FEDERAL COURT OF AUSTRALIA

Commissioner of Taxation v Resource Capital Fund IV LP [2019] FCAFC 51

Appeal from:	*Resource Capital Fund IV LP v Commissioner of Taxation* [2018] FCA 41
File numbers:	NSD 283 of 2018 NSD 285 of 2018
Judges:	**BESANKO, MIDDLETON, DAVIES, STEWARD AND THAWLEY JJ**
Date of judgment:	2 April 2019
Catchwords:	**TAXATION** – where provisions of the income tax law which refer to a company are read as also referring to a corporate limited partnership – where partners of a corporate limited partnership are jointly and severally liable to pay any amount that would be payable by the partnership – whether a corporate limited partnership is an entity which is liable to pay income tax – whether assessments issued to corporate limited partnerships should be treated as being assessments issued to all partners of each partnership **CONSTITUTIONAL LAW** – competency to object – where a corporate limited partnership is treated as a separate "taxable" entity – whether a corporate limited partnership is competent to object to an assessment – where liability is imposed on the individual partners without separate assessment – whether the imposition of joint and several liability on the individual partners would be an incontestable tax and unconstitutional **TAXATION** – ordinary income – source of income – where corporate limited partnerships made a gain from the sale of shares in a company – where value of the shares depended upon the value of a mine located in Australia – where disposal of shares was pursuant to a scheme of arrangement approved by the Federal Court of Australia – whether profits had an Australian source **TAXATION** – Double taxation agreement – residence of limited partnership – Division 855 of the *Income Tax Assessment Act 1997* (Cth) – taxable Australian real property – mining, quarrying or prospecting right – whether limited partnerships could be residents of the United States – whether limited partnerships could rely on Taxation

Determination TD 2011/25 for protection from Australian income tax – whether general purpose leases and a miscellaneous licence issued pursuant to the *Mining Act 1978* (WA) were taxable Australian real property because they each constituted a "mining, quarrying or prospecting right" – whether general purpose leases were a lease of land

Legislation:	*Corporations Act 2001* (Cth) s 411 *Federal Court Rules 1979* (Cth) O 52B (repealed) *Federal Court Rules 2011* (Cth) r 9.41 *Income Tax Assessment Act (No 2) 1968* (Cth) s 122 (repealed), 122B (repealed) *Income Tax Assessment Act 1936* (Cth) Part III, Divs 5, 5A, 10 (repealed), Subdiv C, ss 44, 78 (repealed), 91, 92, 94A, 94B, 94D, 94H, 94J, 94K, 94L, 94M, 94P, 94Q, 94V, 161, 166A(3), 170, 175A, 254, 255 *Income Tax Assessment Act 1997* (Cth) Divs 9, 40, 300 (repealed), 721, 855, ss 4-1, 4-5, 5-5, 6-1, 6-5(3), 9-1, 9-1A, 40-30, 202-5, 202-20(b), 202-30, 205-15, 205-25(1)(a), 330-235 (repealed), 330-240 (repealed), 855-15, 855-20, 855-30, 950-150, 960-100(1), 960-115(b), 960-120(1) Item 2, 995-1 *International Tax Agreements Act 1953* (Cth) s 3A *Judiciary Act 1903* (Cth) s 78B *Sales Tax (Exemptions and Classifications) Act 1935* (Cth) (repealed) *Taxation Administration Act 1953* (Cth) Pt IVC, Sch 1, Subdiv 255-A, ss 3A, 14ZL(1), 175A(1), 353-10, 357-60 *Tax laws Amendment (2009 Measures No 4) Act 2009* (Cth) Explanatory Memorandum, Income Tax Assessment Bill (No. 2) 1968 (Cth) Explanatory Memorandum, Taxation Laws Amendment Bill (No. 6) 1992 (Cth) *Mining Act 1928* (Vic) *Mining Act 1978* (WA) Pt IV Divs 3, 4, ss 8, 85, 86, 87, 88, 91, 103C, 103F, 155, 162A *Mining Act 1904* (WA) s 273 (repealed) *Stamp Act 1921* (WA) *Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*, signed on 6 August 1982, [1983] ATS 16 (entered into force on 31 October 1983) Arts 3(1)(a), 4(1)(b), 6(2), 7, 13, 16
Cases cited:	*Barry R Liggins Pty Ltd v Comptroller-General of Customs*

(1991) 32 FCR 112

Bob-Jane T-Marts v Federal Commissioner of Taxation (1999) 42 ATR 43

City Mutual Life Assurance Society Ltd v Smith (1932) 48 CLR 532

Commissioner of Taxation v Brambles Holdings Limited (1991) 28 FCR 451

Commissioner of Taxation v Northwest Iron Co Ltd (1986) 9 FCR 463

Commissioner of Taxation (Cth) v Reynolds Australia Alumina Ltd (1987) 18 FCR 29

Commissioner of State Revenue v TEC Desert Pty Ltd (2009) 40 WAR 344

Deputy Federal Commissioner of Taxation v Brown (1958) 100 CLR 32

Dismin Investments Pty Ltd v Federal Commissioner of Taxation (2001) 183 ALR 565

Esquire Nominees Ltd v Federal Commissioner of Taxation (1973) 129 CLR 177

Esso Australia Resources Ltd v Federal Commissioner of Taxation (1997) 36 ATR 65

Federal Commissioner of Taxation v Broken Hill Pty Co Ltd (1969) 120 CLR 240

Federal Commissioner of Taxation v Casuarina Pty Ltd (1970) 127 CLR 62

Federal Commissioner of Taxation v Henderson (1943) 68 CLR 29

Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq) (2005) 220 CLR 592

Federal Commissioner of Taxation v Prestige Motors Pty Ltd (1994) 181 CLR 1

Federal Commissioner of Taxation v Resource Capital Fund III LP (2014) 225 FCR 290

Giris Pty Ltd v Federal Commissioner of Taxation (1969) 119 CLR 365

Lewis v Bell (1985) 1 NSWLR 731

Living and Leisure Australia Ltd v Commissioner of State Revenue (2017) 106 ATR 910

Living and Leisure Australia Ltd v Commissioner of State Revenue [2018] VSCA 237

MacCormick v Federal Commissioner of Taxation (1984) 158 CLR 622

Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 16) [2017] WASC 340

Mitsui & Co (Australia) Ltd v Federal Commissioner of

Taxation (2012) 205 FCR 523

Muc v Deputy Commissioner of Taxation (2008) 73 NSWLR 378

NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation (1956) 94 CLR 509

Oil Basins Ltd v BHP Petroleum Pty Ltd (unreported, Supreme Court of Victoria, Kaye, Fullagar and Hampel JJ, 27 May 1988)

Orica Ltd v Federal Commissioner of Taxation (2010) 78 ATR 710

Oxnard Financing S.A. v Rahn [1998] 1 WLR 1465

Parker v Federal Commissioner of Taxation (1953) 90 CLR 489

Pratt Holdings Pty Ltd v Federal Commissioner of Taxation (2012) 216 FCR 258

Premier Automatic Ticket Issuers Ltd v Federal Commissioner of Taxation (1933) 50 CLR 268

Radaich v Smith (1959) 101 CLR 209

Re CSR Ltd (2010) 183 FCR 358

Re Talison Lithium Ltd [2013] FCA 194

Regional Director of Customs (WA) v Dampier Salt (Operations) Pty Ltd (1996) 67 FCR 108

Resource Capital Fund III LP v Commissioner of Taxation (2013) 95 ATR 504

Rio Tinto Ltd v Commissioner of Taxation (2004) 55 ATR 321

Robe River Mining Co Pty Ltd v Federal Commissioner of Taxation (1990) 21 ATR 1068

Rose v Commissioner of Taxation (1951) 84 CLR 118

Spencer v Commonwealth (1907) 5 CLR 418

Spotless Services Ltd v Federal Commissioner of Taxation (1993) 25 ATR 344

Tariff Reinsurances v Commissioner of Taxes (Vic) (1938) 59 CLR 194

TEC Desert Pty Ltd v Commissioner of State Revenue (WA) (2010) 241 CLR 576

Waterhouse v Deputy Federal Commissioner of Land Tax, South Australia (1914) 17 CLR 665

Western Australia v Brown (2014) 253 CLR 507

Western Australia v Ward (2002) 213 CLR 1

Wik Peoples v State of Queensland (1996) 187 CLR 1

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Category:	Catchwords
Number of paragraphs:	242
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ORDERS

NSD 283 of 2018

BETWEEN: **COMMISSIONER OF TAXATION**
Appellant

AND: **RESOURCE CAPITAL FUND IV LP**
First Respondent

RCA IV GP LLC
Second Respondent

NSD 285 OF 2018

BETWEEN: **COMMISSIONER OF TAXATION**
Appellant

AND: **RESOURCE CAPITAL FUND V LP**
First Respondent

RCA V GP LTD
Second Respondent

JUDGES: **BESANKO, MIDDLETON, DAVIES, STEWARD AND THAWLEY JJ**
DATE OF ORDER: **2 APRIL 2019**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders of the primary judge of 9 February 2018 be set aside.

3. In lieu thereof, it be ordered that:

   (a) The applicants' appeal from the objection decision of 14 November 2013 be dismissed.

   (b) The applicants pay the costs of the proceeding before the primary judge.

4. The respondent pay the costs of the appeal.

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

REASONS FOR JUDGMENT

BESANKO, MIDDLETON, STEWARD AND THAWLEY JJ:

INTRODUCTION

1 In March 2013, two "corporate limited partnerships" made a gain from the sale of their shares in **Talison Lithium** Ltd. The corporate limited partnerships were Resource Capital Fund IV LP (**RCF IV**) and Resource Capital Fund V LP (**RCF V**). The **Commissioner** of Taxation issued assessments to the corporate limited partnerships.

2 RCF IV and RCF V brought proceedings (or "appeals") under Pt IVC of the *Taxation Administration Act 1953* (Cth) (**TAA 1953**) contending that the assessments were excessive. The primary judge held that the assessments were excessive, in summary on the basis that:

(1) RCF IV and RCF V were not entities liable to pay tax and the assessments issued to them should be understood as being assessments issued to the partners of RCF IV and RCF V.

