ערעור מיסים

LONG ASSIGNMENT QUESTION

Part A (15 Marks)

Ron, aged 42 and a qualified lawyer, is in the process of completing his income tax return for the income year ending 30 June 2018. He seeks your assistance/advice on how to deal with the following transactions in his tax return:

1. On 30 September 2017, Ron sold all his shares in Zinc Mines Ltd, a company listed on the Australian Stock Exchange. He bought the shares on 5 July 2008 for $50,000 and sold them for $160,000. Ron purchased the shares with the purpose of making a profit from their sale. (Ron did receive dividends during the time he owned the shares). Ron advised his stockbroker to place the sale proceeds in a cash management trust that had its headquarters in Singapore. This trust was paying 12% interest per annum on short-term deposits and many Australian investors were using the trust. Ron's thinking was to hold the money temporarily in the cash management trust while he decides what to do with the funds in the long-term. Unfortunately, on 12 December 2017, Ron's stockbroker (Calvin) advises Ron that the proprietors of the cash management trust were professional fraudsters and that they had defrauded numerous investors of millions of dollars. In short, Ron's $160,000 has also been stolen and there is no chance of getting any of the money back even though the regulatory authorities and several police agencies (from Singapore and Australia) are investigating the fraud. Between 2008 and 2018, Ron only bought and sold other shares around eight times. As at 12 December 2017, Ron was still thinking about the long-term use of the $160,000. Ron received an interest payment from the fund of $3,400 on 14 November 2017.

2. Ron is a beneficiary in a family discretionary trust (Medak Family Trust (MFT)) that Ron's parents established 25-years ago. The MFT owns five investment properties and two small businesses. Like many discretionary trusts, the trustee of the MFT has an absolute discretion to pay profits to any beneficiary listed in the schedule to the trust deed. Ron is listed as one of the beneficiaries in the schedule. The MFT had an accounting profit of $240,000 for the financial year ending 30 June 2018. The net income (taxable income) under s 95(1) of the ITAA 1936 for the income year ending 30 June 2018 was $280,000. The difference was mainly attributable to lower tax depreciation (compared to accounting) on depreciating assets. The difference was not due to any capital gains/capital profits. The trustee exercised his discretion on 29 June 2018 in

favour of Ron (and other beneficiaries). Ron was allocated $45,000 out of the profits for the year. This amount was paid into Ron's bank account on 29 August 2018.

3. Ron has always worked during his adult years. For the last 12-years, he has worked in trade practices law and consumer protection law for a major law firm (Integrity Lawyers Pty Ltd (Integrity Lawyers)). Ron decides to change his career path and now wants to work in banking and finance law. His employer (Integrity Lawyers) agrees to transfer him to the Banking and Finance division but only on strict conditions. The company does not normally allow an established employee lawyer with considerable expertise in an area to change their area of specialty, and effectively start from "scratch". One of the conditions is that Ron must immediately enrol in the Master of Laws (LLM) degree at the University of Sydney and that he undertakes two banking and finance courses per semester over the next two years. Ron agrees. Unfortunately for Ron, the firm insists that Ron meets all his own costs of the degree, aside from textbooks. For the income year ending 30 June 2018, the course fees (both courses were undertaken in Semester One, 2018) came to $8,000 and the textbooks came to $770. Another condition imposed by the firm is that Ron's salary will decrease by 15% when he starts in the Banking and Finance division (i.e. Ron's salary will drop from $160,000 to $136,000). Ron started in the Banking and Finance division in February 2018. If Ron should fail any course in his LLM, he will take a further salary drop of 10%. After two years in the Banking and Finance division, Ron's salary will return to its normal level (i.e. $160,000).

4. On 23 March 2018, Ron presents his receipts for the textbooks he purchased ($770) to the accounts department of Integrity Lawyers, and that department paid the amount ($770) on the receipts into Ron's normal bank account (where his salary is deposited).

Ron also advises that he had $45,000 in net capital losses for the 2014-15 income year (from a sale of shares). These are the only losses available to Ron.

Advise Ron on the income tax consequences of the above transactions, events, etc. Your advice must be supported by relevant tax legislation, tax cases and/or tax principles. (Note, there is no need to calculate Ron's liability to the Australian Taxation Office for the income year because we do not have all relevant facts).

Part B (10 Marks)

Incorporating and building on the relevant facts from Part A above, like other major and second-tier law firms, Integrity Lawyers hires around 15-20 graduate lawyers every year from Australian universities. Given the competition for high quality law graduates from Australian universities, prospective employers like Integrity Lawyers are now having to pay incentive payments (sign-on payments) to attract quality graduates. In August 2017, Integrity Lawyers made 17 payments of $15,000 (total: $255,000) to new recruits. All the new recruits are scheduled to start in February 2018. The main contractual arrangement with the new recruits is that the payment is for agreeing to enter into an employment contract with Integrity Lawyers. If the graduate did not end up working for Integrity Lawyers (e.g. got a job elsewhere), he or she was entitled to retain the money (no need for repayment).

