a business: *Case 1/2003* 2003 ATC 101; participation in five car racing events per year was held not to be a business: *Taxation Case C18* (1971) 71 ATC 77.

[131] This case involved soccer referees who receive payments from Football NSW Ltd to officiate in Football NSW Premier League soccer matches as Grade 20 Referees (Referees, Assistant Referees or 4th Officials) and who receive match fees in the range of $49 to $89. Given that the fees do not usually cover costs, another way of looking at this is to say that the match fees are a "mere contribution to the costs" of pursuing the pastime or hobby. The idea of a mere contribution to costs seems to come from the case of *FCT v Groser* (1982) 65 FLR 121, 121; a property income case. The honorarium paid to the taxpayer in *AAT Case Z16* (1992) 92 ATC 183 at 187 was characterised as a contribution to the costs of performing her voluntary role.

[132] There are many other class rulings that reach the same pastime or hobby conclusion in regard to umpires, coaches, etc, of various sporting codes in Australia: see for example, Australian Tax Office, *Income tax: assessable income: cricket umpires: Burnie Cricket League Inc. receipts,* CR 2003/63, 1 October 2002; Australian Tax Office, *Income Tax: assessable income: cricket scorers: Melbourne Cricket Club Inc. receipts,* CR 2003/73, 1 July 2003; Australian Tax Office, *Income tax: assessable income: football umpire coaches and umpire observers: leagues and associations affiliated with the West Australian Football Commission Inc. receipts,* CR 2004/70, 1 July 2003; Australian Tax Office, *Income tax: assessable income: basketball referees: Townsville Basketball Inc. receipts,* CR 2005/52, 1 July 2004; Australian Tax Office, *Income tax: assessable income: football umpires: Eastern Districts Football League receipts,* CR 2006/51, 1 July 2003; Australian Tax Office, *Income tax: assessable income: Rugby League Officials: Western Australia Rugby League Referees Association,* CR 2007/24, 1 January 2006.

claims to be), but the activities fall short of there being one. In the gambling area, *Evans v FCT*[133] provides an example where activities directed, at least in part, at making money, fell short of being a business.[134] Outside the gambling area, the activity associated with the growing of pine trees in *Thomas v FCT*[135] also provides an example of this. In contrast, the taxpayer's activities in *Thomas v FCT*[136] regarding the growing of avocado trees and macadamia trees were held to be a business.

3. TABLE: INCOME TAX TREATMENT FOR NON-CASH BENEFITS FROM PERSONAL EXERTION, BUSINESS AND CONTRASTING ACTIVITIES[137]

Table Charging provisions under Australia's 'income tax' regime

[133] *Evans v FCT* (1989) 89 ATC 4540.
[134] Gambling or lottery winnings are at times also characterised as windfall gains.
[135] *Thomas v FCT* (1972) 72 ATC 4094.
[136] Ibid.
[137] To repeat, a reader should refer to the notes to the table in Part 3.1 and the commentary in Part 2 in order to establish the hierarchy of operation of a charging provision, where more than one charging provision could apply.

TRANSACTION/ ARRANGEMENT/ ACTIVITY	Section 6-5 of the *ITAA 1997* (Income) (2.2.1)	Section 15-2 of the *ITAA 1997* (Employment or Services Rendered) (2.2.2)	Definition of a "Fringe Benefit" in s 136(1) of the *FBTAA 1986* (2.2.3)	Section 6-5 of the *ITAA 1997*, in Conjunction with the Non-Convertible, Non-Cash Benefit Override Rule in Section 21A of the *ITAA 1936* (2.2.4)
Proceeds for, or Product of Personal Exertion, which *is* Employment (2.3.1)	YES (1)	YES (2)	YES (3)	NO (4)