(2) The gain from the sale of the shares in Talison Lithium was ordinary income with an Australian source.

(3) To the extent the partners of RCF IV and RCF V were United States residents, they were entitled to the benefit of the *Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*, signed on 6 August 1982, [1983] ATS 16 (entered into force on 31 October 1983) as amended (**Double Tax Agreement**, or **DTA**).

(4) Article 13 of the DTA did not authorise Australia to tax the partners of RCF IV and RCF V for the ordinary income gain from the sale of the shares in Talison Lithium. This conclusion was reached because the assets of Talison Lithium were considered not to consist "wholly or principally of real property situated in Australia" within the meaning of Art 13(2)(b)(ii) of the DTA. The conclusion that the assets did not consist "wholly or principally of real property situated in Australia" was reached because the primary judge concluded:

   (a) that Div 855 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**) was the domestic enactment of the power to tax allocated to Australia by Art 13 of the DTA;

(b) under Div 855, the market value of Talison Lithium's taxable Australian real property (**TARP**) assets did not exceed the value of its non-Australian real property (**non-TARP**) assets.

3 The Commissioner appeals from that decision.

4 The grounds of appeal give rise to the following issues:

(1) first, whether RCF IV and RCF V are entities which are liable to pay tax;

(2) secondly, who has been assessed;

(3) thirdly, if RCF IV and RCF V were taxable entities, whether the imposition of liability on the partners in respect of the tax gave rise to an "incontestable tax" and was therefore unconstitutional;

(4) fourthly, whether the source of the gain from the sale of the shares was Australia;

(5) fifthly, whether RCF IV and RCF V can rely on the DTA;

(6) sixthly, whether RCF IV and RCF V can rely on the Commissioner's ruling in Taxation Determination TD 2011/25 (**Ruling**); and

(7) seventhly, whether the primary judge erred in preferring the valuation evidence put forward by RCF IV and RCF V and in the manner in which his Honour dealt with that evidence.

FIRST ISSUE: ARE CORPORATE LIMITED PARTNERSHIPS LIABLE TO TAX?

5 The primary judge considered that the effect of Div 5A of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**) was to treat a corporate limited partnership as a company, but not "to create a new taxable entity": at J[16]. The statutory scheme does not use the phrase "taxable entity". However, the statutory scheme uses and defines the word "entity" and is concerned with entities that must pay income tax.

6 For the reasons which follow, by reason of Div 5A, a corporate limited partnership is treated as a company for taxation purposes and this includes it being an entity which is liable to pay income tax.

7 There was no dispute that RCF IV and RCF V were "limited partnerships" within the meaning of Div 5A, nor that they were "corporate limited partnerships" within the meaning of s 94D. There was no dispute that RCF IV and RCF V were each an "entity" within the meaning of s 960-100(1) of the ITAA 1997.

8 Division 5A of the ITAA 1936 is titled "Income of certain limited partnerships". Subdivision A includes:

> **94A Object**
>
> The object of this Division is to provide for certain limited partnerships to be treated as companies for tax purposes.

9 The Commissioner emphasised that the statutory statement in s 94A of the legislative object is not to treat the limited partnership as a company only for some tax purposes.

10 Division 5A does not contain a provision which states that a corporate limited partnership is not liable to pay tax. This can be contrasted with the position of a partnership under Div 5. Under Div 5, whilst a partnership must "furnish a return of the income of the partnership", it "shall not be liable to pay tax thereon": s 91 of the ITAA 1936. Rather, it is the partners who are made liable to tax under s 92 of the ITAA 1936. These provisions do not apply to a corporate limited partnership by reason of s 94K (in Div 5A).

11 Division 9 of the ITAA 1997 is entitled "Entities that must pay income tax". The Division is a "Guide": s 9-1A (for the definition of "Guide", see: s 950-150(1)). As a Guide, Div 9 forms a part of "this Act" (s 950-100(1)), which is defined to include the ITAA 1936: s 995-1(1). However, Guides are separate from the "operative provisions" of the Act and may only be considered in the particular ways indicated by s 950-150(2):

> Guides form part of this Act, but they are kept separate from the operative provisions. In interpreting an operative provision, a Guide may only be considered:
>
> (a) in determining the purpose or object underlying the provision; or
>
> (b) to confirm that the provision's meaning is the ordinary meaning conveyed by its text, taking into account its context in the Act and the purpose or object underlying the provision; or
>
> (c) in determining the provision's meaning if the provision is ambiguous or obscure; or
>
> (d) in determining the provision's meaning if the ordinary meaning conveyed by its text, taking into account its context in the Act and the purpose or object underlying the provision, leads to a result that is manifestly absurd or is unreasonable.

12 Consequently, the Guide in Div 9 of the ITAA 1997 forms part of the ITAA 1936, but does not confine the operative provisions of Div 5A. The Div 9 Guide is in the nature of intrinsic explanatory material, which (as with extrinsic explanatory material) cannot be used to contradict the meaning of the language of the operative text – see: *Barry R Liggins Pty Ltd v*

Comptroller-General of Customs (1991) 32 FCR 112 at 120; *Muc v Deputy Commissioner of Taxation* (2008) 73 NSWLR 378 at [47]–[49].

13 Section 9-1 of the ITAA 1997 provides that income tax is payable by the entities listed in the table to the section. Item 9 of the table identifies a "corporate limited partnership" as an entity which must pay income tax, and identifies that it must do so because of s 94J of the ITAA 1936.

14 Section 94J is found in Subdiv C of Div 5A (comprising ss 94H to 94X), which is titled "Corporate tax modifications applicable to corporate limited partnerships". Sections 94H to 94K provide:

> **94H Corporate tax modifications applicable to corporate limited partnerships**
>
> If a partnership is a corporate limited partnership in relation to a year of income, the income tax law has effect, in relation to the partnership and in relation to the year of income, subject to the changes set out in the following provisions of this Subdivision.
>
> **94J *Company* includes corporate limited partnership**
>
> A reference in the income tax law (other than the definitions of ***dividend***, and ***resident*** or ***resident of Australia***, in section 6 of this Act and other than Division 355 of the *Income Tax Assessment Act 1997*) to a company or to a body corporate includes a reference to the partnership.
>
> **94K *Partnership* does not include corporate limited partnership**
>
> A reference in the income tax law to a partnership does not include a reference to the partnership.

15 Section 94J operates such that references in the "income tax law" to a "company" include a reference to "the [corporate limited] partnership". Section 94K switches off the operation of Div 5 to the corporate limited partnership. Importantly, s 94J is expressly made subject to s 94V, the provision relied upon by the primary judge for his conclusion that a corporate limited partnership is not a "taxable entity" (and implicitly, that a corporate limited partnership is not liable to pay tax).

16 The "income tax law" is defined in s 94B, which provides:

> **94B Interpretation**
>
> In this Division:
>
> ***income tax law*** means:
>
> (a) this Act (other than this Division and Division 830 of the *Income Tax Assessment Act 1997*); and
>
> (b) an Act that imposes any tax payable under this Act; and

(c) the *Income Tax Rates Act 1986*; and

(d) the *Taxation Administration Act 1953*, so far as it relates to an Act covered by paragraph (a), (b) or (c); and

(e) any other Act, so far as it relates to an Act covered by paragraph (a), (b), (c) or (d); and

(f) regulations under an Act covered by any of the preceding paragraphs.

year of income means (except in paragraph 94L(b)) the year of income in which 19 August 1992 occurred or a later year of income.

17 The phrase "this Act" in s 94B(a) of the ITAA 1936 is defined in s 6(1) in the following way:

this Act includes:

(a) the *Income Tax Assessment Act 1997*; and

(b) Part IVC of the *Taxation Administration Act 1953*, so far as that Part relates to:

(i) this Act or the *Income Tax Assessment Act 1997*; or

(ii) Schedule 1 to the *Taxation Administration Act 1953*; and

(c) Schedule 1 to the *Taxation Administration Act 1953*.

Note: Subsection (1AA) of this section prevents definitions in the *Income Tax Assessment Act 1936* from affecting the interpretation of the *Income Tax Assessment Act 1997*.

18 The effect of s 94J is straightforward. Provisions of the income tax law which refer to a company are read as referring also to a corporate limited partnership. Subject to the operation of s 94V (considered below), the corporate limited partnership is an entity liable to tax in the same way that a company is.

19 The term "taxpayer" is defined in s 6(1) of the ITAA 1936 as "a person deriving income or deriving profits or gains of a capital nature". Every "person" must lodge a return: s 161 of the ITAA 1936. A "person" includes a "company": s 6(1) ITAA 1936; s 995-1(1) ITAA 1997. The reference in the definition of "person" in s 995-1(1) of the ITAA 1997 to a "company" must be read as including a reference to a corporate limited partnership: s 94J of the ITAA 1936.

20 Not only must a corporate limited partnership lodge a return, it is also a "full self-assessment taxpayer", defined in s 6(1) of the ITAA 1936 as follows:

> ***full self-assessment taxpayer***, for a year of income (the ***current year***), means any of the following:
>
> (a) a company; …
>
> Note: A corporate limited partnership is taken to be a company under section 94J, so it will fall within paragraph (a) of this definition.

21 Notes such as that set out immediately above form a part of the ITAA 1936 – see: s 950-100(1) of the ITAA 1997 and the definition of "this Act" in s 995-1(1).

22 The return furnished by a corporate limited partnership as a full self-assessment taxpayer (pursuant to its obligation under s 161 of the ITAA 1936) is taken to be a notice of a deemed assessment in accordance with s 166A(3).

23 In addition, the Commissioner could issue a default assessment to "any person" (which, by the provisions identified above, includes a company and a corporate limited partnership) in the circumstances contemplated by s 167 of the ITAA 1936, which include the failure to furnish a return or the Commissioner not being satisfied with the return furnished. The Commissioner could issue an amended assessment to a corporate limited partnership in accordance with s 170 of the ITAA 1936.

24 Section 5-5 of the ITAA 1997 "tells you when income tax you must pay … is due and payable": s 5-5(1). A corporate limited partnership falls within the meaning of the word "you" which "applies to entities generally": s 4-5. Tax is due and payable when an assessment is made: s 5-5(2). Section 4-1 says that income tax is payable "by each individual and company, and by some other entities". The word "company" is to be read as including a reference to a corporate limited partnership: s 94J.