All 17 recruits who received sign-on payments from Integrity Lawyers did in fact commence employment with the firm at the agreed time. Indeed, all 17 of them were still working for Integrity

Lawyers 12-months after they commenced employment with the company. Integrity Lawyers expects nearly all these staff to remain with the company for some time given the excellent conditions of employment offered by the company (e.g. staff training, flexi-time).

The management committee of Integrity Lawyers decided, after lengthy discussions, to commission a cost-benefit analysis into the viability of having more of its tax division staff out at client locations for longer periods of time while doing client work. This would cut down on the space requirements (and lease payments) at Integrity Lawyers office premises, and it would allow for a closer working relationship between the staff member and the client. The management committee noted that this approach is already used extensively in the audit division and the management consulting division of the company.

Accordingly, Integrity Lawyers commissions a "space usage consultant" to carry out the study and produce a report for the management committee to consider. The report is completed and delivered on 24 November 2017. The consultant that produced the report charged Integrity Lawyers $50,000 for the report. After lengthy deliberations up to March 2018, the management committee decided not to go ahead with any change mainly because tax work is different to audit work (e.g. there is less of a requirement for access to staff of the client). Further, many staff in the corporate tax division quite often work from home in any event, and thereby the objective of reducing the space requirements at Integrity Lawyers leased premises is already being achieved.

Fully advise Integrity Lawyers on the deductibility, etc, of the above expenses. (Ignore the GST consequences of transactions unless relevant to income tax or FBT: see below). Show calculations where appropriate. Support your advice by reference to relevant tax legislation, tax cases and tax principles. (Note, there is no need to calculate Integrity Lawyers taxable income, etc, because the facts do not reveal the total of the company's assessable income and deductions, or for that matter, tax offsets, for any income year). Also, advise Integrity Lawyers on the fringe benefits tax issues associated with the $770 payment made to Ron in Part A. Show calculations where appropriate. Support your advice by reference to tax legislation, tax cases and/or tax principles.

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LONG ASSIGNMENT SOLUTION AND COMPREHENSIVE FEEDBACK

THIS IS NOT JUST A SOLUTION TO THE LONG ASSIGNMENT QUESTION; IT ALSO INCLUDES COMPREHENSIVE FEEDBACK ON RELATED AREAS OR AREAS THAT COULD HAVE BEEN COVERED. This means you were not expected to write out everything that is below; that would be impossible because you did not have enough words to do that. In addition, your assignment was not marked from a basis that you had to deal with everything in this document. The text below is far more comprehensive than that expected from you, and it also contains feedback on each area(s). This feedback is made available to you for your learning. In marking and allocating marks for each area, the marker was looking for coverage of the central points in each area, and the depth of that coverage.

Part A (30 Marks)

1. Sale of Zinc Mines Ltd Shares and Theft

Some parts of this, only some parts, can raise challenging issues.

1.1 **Profit or Receipt on Income Account**

This answer lacks a reference to Graig case (Greig v Commissioner of Taxation [2018] FCA 1084). In addition, there is no reference at list to the rationales arising from the case - the fact that Ron has already **reported** the sale of shares in previous years as a capital loss and the fact that Ron is **working full-time** are critical circumstances for characterizing the receipt. The proposed answer ignores all of the above, although it seems that the person who wrote the question aimed there (N.H).

(Purely as an aside because it is not relevant to the analysis required from a student, unlike the usual situation where a taxpayer wants to argue a profit or receipt is not income, Ron may want to argue that the profit is income because this may, and I emphasise may, provide the better overall tax outcome for Ron).

While shares can be trading stock for certain taxpayers,[1] Ron's shares are not trading stock to him because his activities of purchase and sale of shares is not done in the ordinary course of a business.

[1] See for example, *Investment & Merchant Finance Corporation v FCT* 71 ATC 4149 and *John v FCT* 89 ATC 4101.

The relevant part of the definition of "trading stock" requires that the thing held was acquired for sale in the ordinary course of business.[2] On application of the key criteria, Ron's activities involving the purchase and sale of shares falls way short of being a business of trading shares.[3] Some of the key criteria are: (i) presence of profit motive (ii) engaging in trade regularly (ii) discernible pattern of trading and (iv) operating in a business-like manner and degree of sophistication. Even though there appears to be a profit motive, consideration of all the other criteria overwhelmingly point to there not being a business.

In addition, even though Ron wishes to sell the shares at a profit, the profit is not income. First, and essentially as stated immediately above when testing for the existence of trading stock, Ron is not carrying on a business of buying and selling shares at a profit (i.e. shares are not revenue assets that are not trading stock).