Proceeds for, or Product of Personal Exertion, which *is not* Employment and *not* a Business (2.3.2)	YES (5)	YES (6)	NO (7)	NO (8)
Proceeds of, or Product of, a Business (2.3.3)	YES (9)	NO (10)	NO (11)	YES (12)
Proceeds of, or Product of, a Personal Relationship Between Giver and Receiver (i.e. Mere Gift) (2.3.4)	NO (13)	NO (14)	NO (15)	NO (16)
Reward as a Mark of Esteem, Recognition of an Achievement or Respect for Receiver (2.3.5)	NO (17)	NO (18)	NO (19)	NO (20)

Proceeds of a Pastime, Hobby, Recreation or an Activity that falls short of being a Business (2.3.6)	NO (21)	NO (22)	NO (23)	NO (24)

3.1 Notes to Entries in Table in Part 3[138]

Note 1

If the benefit can be converted into money, it will be income. The assessable income inclusion is the realisable value of the benefit. A judicial ODR should be available for most benefits if it is consumed in the course of the employment. However, given that most non-cash benefits will be fringe benefits or exempt benefits under the FBT regime, there will not be an assessable income inclusion. If the benefit cannot be converted into money, it will not be income in any event.

Note 2

The benefit, whether or not convertible into money, satisfies the positive limbs of s 15-2 of the *ITAA 1997*. The amount of assessable income will be the value to the taxpayer of the benefit. A judicial ODR should be available for most benefits if the benefit is consumed in the course of the employment. There will be a 'double taxation' problem if the benefit also comes within s

[138] For the most part, the commentary here is brief and without elaboration, it being assumed that the reader has read Parts 2 and 3 of the paper. However, some detailed commentary is required where an analysis of the CGT regime is required for comprehensiveness.

6-5 of the *ITAA 1997*, but this will only be the case where the benefit is convertible into money. The double taxation problem is resolved because s 15-2(3)(d) gives priority of operation to s 6-5. Given that most non-cash benefits will be fringe benefits or exempt benefits under the FBTR, there will not be an assessable income inclusion under s 15-2.

Note 3

Most non-cash benefits will come within the definition of a 'fringe benefit' in s 136(1) of the *FBTAA 1986*. If so, the value of the benefit should not be included in the employee's assessable income. A legislative ODR is available under the *FBTAA 1986* to prevent over-taxation. If the benefit is income on ordinary concepts, s 23L(1) of the *ITAA 1936* excludes the amount from the employee's assessable income. If the benefit is caught by s 15-2 of the *ITAA 1997*, but it is not income (e.g. benefit not convertible into money), it is not clear which provision excludes it from the employee's assessable income. As noted earlier, s 23L(1) of the *ITAA 1936* strictly read, only applies when the item is income. Perhaps, the term 'income' in s 23L(1) means 'an amount of assessable income'. In any event, the ATO is unlikely to seek double taxation.

Note 4

Section 6-5 of the *ITAA 1997*, in conjunction with s 21A of the *ITAA 1936*, will not apply to receipt of the benefit because s 21A only applies to a business taxpayer.[139] In short, the benefit, at the very least, must be a product of a business. Engaging in employment is not, on its own, a business.[140] The definitions of

[139] *ITAA 1936* s 21A(1) only applies to 'income derived by a taxpayer', and this is defined in s 21A(5) as being income derived by a taxpayer in carrying on a business.

[140] Note the conclusion reached in the joint judgment of French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ in the High Court in *Spriggs v Commissioner of Taxation* (2009) 239 CLR 1, 2[60]-[73] that employment can

'business' in s 6(1) of the *ITAA 1936* and s 995-1(1) of the *ITAA 1997* supports this (i.e. occupation as an employee is excluded).[141]

Note 5

If the benefit can be converted into money, it will be income. The assessable income inclusion is the realisable value of the benefit. A judicial ODR should be available for most benefits if the benefit is consumed in the course of rendering services. If the benefit cannot be converted into money, it will not be income.