25 A corporate limited partnership can object to an assessment (be it actual, deemed or amended) in accordance with the provisions of Pt IVC of the TAA 1953. The contrary conclusion cannot be reached simply because a corporate limited partnership does not have a legal personality in the same way that a company is recognised as a legal person. Part IVC applies where a provision of an Act provides that "a person who is dissatisfied with an assessment" may object under Pt IVC: s 14ZL(1) of the TAA 1953. In respect of assessments, that right is given by s 175A(1) of the ITAA 1936, which provides that a "taxpayer who is dissatisfied with an assessment made in relation to the taxpayer may object against it" under Pt IVC of the TAA 1953. As noted above, a "corporate limited partnership" is a "taxpayer" and a "person" for the purposes of these provisions.

26 The foregoing conclusion is not denied by the fact that, if a corporate limited partnership did not in fact pay its tax-related liability, a question would arise about the ability of the Commissioner to sue the corporate limited partnership as a legal entity separate from its partners for recovery of the debt to the Commonwealth under Subdiv 255-A of Sch 1 to the TAA 1953. In any event, it might be expected that corporate limited partnerships would ordinarily pay the relevant tax.

27 This construction of s 94J is confirmed by other provisions in Subdiv C of Div 5A of the ITAA 1936. Sections 94L and 94M assimilate distributions to partners of a corporate limited partnership to dividends paid by a company to its shareholders. Sections 94P and 94Q assimilate partnership interests to shares and partners to shareholders. These provisions are as follows:

> **94L *Dividend* includes distribution of corporate limited partnership**
>
> A reference in the income tax law (other than subsection 44(1A) of this Act) to a dividend or to a dividend within the meaning of section 6:
>
> (a) includes a reference to a distribution made by the partnership, whether in money or in other property, to a partner in the partnership; and
>
> (b) does not include a reference to a distribution to the extent to which the distribution is attributable to profits or gains arising during a year of income in relation to which the partnership was not a corporate limited partnership.
>
> **94M Drawings etc. deemed to be dividends paid out of profits**
>
> (1) If the partnership pays or credits an amount to a partner in the partnership:
>
> (a) against the profits or anticipated profits of the partnership; or
>
> (b) otherwise in anticipation of the profits of the partnership;
>
> (whether or not the amount of the profits or anticipated profits is ascertainable), the amount paid or credited is taken, for the purposes of the income tax law, to be a dividend paid by the partnership to the partner out of profits derived by the partnership.
>
> (2) If the partnership makes a subsequent distribution, the Commissioner must take such steps (if any) as are necessary to ensure that the partner is not subject to double taxation.
>
> **94P *Share* includes interest in corporate limited partnership**
>
> A reference in the income tax law to a share includes a reference to an interest in the partnership.
>
> **94Q *Shareholder* includes partner in corporate limited partnership**
>
> A reference in the income tax law to a shareholder includes a reference to a partner in the partnership.

28 Together with other provisions, these provisions allow for the franking of distributions of a corporate limited partnership in the same way as dividends of a company may be franked – see: s 960-115(b) (which defines "corporate tax entity" to include a corporate limited partnership); s 960-120(1), Item 2; s 202-20(b); s 202-30; s 205-25(1)(a) of the ITAA 1997.

29 A distribution can only be franked where a corporate tax entity's franking account has franking credits which have been allocated to the distribution: s 202-5 of the ITAA 1997. A franking credit can only arise in the circumstances provided in s 205-15 which include, for example, where the entity (the corporate limited partnership) pays income tax.

30 These provisions operate on the basis that the corporate limited partnership is assessable on its income *before* distribution. These provisions also operate on the basis that the partners are only assessable under s 44 of the ITAA 1936 on distributions paid or credited (in the same way as shareholders receiving a dividend). This is to be distinguished with the situation of partners under Div 5: the partnership is not assessable or liable to tax; and the partners are assessable and liable for tax irrespective of the actual distribution: ss 91 and 92 of the ITAA 1936.

31 As noted above, in concluding that RCF IV and RCF V were not entities which were liable to tax, the primary judge placed particular reliance on s 94V of the ITAA 1936, which his Honour noted "expressly limits (or undoes) some of the other modifications to the income tax law brought about by Division 5A": J[13]. Section 94V provides:

> **94V Obligations and offences**
>
> (1) The application of the income tax law to the partnership as if the partnership were a company is subject to the following changes:
>
> (a) obligations that would be imposed on the partnership are imposed instead on each partner, but may be discharged by any of the partners;
>
> (b) the partners are jointly and severally liable to pay any amount that would be payable by the partnership;
>
> (c) any offence against the income tax law that would otherwise be committed by the partnership is taken to have been committed by each of the partners.
>
> (2) In a prosecution of a person for an offence that the person is taken to have committed because of paragraph (1)(c), it is a defence if the person proves that the person:
>
> (a) did not aid, abet, counsel or procure the relevant act or omission; and

(b) was not in any way knowingly concerned in, or party to, the relevant act or omission (whether directly or indirectly and whether by any act or omission of the person).

32 After setting out this provision, the primary judge stated at J[13]:

> It is significant that the changes effected by s 94V are of the way in which the income tax law was to apply to the partnership when treated as a company. The section changes, in other words, the way in which the other provisions were otherwise to apply to a partnership when those other provisions would have applied to a partnership as if the partnership were a company. Amongst those changes is that the obligations that would be imposed on the partnership "are imposed instead on each partner" and that each partner is jointly and severally liable to pay any amount that would otherwise be payable by the partnership. The need for such changes to what might otherwise obtain, arises from the possibility that requiring that the income tax law be applied to the partnership "as if" the partnership were a company might otherwise have resulted in the partnership, rather than the partners, becoming liable for obligations, or becoming liable to pay any amount, that "would be" of the partnership. The section deals with the obligations and liabilities imposed or arising in relation to the application of the income tax law (as defined). Those obligations and liabilities necessarily include the obligation and liability to pay tax by an assessment. The enactment of s 94V thus tells against the Commissioner's argument that Division 5A was intended to permit assessments to be raised to the partnership rather than to the partners, and, if it is not a complete answer to the Commissioner's argument, it is, at very least, a strong pointer in that direction. Nothing in s 94V, or in any other provision in Division 5A, authorises the Commissioner to impose any obligation or liability upon any person other than a partner, and if there had been any doubt where the liability and obligation fell, the doubt was expressly removed by s 94V.

33 Section 94V(1)(b) is capable of being read as implying that a corporate limited partnership is not liable to pay tax, or as preventing s 94J from having the consequence that the corporate limited partnership is liable to tax in the same way as a company. As the reasons of the primary judge set out above emphasise, that implication arises because of the phrase "would be" in providing that "the partners are jointly and severally liable to pay any amount that *would be* payable by the partnership". Another way of reading para (b) is that it recognises that, whilst a corporate limited partnership is liable to pay tax, the corporate limited partnership is not an entity with a separate legal personality capable of being sued in debt in respect of that liability. On this reading the real statutory objective which para (b), read in context, discloses, is merely to ensure that persons capable of being sued in debt are made liable for the corporate limited partnership's liability for tax. That is, the phrase "would be" is to be understood as meaning "is".

34 For the purposes of facilitating the treatment of a corporate limited partnership as a company for income tax purposes, and critically to enable such a partnership to pay franked dividends to its partners, the corporate limited partnership is a "person" upon whom is imposed a

liability to pay income tax. But for the purposes of collecting such tax when it remains unpaid, the ITAA 1936 recognises that outside the statutory fiction created by Div 5A a limited partnership, as the primary judge well understood, is a relationship between entities and, unlike an actual company, is not a separate juridical "thing": cf *Federal Commissioner of Taxation v Casuarina Pty Ltd* (1970) 127 CLR 62 at 77 per Windeyer J. Thus, and for the purposes of collecting unpaid income tax, s 94V(1)(b) endures. It enables the enforcement of a debt against actual and not deemed entities.

35 This construction of s 94V(1)(b) is the correct construction having regard, in particular, to the following matters.

36 *First*, s 94V(1) does not state that a corporate limited partnership is not liable to pay tax. This is to be contrasted with the position under Div 5 with respect to a partnership (not treated as a company) which is expressly not liable to pay tax: s 91 of the ITAA 1936.

37 *Secondly*, it is perhaps relevant to note the textual differences between paras (a) and (b) of s 94V(1):

(1) Paragraph (a) is directed to obligations generally, but not to the pecuniary obligation to pay tax which is the specific subject matter of para (b). Paragraph (a) obligations would include, for example, the obligation to comply with a statutory notice such as one issued under s 353-10 of Sch 1 to the TAA 1953 requiring the giving of information. With respect to these obligations, para (a) provides that they are imposed "instead" on each partner, but may be discharged by any of them.

(2) The liability to pay tax, however, is treated differently by para (b). Paragraph (b) does not use the word "instead". It provides for a joint and several liability on the partners. As noted above, this is expressed to be a liability for the tax that "would be payable by the partnership".

38 *Thirdly*, in construing s 94V(1) and para (b) in particular, it is necessary to consider the broader statutory context set out above and it is permissible to have regard to s 9-1 of the ITAA 1997 in the limited way described in [11] and [12] above.

39 The primary judge referred to the Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 6) 1992 (Cth) (**1992 Explanatory Memorandum**). In relation to the proposed s 94V(1) it provided:

Obligations and offences of limited partnerships

Broadly, obligations and offences of limited partnerships are taken to be those of the individual partners, with certain joint and several liabilities. The reason for this approach is that, while corporate limited partnerships are generally treated as companies for the purposes of the income tax law, this does not convert them into companies for other purposes, including criminal law, monetary claims, and so on. So the obligations and offences of limited partnerships continue to be dealt with broadly as before these amendments. The law will provide for limited partnerships in much the same way as for other partnerships.

Where, as an entity, a corporate limited partnership is subject to an obligation under the income tax law, that obligation is imposed on each of the partners, but it may be discharged by any of them [new paragraph 94V(1)(a)].