Secondly, the profit is not income under the isolated transactions doctrine from the *Myer Emporium Ltd case* (first strand).[4] The reason is that where a transaction is not part of the overall business of a taxpayer or the transaction is carried out by a taxpayer that has no business at all, for a profit to be income, there must be both a profit-making purpose at the time of acquisition of the item and the transaction must be commercial or have the character of a business deal. Ron has no business. Ron has the required profit-making purpose at the time of acquiring the shares, but the transaction is not commercial because buying and selling shares on the stock exchange will not be a commercial transaction or a business deal in Ron's situation. It rarely will be for a natural person taxpayer.[5] Even the ATO says this.[6]

A very minor point, given that the positive part of s 15-15 is essentially the same as the first strand of *Myer*,[7] s 15-15 cannot apply to include the profit in Ron's assessable income.[8]

1.2 Profit not on Income Account

The shares are a CGT asset (property), they were acquired post-CGT and a CGT event has occurred to them (CGT event A1) because of their sale.[9] The cost base of the shares is known, namely, $50,000. At first glance, the capital proceeds for the CGT event are $160,000 because this is the amount Ron is entitled to receive, or has received, for the CGT event.[10]

The difficulty arises because the money representing the capital proceeds was stolen around two-months after the CGT event. Section 116-60 reduces the capital proceeds for a CGT event

[2] Definition of "trading stock" in s 70-10(1).

[3] See general criteria for existence of a business from the cases, or the criteria set out in, for example, *Devi v FCT* 2016 ATC 10-419.

[4] *FCT v The Myer Emporium Ltd* 87 ATC 4363.

[5] This was recently confirmed in *Greig v FCT* [2018] FCA 1084 (20 July 2018).

[6] See Examples 1 and 3 at paragraphs 72-73 and 76-77 respectively of Taxation Ruling TR 92/3.

[7] Briefly, to be a profit-making undertaking or plan as required by s 15-15(1), the transaction must be a commercial transaction or have the character of a business deal. In any event, s 15-15 cannot apply when the property is purchased after 19 September 1985, which is the case with Ron's acquisition.

[8] A lot of you referred to CGT event G1 (in s 104-135) as an indicator that Ron was not in the business of buying and selling shares. CGT event G1 has no relevance to that question at all. CGT event G1 applies when a company returns capital to its shareholder(s). No such thing occurred in Ron's situation.

[9] Section 104-10.

[10] Subsection 116-20(1).

where an employee or agent misappropriates (e.g. steals) all or part of the capital proceeds. If s 116-60 applies, Ron would have zero capital proceeds and therefore he would have a capital loss of $50,000, that is, a reduced cost base of $50,000 less zero capital proceeds equals a capital loss of $50,000.

This paragraph (below) is incorrect and unnecessary. We are dealing with the transfer of money from the sale of shares to the Unit trust. This is done through Ron's broker and not through the fraudster. The fraudster issue is not relevant as we have already concluded (below) that once the money has reached Unit trust, it no longer constitutes income (no connection and thus sections 25-45, 116-60, are irrelevant).

However, there are barriers to s 116-60 applying (being satisfied) in Ron's situation. First, the fraudster is not Ron's employee. However, even though there can be some argument, it is likely that the fraudster is an agent of Ron. An agent is not defined in the tax legislation, so the general law definition applies. In *Lean's case*, which involved circumstances like those of Ron and the fraudster, the Full Federal Court seems to have accepted that the relationship was one of principal-agent (custodial agent) between the taxpayer and the fraudster.[11] Accordingly, we should also accept that the agent requirement in s 116-60 is satisfied in Ron's situation.[12]

Secondly, s 116-60 talks about the capital proceeds being stolen. There is a strong argument, partly based on similar reasoning to that in the *Lean case*, albeit dealing with a different section (s 25-45), that the stolen money ($160,000) is no longer the capital proceeds for the CGT event. The reason is that the capital proceeds were fully [constructively] received by Ron and applied for his benefit to a new investment (i.e. cash management trust). Put another way, the capital proceeds have been [fully] received, which means it is impossible to see how they were misappropriated.

On the basis that s 116-60 does not apply, Ron has made a capital gain of $110,000. This is a discount capital gain as the Zinc Mines Ltd shares were held by Ron for more than 12-months. Given Ron has a net capital loss of $45,000 from the 2014-15 income year, this reduces the Zinc Mines Ltd [discount] capital gain down to $65,000 ($110,000 - $45,000). After applying the 50% discount to the $65,000, Ron's net capital gain becomes $32,500, and this is included in Ron's assessable income.[13]

1.3 Deduction for Stolen Money

1.3.1 Section 8-1

Like what was said in the Administrative Appeals Tribunal decision in the Lean litigation,[14] the lost money is a capital loss to Ron under s 8-1, and therefore not deductible. It is capital because Ron is not carrying on a business of trading in shares and the money sent to the fraudster is a capital investment. Support for this comes from the fact that the proceeds of sale of the shares, which is the immediate source of the $160,000, was on capital account. *Charles Moore & Co (WA) Pty Ltd v*

[11] *Lean v FCT* 2010 ATC 20-159 at paragraph 42.