Note 6

If the benefit is income (i.e. benefit is convertible into money), s 15-2 of the *ITAA 1997* will be excluded from applying and there will be no double taxation.[142] Section 15-2 will only apply where the benefit is not income, and this is only likely where the benefit cannot be converted into money. The value to the taxpayer of the benefit will be the amount of assessable income. A judicial ODR should be available for most benefits if the benefit is consumed in the course of rendering services.

Note 7

The FBT regime does not apply as the definition of a 'fringe benefit' is only satisfied where the benefit is 'in respect of employment'. Here, the benefit is a product of (or in respect of) services rendered which is not employment.

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be a component of carrying on a business. With respect, this decision may raise the problem of identifying the appropriate activity to which a particular benefit is related (i.e. proceeds of or product of). This will not matter when the charging provisions bring about the same result. However, where the charging provisions do not do this, the identification issue becomes important.

[141] It is also arguable that to have a business relationship, the payer of the benefit must also be in business. On the other hand, it may be enough that the payer is not acting as a private consumer.

[142] *ITAA 1997* s 15-2(3)(d).

Note 8

Similar to Note 4 above, s 6-5 of the *ITAA 1997* in conjunction with s 21A of the *ITAA 1936* will not apply. The reason is that s 21A only applies to a business taxpayer.[143] In short, the benefit here is not a product of a business. The notions of 'services rendered' and a 'business' may overlap, but where the activity only amounts to services rendered, s 21A cannot apply.

Note 9

If the benefit is not convertible into money, it will not be income. However, the benefit could still be chargeable to tax through s 21A of the *ITAA 1936* operating in tandem with s 6-5 of the *ITAA 1997*. Further, even if the benefit is convertible into money, the benefit will still be chargeable to tax through s 21A *ITAA 1936* in tandem with s 6-5 *ITAA 1997*. In the end, there is little difference in the tax outcome between a convertible and non-convertible non-cash business benefit for the following reasons:

> 1. The advantage that a non-convertible benefit previously enjoyed (i.e. not income) over a convertible benefit, has been removed by s 21A of the *ITAA 1936*;
>
> 2. The assessable income under s 6-5 of the *ITAA 1997* in isolation is the realisable value of the benefit. But this valuation rule is irrelevant (displaced) because s 21A of the *ITAA 1936* is an exclusive code for all non-cash business benefits. This means that the valuation rule(s) in s 21A applies to both convertible and non-convertible business benefits. Under s 21A, the

[143] *ITAA 1936* s 21A(1) only applies to 'income derived by a taxpayer' and this is defined in s 21A(5) as being income derived by a taxpayer in carrying on a business.

> prima facie taxable value is the arm's length value of the benefit, which is what the taxpayer would reasonably have paid to acquire the benefit from the provider. Importantly, in determining this value, any restrictions on converting the benefit to cash are disregarded so that depressing the taxable value through the attachment of restrictions will not be effective; and
>
> 3. Because s 21A of the *ITAA 1936* is an exclusive code for all non-cash business benefits, the potential absence of a judicial ODR under s 6-5 of the *ITAA 1997* does not matter because the legislative ODR in s 21A *ITAA 1936* will apply to all non-cash business benefits.

Note 10

Here, the taxpayer's activities are not merely, or only, the 'rendering of services'; they have gone beyond this and amount to a business. Accordingly, s 15-2 of the *ITAA 1997* does not apply.

Note 11

The FBT regime does not apply as the definition of a 'fringe benefit' is only satisfied where the receipt or benefit is 'in respect of employment'. Here the benefit is a product of (or in respect of) a business.

Note 12

The comments made under Note 9 are incorporated into this note.