Where, as an entity, any amount is payable under the income tax law by a corporate limited partnership, the partners are jointly and severally liable to pay that amount [new paragraph 94V(1)(b)];

Where, as an entity, any offence against the income tax law would have been committed by a corporate limited partnership, each partner will be deemed to have committed the offence [new paragraph 94V(1)(c)].

40 In respect of this, his Honour stated at J[17]:

> These passages reveal that a purpose of the legislation was to provide for corporate limited partnerships to be treated as corporations under the income tax law upon the assumption that corporate limited partnerships were not converted into companies for other purposes. The explanatory memorandum specifically noted, as was subsequently clearly provided, that an obligation under the income tax law of a corporate limited partnership was an obligation "imposed on each of the partners". The explanatory memorandum specifically noted, as was also subsequently clearly provided, that "any amount" that was made payable under the income tax law by a corporate limited partnership was the joint and several liability of the parties and was to be paid by them. There was no suggestion anywhere in the explanatory memorandum of any concept of "taxable entity" or of corporate limited partnerships, or of certain limited partnerships, being created as taxable entities separate from the partners.

41 No assistance is gained from the 1992 Explanatory Memorandum. So far as para (b) of s 94V(1) is concerned, it tends to confirm the construction that should be preferred, namely that if a corporate limited partnership is liable to pay an amount, the partners are jointly and severally liable to pay the amount. The passages set out above do not suggest that the corporate limited partnership is not so liable. It is not surprising that the 1992 Explanatory Memorandum does not refer to any concept of a "taxable entity" (a concept not derived from the legislation) or of corporate limited partnerships being created as taxable entities. The fact that it did not says nothing about the correct construction of Div 5A.

SECOND ISSUE: WHO HAS BEEN ASSESSED?

42 The primary judge, having concluded that RCF IV and RCF V were not taxable entities, had then to decide "who has been assessed and who is before the Court": J[18]. At J[19], the assessments which had been issued, and which were before the Court, were described in these terms:

> The assessments were not in form addressed to the individual partners of RCF IV and RCF V. The assessment in respect of RCF IV was addressed as follows:
>
> > Resource Capital Fund IV LP
> > Maples Corporate Services Ltd
> > Ugland House South Church Street
> > PO Box 308
> > Cayman Islands
>
> The assessment in respect of RCF IV was sent by the Commissioner under cover of a letter dated 25 March 2013 addressed to the General Partner of RCF IV as follows:
>
> > The General Partner
> > Resource Capital Fund IV LP
> > Maples Corporate Services Ltd
> > Ugland House South Church Street
> > PO Box 308
> > Cayman Islands
>
> The Commissioner's letter described the subject matter of the letter as "Resource Capital Fund IV LP (Tax File Number 940 862 980) Assessment regarding disposal of taxable Australian property" and referred throughout to the intended recipient as "you" and informed the recipient described as "you" of having obligations to pay tax and of having rights of objection and appeal. An assessment in similar form, under cover of a letter similarly addressed, was sent by the Commissioner in respect of RCF V …

43 Assessments having been issued to each limited partnership, each partnership – and not any individual partner – lodged thereafter notices of objection. Following the issue to each of the partnerships of a notice of objection decision, each partnership – and not the partners or any individual partner – filed notices of appeal to this Court. Notwithstanding this course of events, the primary judge concluded that the assessments and other procedural steps taken in the proceeding "should … be understood as assessments to, and as steps undertaken by, the partners by reference to their partnership name": J[21]. On this basis, it was the partners who had been assessed and were before the Court through the name of each limited partnership.

44 We disagree with this conclusion. Having decided that each limited partnership is to be treated as a company for tax purposes, including for the purpose of assessment, objection and appeal, and the Commissioner having issued assessments to each said partnership, each

partnership, and not any individual partner, was before the Court, and was competent to pursue each tax appeal.

45 Even if we are wrong in relation to our earlier conclusion concerning the legal capacity for each partnership to be assessed, we would still doubt the conclusion reached by the primary judge. His Honour relied upon the decision of the High Court in *Federal Commissioner of Taxation v **Prestige Motors** Pty Ltd* (1994) 181 CLR 1 for the proposition that a valid notice of assessment need not name the taxpayer liable to pay tax. In that case, the taxpayer had been misdescribed as being the "Prestige Toyota Trust". In this proceeding there has been no misdescription of the taxpayer the Commissioner was seeking to tax. Following the decision of the Full Court of this Court in *Federal Commissioner of Taxation v Resource Capital Fund III LP* (2014) 225 FCR 290 (***RCF III***), it may readily be inferred that the Commissioner very deliberately sought to issue assessments to each limited partnership, and specifically not to any individual partner or to all partners. That is why each assessment was issued in the name of each limited partnership and was sent to the address of each partnership in the Cayman Islands. In this way, and on this basis, each partnership was then served with notice of its purported liability as assessed. As the High Court said in *Prestige Motors* at 14–15:

> This leads us to the conclusion that it is not essential to the validity of a notice of assessment that it state the name of the taxpayer liable to pay the tax. But we do not consider that this conclusion is a complete answer to the question which has arisen. *That is because, on the view which we take of the provisions, it is necessary that the notice should bring to the attention of the person on whom it is served that the assessment to which it relates is an assessment of that person to tax.* The principal purpose of the notice of assessment is to bring to the attention of the person on whom it is served that such person is liable to pay on the due date the amount of tax assessed in the notice on the income stated in the notice. No doubt service of the notice on a taxpayer goes some way towards achieving this purpose. But whether the purpose is achieved in a given case must depend upon the form and contents of the particular notice of assessment. Thus, to take an example given by Hill J. in the Federal Court, a notice assessing A to tax but served on B instead could not stand as a notice assessing B to tax.
>
> (Footnote omitted and emphasis added.)

46 Here, if our earlier conclusion that RCF IV and RCF V are competent to be assessed be incorrect, then the "assessments" issued to each were misconceived. That is because each of the Commissioner's notices of assessment failed to be served on a taxpayer, and no notice was given, by sending the notices to RCF IV and RCF V, of "an assessment of *that person* to tax", to use the language of *Prestige Motors*.

47 In our view, it is also not possible to read each assessment as having been served on each partner, or on the partners collectively. The partners, some of whom reside in the United States, were not, as a fact, served with any assessment. As for service on the partners collectively, it is true that the *Federal Court Rules 2011* (Cth) (**Federal Court Rules**) allow partners to sue and be sued in the name of their partnership: see r 9.41. Whether that rule necessarily applies to a foreign partnership may be the subject of possible doubt, but that is not something we need to resolve: cf *Oxnard Financing S.A. v Rahn* [1998] 1 WLR 1465. That is because there is no equivalent to r 9.41 in either the ITAA 1997, ITAA 1936 or in Pt IVC of the TAA 1953 for the purposes of both assessing partners of a limited partnership collectively, and then for such a partnership to object for the partners against any such assessment. It follows that the primary judge erred in treating the assessments issued to each limited partnership as being assessments issued to all partners of each partnership.

THIRD ISSUE: CONTESTABILITY

48 The respondents filed notices of a constitutional matter pursuant to s 78B of the *Judiciary Act 1903* (Cth) arguing that if each limited partnership was competent to be assessed, the imposition of joint and several liability on the individual partners in respect of such assessments would be an "incontestable tax", and thus unconstitutional. The respondents relied upon the decisions in *Deputy Federal Commissioner of Taxation v Brown* (1958) 100 CLR 32, *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 and *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622.

49 With respect to the respondents, that submission is misconceived. If a limited partnership is competent to be issued with a notice of assessment then, for reasons already given, it is also competent to object to such an assessment pursuant to s 175A of the ITAA 1936 and Pt IVC of the TAA 1953. Plainly, such an assessment is contestable.

50 The imposition of liability on the individual partners is, for reasons earlier expressed, a collection and not an assessment measure. Other provisions of the ITAA 1936 and the ITAA 1997 permit the Commissioner to collect tax which has been assessed in respect of a taxpayer from third parties. They include collecting tax from agents and trustees (s 254 of the ITAA 1936), from a person in receipt or control of money from a non-resident (s 255 of the ITAA 1936) and from a subsidiary member of a consolidated group where a head entity fails to discharge a tax-related liability, and the liability is not covered by a tax sharing agreement (Div 721 of the ITAA 1997). The Commissioner's ability to collect tax in this way does not

render the tax which has been assessed incontestable. The actual taxpayer assessed in each case, as here, has a right of objection. In that respect, any collection of tax from an individual partner would not involve the imposition of a new pecuniary obligation: cf *Waterhouse v Deputy Federal Commissioner of Land Tax, South Australia* (1914) 17 CLR 665. Rather, it would involve collection of a pre-existing pecuniary obligation imposed on the limited partnership. For these reasons, we reject the grounds set out in the notices of a constitutional matter.

FOURTH ISSUE: SOURCE

51 The respondents filed a notice of contention which, amongst other things, contended that the primary judge erred in deciding that the profit derived by each of RCF IV and RCF V from the sale of shares and interests in Talison Lithium had an Australian source for the purposes of s 6-5(3) of the ITAA 1997. That section provides:

> If you are a foreign resident, your assessable income includes:
>
> (a) the ordinary income you derived directly or indirectly from all Australian sources during the income year; and
>
> (b) other ordinary income that a provision includes in your assessable income for the income year on some basis other than having an Australian source.

The term "Australian source" is defined in s 995-1 of the ITAA 1997 as follows:

> ***Australian source:*** ordinary income or statutory income has an Australian source if, and only if, it is derived from a source in Australia for the purposes of the *Income Tax Assessment Act 1936.*

52 It was not disputed by the respondents that the profits each had earned was income according to ordinary concepts. Nor did either respondent submit that the primary judge had applied a wrong test for ascertaining the source of that income. The primary judge, in that respect, said at J[51]:

> The more difficult aspect of the application of s 6-5(3) of the 1997 Act is whether the income was derived from an Australian source. The ascertainment of the source of income has been described as "a practical, hard matter of fact": see *Nathan v Federal Commissioner of Taxation* (1918) 25 CLR 183, 190; see also *Federal Commissioner of Taxation v Crown Insurance Services Ltd* (2012) 207 FCR 247, [88]-[99]. The factors that will be relevant to the ascertainment of the source of income will vary from case to case, and will vary as between different kinds of income. The place of the performance of services is likely to be significant to determine the source of income derived from personal exertion: see *Federal Commissioner of Taxation v French* (1957) 98 CLR 398, 414-415, 420-421; *Federal Commissioner of Taxation v Mitchum* (1965) 113 CLR 401, 408; *Federal Commissioner of Taxation v Efstathakis* (1979) 38 FLR 276. The location of the property will be significant when the income is derived from property (see *Federal Commissioner of Taxation v United Aircraft*

> *Corporation* (1943) 68 CLR 525, 536), and the place where a taxpayer has performed income earning operations will be significant where the income is derived from a service of operations (see *Commissioner of Inland Revenue v HK-TVB International Ltd* [1992] 2 AC 397, 404, 408-409).