[12] The fact the fraudster is clearly a trustee (and therefore there is a trust relationship) does not undermine the existence of an agency relationship. There is no reason, in principle or in logic, why two people cannot stand in two legal relationships at the same time.

[13] Subsection 102-5(1).

[14] *Lean v FCT* 2008 ATC 10-032 at paragraphs 63-65.

FCT[15] and *FCT v La Rosa*[16] are materially different, and therefore distinguishable and of no help to Ron.[17]

1.3.2 Section 25-45

With all due respect, the paragraphs below are unnecessary and erroneous. To discuss one of the sections (25-45 or 116-60) we must first have assessable income. We have already concluded that the money is no longer assessable income but "new investment" and we have no income from it except (perhaps) the "interest" that has *reached* its destination. In addition, the entire discussion of the relevance of Article 25-45 of capital gains has been irrelevant since the enactment of Article 116-60 in order to resolve the issue. The judgment in *Lean* case also refers to the amendment of the law and the only reason why this matter discussed there is because the assessment was before the amendment of the law (and before the judgment was given)

Arguably, this is a challenging issue, but the guidance (or the tests) in the *Lean case*[18] should have been referred to as this case is the main authority on s 25-45.

There are many barriers to satisfying s 25-45. The fraudster is not an employee of Ron. However, it is likely the fraudster is an agent of Ron (see discussion above regarding s 116-60). Only one of these relationship requirements needs to be satisfied under s 25-45(b).

The next issue in s 25-45 is whether the money stolen ($160,000) was included in Ron's assessable income. There are two problems in satisfying this. First, the $160,000 (as an amount) was not included in assessable income. The $160,000 is just the capital proceeds for a CGT event; being capital proceeds for a CGT event is not the same thing as an assessable income inclusion. Capital proceeds is just a step on a path that may result in an assessable income inclusion. In Ron's case, the assessable income inclusion resulting from the steps on the relevant path is [actually] $32,500. This makes it hard to conclude that the money stolen was included in assessable income. And, s 25-45 does not say "part of the money stolen was included in assessable income". It is suggested that a similar problem exists, perhaps with slightly less force, if the profit ($110,000) was income, which it will not be.

Secondly, and assuming Ron has overcome the barrier above (which is very unlikely), the question is whether there is the required identity between the money included in Ron's assessable income and the money stolen? On strict legal theory, the test as set out by Emmett and Edmonds JJ is the key test because the view of two judges outweighs the view of one judge (Perram J). Emmett and Edmonds JJ said where the taxpayer has obtained the benefit of the money, it is not the same money, or if the money has left the taxpayer's hands, it is not the same money. On these tests, the answer for Ron is that it is not the same money. The $160,000 ($32,500) has clearly "left his hands" when it is sent to the fraudster and Ron has obtained the benefit of having that money invested with the cash

[15] *Charles Moore & Co (WA) Pty Ltd v FCT* (1956) 11 ATD 147.
[16] *FCT v La Rosa* 2003 ATC 4510.
[17] Stated broadly, at the time the money was stolen in each of those two cases, the money had a revenue character because of the close association to trading stock; in one case as the proceeds of sale of trading stock, and the other case as the sum to be used to purchase trading stock. Trading stock is a revenue item.
[18] *Lean v FCT* 2010 ATC 20-159 (Full Federal Court).

management trust (fraudster). Again, the same point would be made if the profit was income, which it is not.

1.3.3 Capital Loss under CGT Regime

This is the last area in which Ron has any hope to obtain recognition for his loss from the tax rules, but it is unlikely to succeed; it goes like this.

Ron acquired a CGT asset at the time he paid money to the fraudster. The CGT asset is a debt or the right to get the money back. The money paid ($160,000) is the acquisition cost for the CGT asset. When the fraudster steals the money, Ron has effectively (but most likely, not legally) had his right(s) to get the money back come to an end through one of the methods listed in s 104-25(1) (CGT event C2 occurs).[19] The capital proceeds for the CGT event is zero. The capital loss is $160,000 because the reduced cost base of $160,000 is more than the capital proceeds of zero.

As noted, the argument will not likely succeed. The main reason is that Ron's right to have the money paid back to him does not seem to satisfy any of the methods (i.e. theft or stealing is not mentioned) in s 104-25(1), and secondly, the rights have not been "extinguished". He still has the right to get his money back, and CGT event C2 needs the right to have come to an end (i.e. no longer exist).

As I explained to Professor Dale, I think the two paragraphs below are wrong. This is not a "personal use asset" but a right to receive interest at a tax rate of 12%.