Note 13

Section 6-5 of the *ITAA 1997* (income concept) does not capture or apply to a benefit that is a mere gift given (or received)

on personal grounds. The reason is that if a benefit is given (or received) on personal grounds, it is not the proceeds for, or the product of, personal exertion and the benefit is not the product of a business.[144]

Note 14

Section 15-2 of the *ITAA 1997* does not capture or apply to mere gifts given (or received) on personal grounds. The reason is that if benefits are given on personal grounds, they are not 'in respect of employment' or 'in respect of services rendered'.[145]

Note 15

The short point again is that the definition of 'fringe benefit' in s 136(1) of the *FBTAA 1986* does not capture mere gifts given (or received) on personal grounds. The reasoning is similar to that in Note 14 above concerning s 15-2 of the *ITAA 1997* (i.e. not in respect of employment). This conclusion holds in spite of s 148(1) of the *FBTAA 1986*, the wording of which seems to cast some doubt on this.[146] If it is needed, the ATO has confirmed that s 148(1) does not bring mere gifts within the FBT regime.[147]

Note 16

Section 6-5 of the *ITAA 1997*, in conjunction with s 21A of the *ITAA 1936*, will not apply as the benefit is not the product of

[144] See the comments under Note 16 in regard to other charging provisions (e.g. CGT regime) that may apply to mere gifts.
[145] See comments under Note 16.
[146] For example, *FBTAA 1986* s 148(1) states that a benefit will still be in respect of employment: (1) whether or not the benefit is in respect of any other matter or thing, (2) whether the employment will occur, is occurring or has occurred and, (3) whether or not the benefit is a reward for services rendered or to be rendered by the employee.
[147] Australian Tax Office, *Fringe benefits tax: benefits not taxable unless provided in respect of employment*, MT 2016, 16 June 1986, [5], [7], [12]. See also the comments under Note 16 in regard to other charging provisions (e.g. CGT regime) that may apply to mere gifts.

a business. That is, the receipt of a mere gift given on personal grounds is not the product of a business, which is an indispensable requirement of s 6-5 *ITAA 1997*, and s 21A of the *ITAA 1936*.

There are no other charging provisions in the income tax that apply to a mere gift. In particular, CGT event D1 in s 104-35 of the *ITAA 1936* cannot apply because there is no creation of rights by the recipient in such circumstances. Indeed, a mere gift situation suggests an absence of rights. CGT event H2 in s 104-155 of the *ITAA 1936* should also not apply. First, there is difficulty in characterising the giving of a benefit as a gift as an 'act, transaction or event'. However, even if there is an act, transaction or event, CGT event H2 requires that the act, transaction or event occur in relation to a CGT asset that the recipient owns. This is very unlikely because most, if not all, mere gift situations suggest an absence of conditions or wishes associated with the benefit, let alone an association with a CGT asset owned by the recipient.[148]

Finally - and these comments could have been made in other notes - if the benefit received is not a consumable, then the receipt of the benefit may involve the acquisition of a depreciating asset as defined in s 40-30 of the *ITAA 1997* and/or the acquisition of a CGT asset under the CGT regime. Where the benefit is used or 'consumed' in the taxpayer's domestic or personal setting, which is expected to be the case most of the time, there will usually be no tax consequences. That is, the holding and ultimate disposal of the asset will not give rise to a taxable gain or an accrued (recognised) loss.[149] If the benefit received is a CGT asset that is

[148] The ATO has indicated that *ITAA 1936* ss 160M(6), 160M(7) (old versions of CGT event D1 and CGT event H2) do not apply to gifts: see Agenda Item 2 of the CGT sub-committee minutes of the National Tax Liaison Group, December 1992.

[149] *ITAA 1936* ss 40-25(2), 40-25(7), 40-285 and 40-290 for a depreciating asset, and *ITAA 1936* ss 108-20 and 118-10(3) for a CGT asset that is a personal use asset.

a collectable, then it is more likely that a taxable gain can arise and an accrued (recognised) loss will be made; it will depend on whether a greater than $500 acquisition cost can be attributed to the asset.[150]