Rather, the respondents submitted that the test for determining source was misapplied and that the primary judge should have decided that the profits earned did not have an Australian source. For that purpose, the respondents did not dispute any of the facts found by the primary judge; instead, they disputed the way the test for determining source was applied to those facts.

53 The primary judge was well aware of the connection the profits had with activities which had taken place overseas. At J[52], his Honour summarised accurately those overseas connections, as relied upon by the respondents, in these terms:

> In that context the applicants submitted that the gains did not have an Australian source because: (a) all decisions and negotiations for the investment in Talison Minerals were made by the Investment Committee of the general partner outside Australia; (b) monitoring of the investment was conducted by the Investment Committee of the general partner outside Australia; (c) all decisions and negotiations regarding the disposal of the investment were made by the Investment Committee of the general partner outside Australia; (d) the limited partners could not and did not take any part in the management of the partnership and were passive investors; (e) before making important decisions, the Investment Committee of the general partner took advice from the management company, RCF Management, outside of Australia; (f) the shares which were disposed of were listed and were freely tradable on the Toronto Stock Exchange; and (g) the consideration for the disposal of shares was paid on behalf of Tianqi, a Chinese company, and was payable and received outside Australia and in Canadian dollars.

54 The primary judge nevertheless formed the view that there were sufficient connections with Australia to give the profits a source in this country. In that respect, his Honour was mindful of the following observation of Lockhart J in *Spotless Services Ltd v Federal Commissioner of Taxation* (1993) 25 ATR 344 at 359:

> The cases demonstrate that there is no universal or absolute rule which can be applied to determine the source of income. It is a matter of judgment and relative weight in each case to determine the various factors to be taken into account in reaching the conclusion as to source of income.

55 Exercising judgment and giving weight to the relevant facts here, the primary judge noted that the business strategy of the respondents "included substantial activity in Australia". That strategy comprised not merely a passive holding of shares, but an acquisition of shares and then a restructure and management of the underlying business in order to secure a better profit from a future sale. The general partner of each of RCF IV and RCF V had entered into an agreement with **RCF Management** LLC for the management of the operation and

investments of each partnership through an investment committee. For that purpose, RCF Management had entered into an agreement with RCF Management Pty Ltd (**RCF Management Australia**) pursuant to which administration and management services were supplied. The primary judge said at J[53]:

> RCF Management Australia maintained an office in Australia from which RCF IV's and RCF V's investments in Talison Minerals and Talison Lithium were managed. RCF Management Australia had employees living in Australia including Messrs McClements, Hills and Corbett. They played an active role in the management, including the ultimate disposal, of the investment. They frequently participated from Australia in Investment Committee meetings and, with others in Australia, prepared the papers for consideration and decision by the Investment Committee. Messrs [Hills] and Corbett, and subsequently Mr Hepburn, were designated by title as transaction managers in relation to the investment in Talison Lithium. An element of the investment strategy of the RCF IV and RCF V partnerships was for members of the RCF Management team to occupy positions on boards of the companies in which RCF invested to guide management and to contribute to an increase in the value of the investments which were intended to be sold at a profit. That function was performed by employees in the Perth office, namely, by Mr McClements and Mr Hills, and upon the latter's departure for Denver in June 2012, by Mr Corbett. Mr Hills gave evidence of significant work undertaken by him as a director of Talison Minerals and Talison Lithium. Dr Bhappu confirmed in cross-examination his understanding as a member of the Investment Committee that the role of Mr McClements and Mr Hills as directors of Talison Lithium and Talison Minerals was developing the strategy over time in those companies of the Investment Committee. He agreed that at the relevant times members of the investment team in the Perth office were managing the investment by RCF.

56 In reaching the conclusion that the profits bore an Australian source, the primary judge relied upon the foregoing findings of fact and also relied upon:

(1) the fact that the profits earned were linked to the value of the shares and interest held in Talison Lithium, which, in turn, depended upon the value of the mine at Greenbushes, which is located in Australia; and

(2) the fact that the shares and interests in Talison Lithium were sold pursuant to a scheme of arrangement ordered by the Federal Court.

57 The circumstances of this case may be contrasted with those considered in ***Tariff Reinsurances*** *v Commissioner of Taxes (Vic)* (1938) 59 CLR 194 where the relevant income of the English company derived from reinsuring Victorian insurance risks was found to have no connection with Victoria. The source of that income was said to be the place where the contract had been made from which the income was derived. Latham CJ said at 207:

> To the fact that the contract was made in England I add the facts that the English company conducted no transactions or operations of a profit-making kind in Victoria, that it in fact did nothing in Victoria, that the Victorian company was not, in carrying

> on its business, the agent or representative or employee of the English company, and that there is no evidence to show that it was engaged in any form of joint venture in Victoria with the Victorian company.

58 In contrast, having regard to the findings at J[53] *supra*, it could not be said that either respondent "did nothing" in Australia (whether through RCF Management Australia or otherwise).

59 The issue here is one of fact and no more. In ascertaining the source of income, there are no immutable rules, save for general propositions. Before us, the respondents emphasised the following factors in support of the contention that the source of the assessed profits was not in Australia:

(1) most, if not all, of the key decisions were made by an investment committee located in Denver Colorado (with Australian members dialling in);

(2) the shares in Talison Lithium were listed on the Toronto stock exchange;

(3) negotiations leading up to the sale of the shares and interests in Talison Lithium took place outside Australia;

(4) the incorporation of Talison Lithium in Australia was incidental and immaterial;

(5) consideration for the sale of the shares and interests was received outside Australia and was denominated in Canadian dollars;

(6) if the shares had been sold "on market" in Canada with a foreign vendor and purchaser, any resulting profit would "clearly" not have had an Australian source; the intervention here of the Australian scheme of arrangement should not make any difference to that conclusion. The presence of that scheme, said by the respondents to be the only real connection with this country, was of itself insufficient to give the profits an Australian source.

60 Before us, senior counsel for the respondents sought to drive his point home by stating, perhaps rhetorically, that it would be absurd to suggest that a profit (or part thereof) made by an Australian resident on a sale of shares in BHP Billiton Ltd should have a source in a South American country merely because, amongst other things, that company had mining operations located in that state. Given here the many additional connections with Australia identified by the primary judge, as set out above, senior counsel's observation, with respect, is not apt. In that respect, as already mentioned, the respondents did not take issue with the findings of fact made at J[53] below, save perhaps to a mistaken reference to RCF V. Those

findings include the fact that RCF Management Australia employees played "an active role in the management, including the ultimate disposal, of the investment". And whilst it is true that those employees were not employed by either respondent, they were employed by a company which, inferentially, was ultimately controlled by each respondent or, at the very least, existed to serve the interests of each of RCF IV and RCF V. In substance, as a "practical" matter, those employees helped manage the investment in Talison Lithium for each of RCF IV and RCF V.

61 In *Esquire Nominees Ltd v Federal Commissioner of Taxation* (1973) 129 CLR 177, Stephen J made an observation which is of assistance here. At 224, his Honour said:

> It has been said that the doing of acts or the possession of property are the only two sources of income ...

His Honour then said at 225:

> To say that questions of source depend upon practical matters of fact will not necessarily assist in determining which of a range of possible meanings of source is meant, but context should provide a solution. ... the source referred to is that from which income is produced by the taxpayer's own acts of derivation or ownership. All this suggests that a quite proximate source is being referred to.

62 Here the "acts ... of ownership" included the "active management" in Australia of a Western Australian mining company for the benefit of each of RCF IV and RCF V. It also included participation as a shareholder, at least by proxy, in the shareholder meetings ordered by the Federal Court to be held at the Duxton Hotel in Perth as part of the scheme of arrangement: ***Re Talison Lithium Ltd*** [2013] FCA 194. In that respect, the following findings of the primary judge are relevant. His Honour found at J[47]–[48]:

> On 12 March 2013 the Federal Court approved the share scheme and the option scheme and the orders made by the Court under s 411 of the Corporations Act were lodged with the Australian Securities and Investments Commission with the consequence that the scheme became effective.
>
> On 19 March 2013 the Talison Lithium security holders became entitled to receive the scheme consideration. As at 20 March 2013 RCF IV held, on behalf of limited partners, 26,398,222 (being 23.1%), and RCF V held 14,987,505 (being 13.1%), of the shares on issue of Talison Lithium. The terms of the share scheme and option scheme provided that Talison Lithium security holders were divided between those whose registered address was in Australia and those whose registered address was other than in Australia. The latter were defined as "the Canadian Scheme Shareholder". RCF IV and RCF V were each a "Canadian Scheme Shareholder" and were paid for their shares in Canadian currency. The consideration payable to RCF IV pursuant to the Tianqi scheme was C$197,986,665 and the consideration payable to RCF V was C$112,406,287.50.