Even if the CGT event C2 argument succeeded, it looks like the debt would be a personal use asset and therefore no capital loss can arise: s 108-20(1). Why a personal use asset? Because the debt did not arise from Ron carrying on a business, and it is likely the debt did not arise in the course of producing Ron's assessable income: s 108-20(2)(d).
Second, the question is not about coins and bills, but rather obligatory right and therefore the" currency" issue is also irrelevant

For completeness, and even though arguable, CGT event C1 in s 104-20 is unlikely to apply because Australian currency is unlikely to be a CGT asset.[20] If the money was in another currency, then perhaps CGT event C1 may apply: see bullet point 6 in note under s 108-5(2) where foreign currency is listed. There is no indication that the $160,000 was converted into, and held in, non-Australian currency when stolen. There is also an argument that CGT event C1 only applies to tangible assets, and that arguably, money is not something that is tangible in the relevant sense.[21]

2. Interest Earned ($3,400)

[19] Section 104-25.
[20] For various views on this "general area", see Taxation Determination TD 2002/25 and Interpretative Decision ATO ID 2003/166.
[21] Unfortunately, CGT event C1 and/or CGT event C2 was not discussed in *Lean's case*.

This is probably a mistake that involves paying unnecessary tax. In our case, this is a Ponzi fraud, and there was no source of income in the first place (so the "interest" is not return from property but return of property). This is not only my opinion but the opinion of the Canadian court (Roszko v. The Queen 2014 TCC 59) which I referred to and the IRS.

The interest received is income on ordinary concepts as it is a return from property (principal sum), and therefore included in Ron's assessable income.[22]

A very good answer, that should attract one to two bonus marks, would say that because the cash management trust is a trust estate, Ron is really assessed under s 97(1) of the ITAA 1936[23] as a presently entitled beneficiary of a trust estate. In the end, it probably does not matter much.

3. Beneficiary in Medak Family Trust (MFT)

The Medak Family Trust (MFT) is a trust estate under Part III Division 6 of the ITAA 1936 (e.g. s 95, s 97). And, the MFT has trust law income (accounting profit) ($240,000) and taxable income ($280,000) for the 2017-18 year (financial year and income year respectively).[24] Ron is a [potential] beneficiary of MFT. Ron becomes presently entitled to part of MFT's trust law income (accounting profit) because, before the end of 30 June 2018, the trustee exercised his discretion to allocate (applied for beneficiary's benefit) $45,000 of trust law income to Ron.[25] The fact that Ron does not receive this money (trust income) until 29 August 2018 (after year-end) does not undermine this; Ron is presently entitled to $45,000 because he becomes presently entitled to it before year-end.

In turn, because of Ron's present entitlement under s 101 of the *Income Tax Assessment Act* 1936 (and the trust estate has taxable income), Ron must include an amount in his assessable income under s 97(1) of the ITAA 1936. The amount included in assessable income is not the amount Ron is presently entitled to receive. Instead, the amount to which he is presently entitled ($45,000) is a factor (or part of the formula) in determining his assessable income inclusion. Using the proportionate approach to s 97 as per the High Court decision in the *Bamford case*,[26] Ron's assessable income inclusion is $52,500 calculated as follows: ([$45,000 / $240,000] x $280,000).

(As an aside, the fact Ron is being taxed on an amount ($52,500) that is greater than what he receives ($45,000) is correct and contemplated by the rules in s 97(1)).

4. Ron's Course Fees ($8,000)

[22] Section 6-5.
[23] *Income Tax Assessment Act* 1936 (ITAA 1936).
[24] There was no need to explain how the trust law income (accounting profit) was arrived at or how the taxable income was arrived at. This would have been a waste of words. These things just needed to be accepted.
[25] Section 101 of the ITAA 1936.
[26] *FCT v Bamford & Others* 2010 ATC 20-170.

The fees are self-education expenses. This is a challenging issue, for the reason(s) given below.

4.1 Not Capital, Irrelevant Deduction Denial Provisions, Etc

Self-education expenses cannot be capital,[27] so the negative capital limb in s 8-1(2) cannot deny Ron a deduction. Further, ss 26-19 and 26-20 cannot apply to deny Ron a deduction.[28] Section 8-1 is the only provision (deduction conferral provision) under which a deduction for self-education expenses is available.

4.2 Put *FCT v Anstis* Aside

We will first address the positive limbs (only first positive limb) by putting aside the unusual situation in *FCT v Anstis*,[29] which may be useful to Ron (see below). Two reasonably clear tests emerge from the cases under the first positive limb of s 8-1 regarding self-education expenses. First, expenses of self-education to keep-up-to-date in the area in which a taxpayer is currently gaining assessable income is enough to satisfy the first positive limb (and therefore deductible). Secondly, if a taxpayer's self-education is directed at breaking into a new area of assessable income production or getting a first qualification, the expenditure fails the positive limb. On this basis, the tests are not whether the worker is with the same employer, or whether the degree pursued is an undergraduate or postgraduate degree.