Note 17

Such 'rewards' will not be income on ordinary concepts because they are not the product of the recipient's personal exertion or a business. Even though the examples of this category of receipt set out in Sub-Part 2.3.5 from *Scott v FCT* were provided by Windeyer J in the context of an analysis of s 26(e) of the *ITAA 1936* (now s 15-2 of the *ITAA 1997*), it is clear that his Honour's comments are relevant to the income section, now s 6-5 *ITAA 1997*.[151] Further, the ATO's approach in Taxation Ruling IT 2145 (i.e. that winning an amount of $40 000 under the BHP Award for the Pursuit of Excellence program in a particular field is not income) and Class Ruling 2002/83 (cash prizes awarded to scientists, teachers of science, etc under the various categories of the Science Awards provided by the Prime Minster are not income) also supports the non-income conclusion.[152]

Note 18

Such 'rewards' will not be caught by s 15-2 of the *ITAA 1997*. These rewards are not 'in respect of employment' or 'services

[150] *ITAA 1997* ss108-10, 118-10(1).

[151] See the various references to the term 'income' in *Scott v FCT*.

[152] It is worth noting that three Prime Minister's Prizes (i.e. Australian History, Science, and Literary Award) are expressly made exempt from income tax: *ITAA 1997* s 51-60. It is doubtful that s 51-60 has any operative effect given that such prizes are unlikely to be caught by any charging provision. See the comments under Note 20 in regard to other charging provisions (e.g. CGT regime) that may apply to rewards to mark an achievement, etc.

rendered'. The comments and the authorities set out in Note 17 above are also relevant to s 15-2.[153]

Note 19

Such 'rewards' are not in respect of employment. The reasons are the same as those set out in Notes 17 and 18 above. Accordingly, the FBT regime will not apply.[154]

Note 20

Section 6-5 of the *ITAA 1997* in conjunction with s 21A of the *ITAA 1936* will not apply, as the 'reward' is not the product of a business or the proceeds of operating a business.

There are no other charging provisions in the income tax that apply to a reward as a mark of esteem, recognition of an achievement or respect for receiver. Given the closeness of a mere gift situation to that of a reward as a mark of esteem, recognition of an achievement or respect for receiver, the analysis here is essentially the same as that in Note 16 in regard to mere gifts. In particular, CGT event D1 in s 104-35 of the *ITAA 1997* cannot apply because there is no creation of rights by the recipient in such circumstances. Indeed, the esteem, achievement, etc situation suggests an absence of rights. And, CGT event H2 in s 104-155 of the *ITAA 1936* should not also apply. Even if there is an act, transaction or event, CGT event H2 requires that the act, transaction or event occurs in relation to a CGT asset that the recipient owns. This is very unlikely because most, if not all, mark of esteem situations suggest an absence of conditions or wishes associated with the receipt, let alone an association with a CGT asset owned by the recipient.

[153] See the comments under Note 20 in regard to other charging provisions (e.g. CGT regime) that may apply to rewards to mark an achievement, etc.
[154] Ibid.

Finally, the comments in Note 16 in regard to the acquisition of an asset through receipt of a benefit are incorporated here.

Note 21

These types of activities are not regarded as income-producing activities (e.g. proceeds of personal exertion or a business) and therefore any benefits thereon will not give rise to income on ordinary concepts.[155]

Note 22

Section 15-2 of the *ITAA 1997* will not apply because none of the listed activities involve employment or services rendered.[156]

Note 23

The definition of a 'fringe benefit' cannot be satisfied because none of the listed activities involve employment.[157]

Note 24

Section 6-5 of the *ITAA 1997* in conjunction with s 21A of the *ITAA 1936* will not apply, as the 'reward' is not the product of a business or the proceeds of operating a business. The activities covered by this category can take many forms (e.g. gambling, sporting activities). They can also involve the sale of property. Accordingly, there is a need to make some comment to ensure sufficient coverage. The approach is to select three types of activities that would come within this category.