63 Gilmour J described the scheme of arrangement in these terms in *Re Talison Lithium Ltd* at [3]–[7]:

> Talison is an Australian incorporated public company listed on the Toronto Stock Exchange (TSX) with approximately 38 registered holders (as at 14 December 2012) of an aggregate of 114,401,292 ordinary shares (Shares) and approximately 102 registered holders of an aggregate of 3,432,966 options to subscribe for Shares (Options).
>
> Talison is in the business of lithium exploration, extraction and production, and operates a mining project in Western Australia.
>
> Two separate schemes of arrangement are proposed; a "Share Scheme" between Talison and its ordinary shareholders (Share Scheme) and an "Option Scheme" between Talison and its optionholders (Option Scheme) (together the Schemes).
>
> The Schemes involve the acquisition of all of the Shares and Options of Talison by the Bidder. Regulatory approvals have been obtained from the Foreign Investment Review Board and the National Development and Reform Commission (amongst other necessary PRC government approvals).
>
> It is proposed that:
>
> (a) the Bidder will acquire Talison by Talison shareholders transferring their Shares to the Bidder and, in respect of the Options:
>
> (i) Talison optionholders will exercise certain of their Options by paying the exercise price (which will be funded by way of a loan from Talison), with Shares held in the Talison Long Term Incentive Plans Trust (LTIP Shares) being delivered to Talison optionholders before being immediately transferred to the Bidder; and
>
> (ii) Talison optionholders will transfer the balance of their Options to the Bidder;
>
> (b) Talison shareholders will receive C$7.50 for each Share and Talison optionholders, whether transferred or exercised, will receive C$7.50 less the exercise price for each Option;
>
> (c) the Schemes will effect the acquisition of Talison by the Bidder and will result in Talison becoming a wholly owned subsidiary of the Bidder; and
>
> (d) Talison will cease to be listed on the TSX.

64 His Honour's finding at [7(c)] that the Scheme "will effect the acquisition of Talison" by the purchaser is here a contributing factor. What bound the respondents to dispose of their shares and interests in Talison Lithium was not the entry into a contract of sale overseas *but* the convening of the scheme meeting, the approval at that meeting of the scheme of arrangement, the approval of that scheme by the Court, and the lodging of the order of the Court with the Australian Securities and Investment Commission: s 411(4) and (10) of the *Corporations Act 2001* (Cth); *Re CSR Ltd* (2010) 183 FCR 358 at [10]. A proximate origin of the profits here was thus the scheme of arrangement and the location of that arrangement was unquestionably

in Australia. The locus of the scheme is analogous to the place where the contract was made in *Tariff Reinsurances,* and to the making of the contract in New South Wales considered in ***Premier Automatic*** *Ticket Issuers Ltd v Federal Commissioner of Taxation* (1933) 50 CLR 268. In *Premier Automatic*, income payable under a contract had a source in Australia because that was where the contract had been made. As Rich J said at 286:

> The profits were derived by the taxpayer from its enforceable right, conferred by the agreement in the events which happened, to a sum amounting to ten per cent of the purchase money. The source of this right was the making of the agreement which took place in New South Wales. For these reasons I think that as a matter of law the profits arose from a source in New South Wales.
>
> See also: Starke J at 292; Dixon J (as his Honour then was) at 297; Evatt J at 303; and McTiernan J at 303.

65 Here, each respondent's "enforceable right" to the proceeds of the sale of the interests and shares in Talison Lithium arose from the scheme of arrangement. That arrangement took place in Australia, and accordingly, because the scheme was the "proximate" origin of the profits earned, and because of the other connections with Australia summarised by the primary judge at J[53] *supra*, including the location of the mine in Western Australia, those profits had a source in Australia. At the very least, it was open to his Honour so to conclude.

66 For these reasons, in our view, the primary judge did not err in deciding that the source of the profits assessed by the Commissioner was in Australia.

FIFTH ISSUE: CAN RCF IV AND RCF V RELY ON THE DOUBLE TAX AGREEMENT?

67 One commences with the proposition that the respondents can invoke the Double Tax Agreement in this Court if they are each a "resident" of the United States for the purposes of that DTA. It was common ground that each partnership was a "look through" entity for US income tax purposes and that neither was liable to pay income tax in the United States. Article 4(1)(b) of the DTA provides:

> (b) a person is a resident of the United States if the person is:
>
> (i) a United States corporation;
>
> (ii) a United States citizen, other than a United States citizen who is a resident of a State other than Australia for the purposes of a double tax agreement between that State and Australia; or
>
> (iii) any other person (except a corporation or unincorporated entity treated as a corporation for United States tax purposes) resident in the United States for purposes of its tax, provided that, in relation to any income derived by a partnership, an estate of a deceased

> individual or a trust, such person shall not be treated as a resident of the United States except to the extent that the income is subject to United States tax as the income of a resident, either in its hands or in the hands of a partner or beneficiary, or, if that income is exempt from United States tax, is exempt other than because such person, partner or beneficiary is not a United States person according to United States law relating to United States tax.

68 The issue for consideration is the application of Art 4(1)(b)(iii). The primary judge was of the view that neither respondent could be a resident of the United States because neither, for United States tax law purposes, is a separate legal person or entity. The term "any other person" in Art 4(1)(b)(iii) above could not, according to the judge below, refer to either limited partnership. However, his Honour reasoned that those partners who were residents of the United States could invoke the DTA. Because his Honour had formed the view that those partners were before the Court, he went on to consider the application of the DTA to them.

69 If it matters, the foregoing conclusion may be open to doubt as the term "person" is defined in Art 3(1)(a) of the DTA to expressly include a "partnership", unless the context otherwise requires. That Article provides:

> the term "person" includes an individual, an estate of a deceased individual, a trust, a partnership, a company and any other body of persons;

70 We do not see that "context" necessarily requires one to read a "person" in Art 4(1)(b)(iii) as excluding a partnership. Indeed, the reference to "such person shall not be treated as a resident" in the subparagraph arguably refers back to a "partnership", deceased estate or trust, as does the phrase "in its hands". But we note that Art 4(1)(b)(iii) would, in any event, only include a partnership "to the extent that the income is subject to United States tax as the income of a resident, either in its hands or in the hands of a partner or beneficiary, or, if that income is exempt from United States tax, is exempt other than because such person, partner or beneficiary is not a United States person according to United States law relating to United States tax". Even if, as contended for by the respondents, the central management and control of each partnership was located in Denver, Colorado, there was, nonetheless, no evidence before us concerning the satisfaction of this condition of Art 4(1)(b)(iii). Whilst the Commissioner accepted that, generally speaking, each partnership was a fiscally transparent entity for United States tax purposes, there was no evidence that the income of either partnership was "subject to tax in the United States". It follows that neither respondent was a resident of the United States for the purposes of the DTA. Whether, by reason of the current state of the domestic income tax law of the United States, it is otherwise practically possible

for a limited partnership to be a resident of the United States for the purposes of Art 4(1)(b)(iii), is an issue we need not determine.

71 In any event, there is a further reason why we do not think either respondent was a resident of the United States for the purposes of the DTA. In *Resource Capital Fund III LP v Commissioner of Taxation* (2013) 95 ATR 504, Edmonds J at first instance formed the view that the definition of a "resident" in Art 4(1)(b)(iii) imposed a dual requirement to be satisfied, namely that the partnership was a resident of the United State for tax purposes and the income of the partnership had to be subject to United States tax. His Honour said at [55]–[60]:

> One underlying issue on which the parties parted company was whether RCF was a resident of the US for the purposes of the Convention. The Commissioner submitted that ultimately it does not matter in the present case if RCF is a resident within the meaning of Art 4(1)(b)(iii) of the Convention or not, a proposition with which, for reasons developed later, I agree (see [68] below). On the other hand, the Commissioner's reasons underlying the proposition, namely, because the relevant taxing article in the Convention (Art 13) gives Australia unlimited taxing rights must, for reasons which I will also develop later, be rejected (see [63] below).
>
> The Commissioner's "preferred" position on this issue is that RCF was a resident of the US for the purposes of the Convention in the year of income. To this end, the Commissioner submitted that Art 4(1)(b)(iii) of the Convention should not be read as literally requiring that partnerships must be recognised by the US as a resident separate from the requirement that income of the partnership must be taxed in the hands of a US resident partner, as such a requirement would defeat the clear intention of the Convention to recognise partnerships as being capable of being "residents" for treaty purposes. The reason for this, according to the Commissioner, is because there is no principle of US tax law that a partnership's residence is based on where it is organised.
>
> RCF submitted that it was neither appropriate nor permissible to ignore the words "resident in the United States for purposes of its tax" in Art 4(1)(b)(iii) of the Convention and that there was a dual requirement to be satisfied before a partnership could qualify as a resident of the US for the purposes of the Convention: first, the partnership had to be resident in the US for the purposes of its tax; and second, the income of the partnership had to be subject to US tax as the income of a resident partner, or be exempt from US tax in the hands of a resident partner.
>
> RCF submitted that it would fail the first requirement: being a foreign partnership, it was not resident in the US for the purposes of its tax notwithstanding that all or substantially all of the partners were resident in the US and liable to or exempt from US tax on their distributive shares of such income. The basis of RCF's submission that it was not resident in the US for the purposes of its tax went like this: the domestic/foreign classification test for partnerships is the same as it is for companies: IRC §§ 7701(a)(4), 7701(a)(5). The Report of the US Senate Foreign Relations Committee on the Convention states, in summarising Art 4 (see [42] above), that "a company is resident in the United States if it is organised in the United States". RCF submitted that the implication of this statement, in context, is that a company that is not organised in the US is not resident in the US. Since partnerships and

> corporations are subject to the same Internal Revenue Code classification test for whether they are domestic or foreign, RCF further submitted that there is no reason for partnerships to be subject to a different test than corporations for whether they are resident in the US. On this basis, RCF would not be resident in the US for US tax purposes because it was organised under the laws of the Cayman Islands.
>
> RCF's submission is certainly consistent with the position which prevailed under the [income tax convention between Australia and the US dated 14 May 1953 (**1953 Convention**)] (see [43] above); only a partnership created or organised in or under the laws of the US qualified as a resident of the US for the purposes of the 1953 Convention. Implicit in that was that such a partnership was resident in the US for US tax purposes and a foreign partnership, such as RCF, was not.
>
> Having regard to this last mentioned consideration, I am of the view that RCF's submissions on this issue are to be preferred to the Commissioner's: first, that Art 4(1)(b)(iii) of the Convention does impose a dual requirement to be satisfied before a partnership can qualify as a resident of the US for the purposes of the Convention; second, that RCF is not resident in the US for the purposes of its tax; and third, it follows that RCF is not a resident of the US for the purposes of the Convention.