Ron is clearly breaking into a new area of assessable income production, Banking and Finance, from another area (Trade Practices Law). The reduced salary paid to Ron from the time he starts in Banking and Finance supports this. Ron may argue that he is not breaking into a new area because he is already is in "law generally", and therefore is only really keeping-up-to- date in an established area. It is suggested that that this is largely inaccurate because it does not reflect what is [really] productive of his assessable income. Ron has been making his assessable income from trade practices and consumer protection law, and not law generally.

On the other hand, Ron is [actually] working in the topic area of Banking and Finance at the time he undertakes the study that gives rise to the expenses, and the topics studied are banking and finance. In this regard, he is maintaining and improving his skills in banking and finance. We therefore seem to have a clash of principles here, which makes the issue very difficult. Students should have recognised the difficulty here; an answer that does not see the difficulty is not a good response.

There are clearly arguments both ways, and there are two old cases that provide some support for Ron, namely, *FCT v Smith*[30] and *FCT v Lacelles-Smith*.[31] In both these cases, deductions were given for an initial qualification where what was learnt in studying helped build skills and knowledge to carry out their job. Further, it is strongly arguable that Ron does come to the new Banking and Finance division with a lot of skills and knowledge that can be put to practical use in that work

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[27] *FCT v Hatchett* 71 ATC 4184 at 4186.

[28] Section 26-19 and s 26-20 respectively deal with: (i) expenses related to the production of income support payments from the government like youth allowance (see *FCT v Anstis* 2010 ATC 20-221) and (ii) payment of, or repayment of, Commonwealth government assistance (e.g. HELP) for studying at an Australian university.

[29] *FCT v Anstis* 2010 ATC 20-221.

[30] *FCT v Smith* 78 ATC 4157.

[31] *FCT v Lacelles-Smith* 78 ATC 4162.

right-away because of the overlap in the knowledge base for trade practices law and banking and finance law (i.e. there would be a large area of overlap).

Not without some doubt, I think the best answer is that Ron can obtain a deduction because his situation is more like the keeping-up-to-date situation where he already has "base skills" in banking and finance, and that by studying, he is improving his skills and knowledge in an area in which he is working (producing assessable income).[32]

4.3 *FCT v Anstis* Argument

The deduction conclusion decision in *Anstis* is arguably unusual in approaching self-education expenses.[33] On the approach of the High Court in *Anstis*, can Ron argue that working in the Banking and Finance division is what is productive of his assessable income and that he must, as an employer imposed condition, enrol in the Master of Laws and undertake and pass two banking and finance courses per semester in order to retain his yearly salary of $136,000? Indeed, it is expressly stated his salary would drop further if he fails a course. On this basis, can't the course fees be viewed as an expense that is productive of his yearly salary, just like Ms Anstis?

The answer is probably no, because it is working in the Banking and Finance division that is productive of Ron's assessable income, albeit that poor study performance could lead to a reduction in that assessable income. On this basis, *FCT v Anstis* is most likely distinguishable.

4.4 Taxation Ruling TR 98/9: Binding Nature of Favourable Public Rulings

The short question here is whether there is anything in this binding ruling that confers deductibility to Ron by operation of the relevant rule concerning binding public rulings (i.e. ruling is more favourable than the tax law)? The answer appears to be no. On reading paragraphs 12-15 (particularly paragraph 13) of Taxation Ruling TR 98/9, it does not expressly give a deduction where the taxpayer incurs expenditure to enable the taxpayer to build initial skill and knowledge in an area. Therefore, Ron cannot solely rely on this ATO binding ruling to get a deduction.

4.5 Section 82A of the ITAA 1936

If the course fees are deductible under s 8-1, there is a chance that $250 of them will be denied deductibility under s 82A. We cannot answer this question because we do not know whether Ron has any non-deductible (fail s 8-1) expenses of self-education. Importantly, s 82A does not just deny the first $250 of deductible expenses of self-education, but it effectively does operate like this when the taxpayer has zero non-deductible expenses of self-education for the income year. The $770 reimbursed to Ron is not included in "the net amount of expenses of self-education" and therefore is not counted as a non-deductible expense of self-education.

5. Textbooks ($770)

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[32] It is suggested that Ron's salary increase after two-years in the Banking and Finance division does not support deductibility of the course fees. The salary increase looks to be associated with Ron's history with Integrity Lawyers and/or his increased expertise in Banking and Finance.

[33] *FCT v Anstis* 2010 ATC 20-221.