> 1. Gambling, lottery, etc: s 118-37(1)(c) of the *ITAA 1997* states that capital gains and capital losses are disregarded for a CGT event

[155] See the comments under Note 24 in regard to other charging provisions (e.g. CGT regime) that may apply to the various activities set out here.
[156] Ibid.
[157] Ibid.

relating to gambling, a game or a competition with prizes. This exemption from CGT should cover most forms of gambling.[158]

2. Sporting activities: Unlike the gambling situation, there is no specific exemption in the CGT regime for receipts from sporting activities (e.g. playing, coaching, refereeing sport). Given that capital gains and capital losses can only arise from a CGT event,[159] the issue is whether a CGT event can be identified as applying. It is hard to see how the pre-existing asset events (e.g. CGT event A1, CGT event C2)[160] can apply because no asset is realised through participating in the sporting activity. And, it cannot be said in any event that the benefits received are in respect of an asset; rather, they are in respect of the 'service'. CGT event D1 cannot apply because the participation in sport does not involve the creation of rights in the provider of the benefit. There may have been a creation of rights at the time the participant agreed to participate in the future, but at the time of actual performance, which is also the time of receipt of the benefit, a creation of rights is not occurring. CGT event H2[161] also cannot apply. While there may be an act, transaction or event in the form of

[158] *ITAA 1936* s 26AJ will not apply to the type of gambling winnings contemplated in this article. Section 26AJ can only apply where the gambling winnings arise from a gambling opportunity offered to the taxpayer because of an investment the taxpayer made. In short, the way to view s 26AJ is that it is taxing returns that are considered to flow from an investment (i.e. return from property principle).

[159] *ITAA 1936* s 102-20.

[160] Respectively, *ITAA 1936* ss 104-10, 104-35.

[161] *ITAA 1936* s 104-155.

performance of the 'service', that act is not in relation to a CGT asset owned by the taxpayer.[162]

3. Sales of items: Where an activity that incorporates the sale or exchange of items is a pastime, hobby, etc, the activity would fail to satisfy the notion of a taxable purpose in the depreciating asset regime.[163] Accordingly, there will be no balancing charge or loss on sale of such items.[164] Further, the items should also satisfy the notion of something 'used or kept mainly for personal use and enjoyment'. Accordingly, the item will be a personal use asset,[165] or a collectable[166] under the CGT regime. The difference between a personal use asset and a collectable is that to be a collectable, the asset must fall within a list (e.g. artwork, jewellery, antique).[167] The significance of all this is the following: (1) all losses on personal use assets are disregarded;[168] (2) gains will only accrue on personal use assets where the purchase cost was more than $10 000;[169] (3) gains and losses can only arise on collectables where the purchase cost was more than $500;[170] and (4)

[162] It is worth noting that the personal use asset exemption in s 118-10(3) of the *ITAA 1936* may not assist to exempt gains from sporting activities because that provision only seems to apply where a pre-existing asset is involved. The reference to the first element of the cost base of the personal use asset is one of the bases for this conclusion.
[163] *ITAA 1936* s 40-25(7).
[164] Ibid s 40-285, 40-290.
[165] Ibid s 108-20(2).
[166] Ibid s 108-10(2).
[167] Ibid ss 108-10(2)(a)-(c).
[168] Ibid s 108-20(1).
[169] Ibid s 118-10(3).
[170] Ibid s 118-10(1).

> losses on collectables can only be used against gains on collectables (i.e. quarantined).[171]

Finally, the comments in Note 16 in regard to the acquisition of an asset through receipt of a benefit are incorporated here.

4. CONCLUSION

The income tax rules in regard to non-cash benefits as proceeds of personal exertion and business are complex. There is considerable overlap of charging provisions and the valuation rules for each charging provision are not the same. The reconciliation rules and priority of operation rules become important. However, we have reached a point where there is sufficient familiarity with the rules, how they interact, etc, so that there is a reasonable degree of certainty of application of the rules. Further, although there are some anomalies, they are not that significant and can probably be addressed through judicial 'clarification' and/or sensible administrative practices.

[171] Ibid s 108-10(1).