72 Paragraph [43], referred to in the above passage, is in these terms:

> Under Art II(1)(g) of the 1953 Convention, a partnership created or organised in or under the laws of the US (a US domestic partnership) was a resident of the US for the purposes of the 1953 Convention whether or not the partners were liable to US tax on the income of the partnership. If the partners in the US domestic partnership were foreign companies (i.e., incorporated outside the United States) and the partnership income was not effectively connected with the conduct of a trade or business carried on in the US, neither the partnership (because it was fiscally transparent) nor the partners would be liable to US tax on the partnership income, but because the partnership was a resident of the US for the purposes of the 1953 Convention, it was entitled to the benefits of the 1953 Convention vis-à-vis Australian source income. The negotiators of the Convention were conscious of this anomaly when drafting Art 4(1)(b)(iii); thus, under the Convention, even a US domestic partnership will only be a resident of the US for the purposes of the Convention to the extent that the income of the partnership is subject to US tax in the hands of a partner or, if that income is exempt from US tax, is exempt other than because such partner is not a US person according to US law relating to US tax.

73 On appeal, the Full Court of this Court accepted that Resource Capital Fund III LP was not a resident of the United States, but otherwise did not consider the dual requirement test. We respectfully adopt the reasoning and conclusion of Edmonds J on this issue. Neither respondent satisfies this dual requirement. Like the limited partnership considered in *RCF III*, each respondent was organised under the laws of the Cayman Islands and thus could not be a resident of the United States for the purposes of its tax. Further, neither respondent was liable to pay tax in the United States.

74 It follows that neither corporate limited partnership was a resident of the United States for DTA purposes, and neither, as the taxpayer before us, can rely on the DTA, subject to any application of the Ruling, as to which see below.

75 We, otherwise, do agree with the primary judge's conclusion that each United States resident partner was capable of invoking the DTA, but *not* for the purposes of this Pt IVC tax appeal. Each partner, who was a resident in the United States, had and has the legal capacity to invoke the DTA in recovery proceedings or in collateral recovery proceedings, such as might be brought by the Commissioner under s 255 of the ITAA 1936, assuming the requirements for DTA protection are otherwise made out. As the Commissioner pointed out, partners could also seek, in an appropriate case, declaratory relief concerning the possible application of the DTA to that partner's share of profits. A partner would probably have standing to commence such a proceeding. Such partners, however, are not able to invoke DTA protection in a tax appeal brought pursuant to Pt IVC of the TAA 1953 by a limited partnership, which is subject to Div 5A of the ITAA 1936, precisely because those partners are not the taxpayers in those proceedings.

76 It is true that the general partner of each of RCF IV and RCF V were joined to each tax appeal. But they are not eligible to enforce the DTA in these proceedings. There was no evidence that either of them was a resident of the United States for the purposes of the DTA. Nor does either have standing in a Pt IVC tax appeal to contend that the assessment issued to each limited partnership was excessive.

77 The foregoing is consistent with the reasoning and conclusion of the Full Court of this Court in *RCF III* which found that the DTA did not prevent the Commissioner from assessing the limited partnership the subject of that case. We respectfully agree with that conclusion.

78 In his submissions to this Court, the Commissioner raised an additional reason for contending that the respondents were not able to rely on the DTA. He contended that it had not been shown that the partners of RCF IV and RCF V were "qualified persons" within the scope of Art 16. It is unnecessary for us to reproduce the terms of that Article, or otherwise to consider it. That is because, for reasons already given, the partners are not the taxpayers before the Court. It is also because this point had never been raised before the primary judge and was not a ground of the Commissioner's notice of appeal. It had also not been raised by the Commissioner in his notice of objection decision. Senior counsel for the respondents informed the Court that if he had known before the trial below that Art 16 was to be relied upon by the Commissioner, he would have led evidence to meet this point. In *Dismin Investments Pty Ltd v Federal Commissioner of Taxation* (2001) 183 ALR 565, Hill, Drummond and Goldberg JJ said at [36]:

> Consistently with the authorities to which we have referred, we are of the view that the Commissioner should not now be allowed to argue, for the first time on appeal, a basis for assessment not argued at first instance and a basis, had it been argued at first instance, which would have called for consideration by the appellant whether to lead evidence not called having regard to the manner in which the case was run below.

79 In that respect, in the usual case, it will be sufficient for counsel to state that the raising of the new ground may have affected the evidence that might have been laid. As Shepherd J observed in *Commissioner of Taxation v Brambles Holdings Limited* (1991) 28 FCR 451 at 455:

> To my mind, the fact that counsel, acting responsibly, has said that the raising of the ground at the primary hearing may have affected the evidence he would have led is enough to dispose of the question.

80 It follows, that we decline to consider the Art 16 point. It was not open to the Commissioner to rely on it on the appeal to this Court.

SIXTH ISSUE: CAN RCF IV AND RCF V RELY ON THE RULING?

81 Whilst neither respondent can invoke the protection, if any, of the Double Tax Agreement, the Commissioner is nonetheless bound by his Ruling. By "bound", we mean in the sense prescribed by s 357-60 of Sch 1 of the TAA 1953, which provides:

> (1) Subject to subsection (5), a ruling binds the Commissioner in relation to you (whether or not you are aware of the ruling) if:
>
> (a) the ruling applies to you; and
>
> (b) you rely on the ruling by acting (or omitting to act) in accordance with the ruling.

The Commissioner does not dispute this. He contends, however, that the Ruling does not apply to the facts of this proceeding.

82 The Ruling ostensibly addresses the capacity of a taxpayer to invoke tax treaty, or here DTA, protection in relation to investments made in Australia through a fiscally transparent limited partnership, to the extent that the partners of that partnership are resident in a treaty country. In very general terms, by reason of Art 7 of the DTA, a resident of the United States cannot be made liable to pay Australian income tax in relation to business profits with an Australian source. This was explained by the primary judge at J[55] in terms we adopt:

> Article 7 is a fundamental pillar in the allocation of taxing rights between Australia and the United States of America. It adopts the principle that business profits of an enterprise are ordinarily only to be taxed by the country of the enterprise. There are, however, two exceptions to that principle: see C. Garbarino *Judicial Interpretation of Tax Treaties*, (Edward Edgar Publishing, 2016), CL 4; M. Kobetsky, *International*

> *Taxation of Permanent Establishment* (Cambridge University Press, 2011), 196-7, 357-9. The first is that business profits may be taxed in the place where the enterprise has a permanent establishment but it was not contended that the taxpayers had a permanent establishment in Australia. The second is that Article 7 does not apply to items of business profits which are dealt with separately by other articles such as Article 13. The effect of Article 7 for RCF IV and RCF V is, therefore, that the partners would not be taxable by Australia if they come within its terms unless their profits include items which are dealt with separately by another Article.

83 The part of the Ruling which comprises the Commissioner's ruling is not lengthy and should be set out in full as follows:

> Income tax: does the business profits article (Article 7) of Australia's tax treaties apply to Australian sourced business profits of a foreign limited partnership (LP) where the LP is treated as fiscally transparent in a country with which Australia has entered into a tax treaty (tax treaty country) and the partners in the LP are residents of that tax treaty country?
>
> ...
>
> **Ruling**
>
> 1. Yes, to the extent the business profits are treated as the profits of the partners (and not the LP) for the purposes of the taxation laws of the country of residence of the partners; the profits are not dealt with under another Article of the Treaty (such as Article 13); and the resident partners meet any other applicable tax treaty requirements.
>
> 2. The Article will also apply to the extent that a partner in a LP is itself a LP and its partners (the ultimate partners) are residents of a tax treaty country.
>
> 3. A reference in this Determination to a limited partnership (LP) includes a reference to an entity that is not a resident of Australia and satisfies the definition of limited partnership in section 995-1 of the *Income Tax Assessment Act 1997* (ITAA 1997).
>
> 4. The term 'ultimate partner' in this Determination means a tax treaty country resident with an indirect interest in the LP which derives the Australian sourced business profit. The indirect interest is held via an interposed LP.
>
> 5. This Determination does not apply where the fiscally transparent entity is not a partnership.
>
> ***Example 1***
>
> 6. *Cayman LP is a limited partnership formed in the Cayman Islands. The limited partners in Cayman LP are resident in a tax treaty country. The general partner of Cayman LP is a private equity firm and is also resident for tax purposes in the treaty country.*
>
> 7. *For that country's tax purposes, Cayman LP is treated as fiscally transparent, such that the profits derived by Cayman LP are treated as the profits of the resident partners, to the extent of their interest in Cayman LP. Cayman LP is also a 'corporate limited partnership' within the meaning of that term in section 94D of the Income Tax Assessment Act 1936 (ITAA 1936) and is therefore treated as a company for Australian tax law purposes. Cayman LP is not treated as an Australian resident under section 94T of the*

ITAA 1936.

8. *Cayman LP acquires all of the shares in Target Co, an Australian manufacturing company. The primary purpose of the partners in Cayman LP for acquiring Target Co is to improve its business operations in the short term and then sell Target Co via an initial public offering for an amount greater than the purchase price. This activity is undertaken through an independent agent acting as such in Australia in the ordinary course of its business. Cayman LP derives profits from the sale of Target Co at a price higher than that for which it was acquired. These profits are Australian-sourced and are not attributable to a permanent establishment in Australia.*

9. *Article 7 of the relevant tax treaty prevents Australia from imposing tax on profits of an enterprise of the other country unless such profits are attributable to a permanent establishment in Australia. Although the profits in this example are derived by Cayman LP, these profits are treated as the profits of the limited partners under their home country's tax law and are not taxed in the Cayman Islands. The profits of Cayman LP will not be subject to tax in Australia to the extent the profits are treated as the profits of the limited partners in the treaty country.*

Example 2

10. *The facts are as above in Example 1 with the following additions:*

- *A limited partner in Cayman LP is another limited partnership formed in the Cayman Islands (Interposed LP);*
- *There are two limited partners in Interposed LP. One limited partner is a resident of a tax treaty country; the other is not a resident of a tax treaty country;*
- *In the Cayman Islands and the tax treaty country, neither Cayman LP nor Interposed LP are treated as taxable entities. Rather, the profits are treated as the profits of the limited partners; and*
- *Interposed LP does nothing more than distribute the profits it receives from Cayman LP to the limited partners.*

11. *In respect of the limited partner of Interposed LP resident in a tax treaty country, the result as outlined in example 1 applies. Thus, to the extent the profits derived by Cayman LP are treated as the profits of that limited partner, Article 7 will apply and Australia will not tax those profits provided the Commissioner is satisfied as to residence and other applicable treaty requirements.*

12. *In respect of the profits derived by Cayman LP that are treated as the profits of the limited partner not resident in a tax treaty country, Australian tax will be imposed.*

Example 3

13. *The facts are the same as in example 2 except that the limited partner resident in the tax treaty country is a tax exempt organisation that qualifies as a resident for the purposes of the relevant tax treaty. To the extent the profit is treated as the profit of the tax exempt organisation, Australian tax will not be imposed. Again, the Commissioner must be satisfied that the profit is treated as the profit of a tax treaty country resident and any other*

applicable treaty requirements must be met.