Briefly, even if the self-education expenses, including the textbooks, were otherwise deductible to Ron under s 8-1, the cost of the textbooks is denied deductibility because of s 51AH.[34] This section denies a deduction for an expense where the expense has been reimbursed to the taxpayer, and the reimbursement is a fringe benefit. In short, Ron has been reimbursed his textbook expenses (because the amount paid to him is based on costs incurred by Ron) and that reimbursement gives rise to a fringe benefit under s 136(1) of the FBTAA because the $770 payment to Ron is in respect of his employment, etc, and it is not within the definition of "salary or wages";[35] in particular, it is not an allowance.[36]

Part B (20 Marks)

1. Sign-On Fees ($255,000)

This outgoing must be looked at from the perspective of the payer, Integrity Lawyers, and not from the perspective of the recipients/payees (employees). This generally means the arguments or reasoning that makes sign-on amounts income (s 6-5) to recipients will not be available in characterising the expense in the hands of Integrity Lawyers.

1.1 Positive Limbs

The positive limbs are satisfied because costs of attracting employees to work in a taxpayer's business makes the expenditure relevant to the taxpayer's business, and the business is pursued to produce or gain assessable income. Producing assessable income for Integrity Lawyers is the only explanation for the expense.

Further, the fact the expense is incurred before the graduates (future employees) start working for Integrity Lawyers does not mean there is a lack of contemporaneity. Like other areas, the expenditure must be viewed from the payer's viewpoint and not from someone else's viewpoint; Integrity Lawyers has an established business.

1.2 Negative Capital Limb

There is an argument that these expenses are capital on application of the guidelines in *Sun Newspapers*[37] because of their isolated nature, the fact they will not be repeated for this group of graduates ever again and that strictly (but perhaps not practically), the payments are to attract an employee as opposed to paying them for their ongoing service.

The capital argument will not succeed. The main reason is that expenses to do with securing, maintaining and/or dismissing staff will nearly always be on revenue account because such

[34] Section 51AH of the ITAA 1936.

[35] Salary or wages means - "salary, wages, commission, bonuses or allowances": definition of "salary or wages" in s 136(1) of the *Fringe Benefits Tax Assessment Act* 1986 (FBTAA) and s 12-35 in Schedule 1 to the *Taxation Administration Act* 1953 (TAA).

[36] There is an argument that s 8-1 itself achieves the deduction denial for a reimbursed expense anyway because there is "no outgoing" when an expense is reimbursed.

[37] *Associated Newspapers Ltd v FCT; Sun Newspapers Ltd v FCT* (1938) 5 ATD 87 at 96.

expenses (staff costs) are an ongoing issue for a business taxpayer that requires workers.[38] Further, the expenditure does not add to the structure of the business.[39]

1.3 Section 40-880

If the expense is capital, which is very unlikely, s 40-880 would provide a deduction for the expense over five-years (20% per income year: $51,000) because the expense is capital and it is incurred in relation to the business carried on by Integrity Lawyers. Relevance to the business is on the same grounds as set out above for the positive limbs of s 8-1.

2. Cost-Benefit Analysis (Feasibility Study) of Staff out at Client Premises Report ($50,000)

2.1 Positive Limbs of s 8-1

This expenditure is very likely to satisfy the positive limbs because it is to do with staff costs, or at least, costs of accommodating staff (rent of premises) of an existing business or source of income. It is directed at improving efficiency or making cost savings of an existing business. This is not a cost in trying to decide whether to start a new source of income, as was the case in *Softwood Pulp & Paper Ltd v FCT*,[40] where the court held that the expenditure on a feasibility study did not satisfy the positive limbs of the general deduction provision.

Therefore, the expense here is for producing assessable income, and it does not fail the positive limbs due to a lack of contemporaneity with an income activity.

2.2 Negative Capital Limb

Like the sign-on fees paid, this expenditure is very likely to be on revenue account because the cost is to do with staff, or at least, costs of accommodating staff (rent of premises) of an existing business or source of income. Accordingly, it will not be capital and therefore is deductible under s 8-1. Good but what happened to this part of the question: "_and thereby the **objective** of reducing the space requirements at Integrity Lawyers leased premises is **already being achieved**" (Fletcher & Ors)

2.3 Section 40-832

The debate above about lack of contemporaneity and the revenue-capital nature distinction under s 8-1 is "largely academic" because Integrity Lawyers would in any event obtain a deduction immediately for the full cost of the feasibility study ($50,000) under s 40-832, assuming it can satisfy being capital in nature. That is, the cost of the feasibility study is a project amount, it is capital in nature (if not revenue), the project can be the [potential] practice or arrangement of having tax staff located at client premises and the project is for a taxable purpose (income production).[41]

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[38] *W Nevill & Co Ltd v FCT* (1937) 4 ATD 187; *BP Australia Ltd v FCT* (1965) 14 ATD 1 at 9.

[39] As a practical matter, one can also make the argument that the sign-on payment is "part and parcel" of the cost of securing the services of an employee.

[40] *Softwood Pulp & Paper Ltd v FCT* 76 ATC 4439.

[41] Section 40-835 and s 40-840(2).

The project is abandoned in March 2018, and therefore the whole amount is deductible in the 2017-18 income year.[42]

3. Cost of Fringe Benefit, Etc

Logic and required information need(s) under the various tax regimes suggests that the best order to handle a transaction that involves the interaction between the three tax regimes is as follows, GST, FBT and then income tax.

3.1 Goods and Services Tax (GST)

The entire GST issue should have been mentioned above regarding the payment of 50,000 to a commercial supplier. This is a very significant sum (4545$), and in addition, it is not certain that the books were purchased new, and not from a colleague.

Integrity Lawyers will obtain an input tax credit of $70 (1/11th of $770) under the GST Act[43] from its reimbursement of $770 to Ron because all the requirements for a "creditable acquisition" under s 11-5 of the GST Act (with help from s 111-5(1)) are satisfied.[44] Importantly, textbooks are not a GST-free supply (no GST) of education services.[45] This means the supply of a textbook to Ron was a taxable supply by the seller.[46] For a creditable acquisition for Integrity Lawyers, like income tax, expenses must be viewed from the perspective of the payer. Making the reimbursement to Ron is an acquisition in carrying on Integrity Lawyers' enterprise because it is a cost of retaining Ron's employment services (just like the cost of salary or wages).[47]

3.2 Fringe Benefits Tax (FBT)

There is no reference to a reasonably possible scenario whereby the books are used for more than one year (eg two years LLM), and therefore the rule does not apply to depreciation of a CGT asset.
As noted earlier, Ron's reimbursement is a fringe benefit. The prima facie taxable value (initial taxable value) is $770.[48] There is (and cannot be) a recipient's contribution for a reimbursement.[49]

The otherwise deductible rule may lower the taxable value further.[50] The [partly hypothetical] question to ask under the otherwise deductible rule is this, if Ron had incurred and paid to purchase the benefit (i.e. textbooks), would he have got an income tax deduction for the expense?[51] We have

[42] Subsection 40-830(2) and s 40-832(2).
[43] *A New Tax System (Goods and Services Tax) Act* 1999 (GST Act).
[44] Section 11-20 and s 11-25 of the GST Act.
[45] Section 38-85 of the GST Act. Specifically, the supply of a book is not the supply of an education course or administrative services related to the supply of the course.
[46] It is very likely the supplier of the textbooks would have been registered under the GST as they would be carrying on a business (enterprise) and their turnover would be above the compulsory registration turnover threshold in the GST Act: ss 9-5, 9-20 and 23-5 of the GST Act.
[47] Subsection 11-15(1) of the GST Act. As an aside, the deductibility of the expense to Ron of course fees, etc, is completely irrelevant to the entitlement of Integrity Lawyers to an input tax credit.
[48] Section 23 of the FBTAA. The GST-inclusive amount is relevant.
[49] Section 23 of the FBTAA.
[50] Section 24 of the FBTAA.
[51] The otherwise deductible rule in the FBTAA regime is not concerned with: (i) Ron's actual income tax deductions and (ii) Integrity Lawyers' (employer's) deductions.

already effectively addressed (or answered) this by answering the course fees [actual] deductibility question for Ron above. It is likely to be yes, but it is clearly arguable.

If the answer is yes, that is, it would have been deductible, the otherwise deductible amount is $770,[52] and this will reduce the taxable value of the fringe benefit to zero (i.e. $770 - $770).[53] If the answer is no, the taxable value remains at $770.

If there is zero taxable value, the Type 1/Type 2 classification becomes irrelevant as there is zero FBT payable.

If there is a taxable value, the benefit is a Type 1 fringe benefit because, as noted above, Integrity Lawyers obtained an input tax credit for the GST on the cost of the benefit.[54] The taxable value of the fringe benefit is grossed-up by 2.0802, and therefore becomes $1,601 ($770 x 2.0802). If there is a taxable value, FBT payable is therefore $752 ($1,601 x 47%).

3.3 Income Tax

The deduction for the reimbursement for Integrity Lawyers would be $700. This is a staff cost, just like salary or wages is a staff cost. It satisfies the positive limbs of s 8-1 because Ron is working in Integrity Lawyers' business and it is not capital because the remuneration of an employee only provides an employer with a short-term advantage. The amount of deduction is only $700 as there cannot be a deduction for an input tax credit.[55]

There is no deduction for FBT if there is no FBT payable. However, if FBT is payable, it also is a deduction to Integrity Lawyers. The reasoning is the same as the reasoning for deductibility of the cost of the underlying fringe benefit (reimbursement).

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[52] Note that s 82A is ignored (does not exist) when applying the otherwise deductible rule. Therefore, there is no chance of having the otherwise deductible amount reduced by up to $250.
[53] As an aside, the otherwise deductible amount is $770, and not $700, because Ron cannot obtain an input tax credit for GST paid on an acquisition; an employee cannot satisfy s 11-5 of the GST Act because an employee does not carry on an enterprise.
[54] Section 149A of the FBTAA.
[55] Section 27-5.