84 The content of the Ruling may be summarised by stating that it declares that no Australian income tax is payable on business profits derived by a limited partnership from sources in Australia, where those profits are subject to the business profits article of an applicable double tax treaty and where the partners of the partnership are residents in a treaty country which treats the partners as liable to pay tax on those profits. And that will be so, even when the limited partnership is not a resident of a treaty country and is deemed by Div 5A of Pt III of the ITAA 1936 to be a corporate taxpayer. The Ruling is expressed not to apply where the profits are dealt with by another article of the applicable treaty.

85 The primary judge was of the opinion that the Ruling bound the Commissioner, so far as it goes. We agree with that conclusion, but for different reasons. If the profits here had fallen only within Art 7 of the DTA, each respondent might have secured DTA protection (to the extent that each otherwise satisfied the requirements of the Ruling), even though, for reasons we have explained, neither can otherwise independently or directly rely upon that Article of the DTA. That is because the source of that protection is the Commissioner's Ruling. By its terms, the benefit of the Ruling is not confined to the partners of a limited partnership who are resident in a treaty country, but extends to any taxpayer who can benefit from it in a Pt IVC tax appeal. Both s 357-60 of Sch 1 of the TAA 1953 and the Ruling itself are directed at "you". The "you" refers to any taxpayer that relies upon the content of the Ruling. That includes here each of RCF IV and RCF V.

86 But, as already mentioned, the Ruling is qualified. It excludes profits which are "dealt with under another Article of the Treaty (such as Art 13)". Profits will be so "dealt with", in our view, if they fall within the carve-out which is set out in Art 7(6). That Article provides:

> Where business profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

87 It may be odd to ask whether business profits of a taxpayer, should be dealt with separately by another Article of the DTA, when the taxpayer is not itself otherwise eligible to invoke directly DTA protection. But the legitimacy of the question arises from the terms of the Commissioner's Ruling which binds him.

88 Before we consider Art 13, the Commissioner here submitted that he was not bound by the Ruling for two additional reasons. First, he submitted that to satisfy the Ruling each partnership needed to demonstrate that its partners (or at least some of them) were residents

of the United States. RCF IV and RCF V could not obtain the benefit of the Ruling in the absence of evidence which proved the residence of those partners. He also relied upon Art 16 for this purpose. He further submitted that the partners of each of RCF IV and RCF V were not entitled to "rely" on the Ruling, as they were not before the Court. Secondly, as for each respondent, neither could rely upon the Ruling, he submitted, because they were not residents of the United States; nor were they "enterprises" for the purposes of the DTA.

89 The first submission directs attention to the requirement of the Ruling that the partners be "resident of a tax treaty country". The respondents objected to this submission being put. Again, it was a point not raised below. It was not the subject of an express ground of appeal. The respondents said they would have led evidence about it had they been given proper notice. The Commissioner contended that the respondents' complaint was "false". The onus was on the respondents, he said, to discharge their burden of proof, and for that purpose, the Commissioner had, in general terms, informed each respondent below, in both opening and closing submissions, that "the other criteria for tax treaty relief had to be satisfied".

90 In our view, the existence of the onus of proof does not, of itself, permit the Commissioner to raise new contentions of fact or law, without the giving of proper notice. Nor, in our view, was proper notice given by the generalised statement that other, non-specified, "criteria for tax treaty relief" had to be satisfied. We think that if the Commissioner wished to make the point that the partners here were not residents of the United States, he should have given express notice of this issue in his appeal statement at first instance, or by the making of a timely amendment to that appeal statement before the trial below. That, after all, is the purpose of an appeal statement; it is to give fair notice to the other side and to the Court of the issues to be addressed. In *Rio Tinto Ltd v Commissioner of Taxation* (2004) 55 ATR 321, Sundberg J at [31] said of the former statement of facts, issues and contentions required by former O 52B of the *Federal Court Rules 1979* (Cth):

> Whether one looks to the pre-Order 52B practice or the current regime, the real point is not whether what the Order mandates is less formal than pleadings or takes the place of pleadings, but that the intention behind the practice and the Rule is that "both parties to the litigation know what the case is which they have to meet": per Aickin J in *Bailey* [(1977) 136 CLR 214] at 227 and per Hill J in *Bartlett* [(2003) 54 ATR 261] at 265.

Later at [58] his Honour said:

> It is now well-established that the statement [of facts, issues and contentions] takes the place of pleadings so that after the exchange of statements the parties to a tax appeal know the case each has to meet. A statement that leaves a taxpayer uncertain

> as to how the case is put against it is embarrassing and oppressive. A statement that does not disclose the facts on which the respondent has based his assessment and the manner in which he has arrived at it, suffers from these twin vices.

91 The foregoing observations are equally applicable to the appeal statement now mandated by the current Federal Court Rules, and we respectfully adopt them.

92 It follows that for these reasons, and for the reasons already given in respect of the Commissioner's attempt to rely upon Art 16, we do not consider that the Commissioner may rely upon his first submission.

93 We make two further observations:

(1) First, there was in evidence before the primary judge lists of the partners of each respondent which identify, in each case, their residency (inferentially for DTA purposes). It was not clear whether the lists formed part of an affidavit or were an exhibit. But they were admitted into evidence without apparent objection from the Commissioner. They were also not the subject of cross-examination, and the accuracy of the claims concerning the residence of each named partner in them, were not otherwise challenged by the Commissioner below. The lists disclose that the overwhelming majority of partners were residents in the United States; and

(2) Secondly, the orders for final relief made below were framed to exclude relief for those partners of RCF IV and RCFV "who were not residents of the United States". If we had been minded to dismiss this appeal, there is no reason why orders framed in this way could not have addressed the Commissioner's new complaint concerning the residency of the partners.

94 We also reject the second submission. The legal capacity of the respondents to rely upon the Ruling is not dependent upon each being a resident of the United States, or upon being an "enterprise" for the purposes of the DTA. Rather, that legal capacity turns upon the content of the Ruling and the way it binds the Commissioner by reason of s 357-60 of Sch 1 of the TAA 1953. In that respect, the Ruling does not require that the foreign limited partnership be a resident of a treaty country in order for it to obtain the benefit of the Ruling. Indeed, looking at the examples which form part of the Ruling, it appears that the limited partnership described was probably a resident of the Cayman Islands where it had been formed. Moreover, we have concluded that the protective reach of the Ruling is not confined to the partners of a corporate limited partnership. Indeed, given that the example in the Ruling

contemplates that the relevant limited partnership is subject to Div 5A of Pt III of the ITAA 1936, it would be odd if a limited partnership, in its capacity as a taxpayer, could not rely on the Ruling itself.

95 Here, for the foregoing reasons, we are satisfied that the question and answer ruled upon in the Ruling applies to RCF IV and RCF V (to the extent to which each limited partnership had partners in the United States liable to pay tax in that country in the required sense; as already mentioned, it was accepted by the parties that each partnership was "fiscally transparent" for the purposes of the Ruling), assuming that Art 13 does not apply to render it inapplicable. We are also satisfied having regard to the evidence summarised by the primary judge at J[68]–[73] that each of RCF IV and RCF V relevantly relied upon, and continued to rely upon, the Ruling for the purposes of s 357-60(1)(b) of Sch 1 of the TAA 1953. In that respect, the answer given to the question posed by the Ruling may be wrong at law: cf *RCF III*. But as Gordon J observed in *Pratt Holdings Pty Ltd v Federal Commissioner of Taxation* (2012) 216 FCR 258, the law permits a taxpayer to benefit from an erroneous tax ruling. As her Honour said at [154]:

> The answer in para (xi) [of the ruling in that case] was wrong. But the fact that it was wrong was the very reason why LME1 sought to rely on it. It gave it a more favourable application of the law. That it provided a more favourable answer was and remains one of the purposes of the private ruling system, a system which would have even less utility if the respondent was permitted to walk away from the answers he has given.

Article 13

96 The Commissioner does not dispute that the profits made by each of RCF IV and RCF V are "business profits" within Art 7 of the DTA. Rather, he relies upon Art 7(6) to contend that Art 13 deals with those profits separately. If Art 13 does apply, neither respondent will have the protection of the Ruling. Further, Art 13 would, if satisfied, allocate taxing rights to Australia in any event. In such circumstances, the Commissioner's assessments would not be found to be excessive because, as we have already held, the relevant profits are ordinary income with an Australian source and, subject to the Ruling, are properly taxable in Australia. It follows that the application of Art 13 is critical to the Commissioner's appeal (although, as will be seen, by agreement between the parties, its application in this appeal turns upon a consideration of Div 855 of the ITAA 1997).

97 Article 13 relevantly provides:

> Alienation of property

(1) Income or gains derived by a resident of one of the Contracting States from the alienation or disposition of real property situated in the other Contracting State may be taxed in that other State.

(2) For the purposes of this Article:

...

(b) the term "real property", in the case of Australia, shall have the meaning which it has under the laws in force from time to time in Australia and, without limiting the foregoing, includes:

(i) real property referred to in Article 6;

(ii) shares or comparable interests in a company, the assets of which consist wholly or principally of real property situated in Australia; and

(iii) an interest in a partnership, trust or estate of a deceased individual, the assets of which consist wholly or principally of real property situated in Australia.

...

(7) Except as provided in the preceding paragraphs of this Article, each Contracting State may tax capital gains in accordance with the provisions of its domestic law.

(8) For the purposes of this Article, real property consisting of shares in a company referred to in sub-paragraph (2)(b)(ii), and interests in a partnership, trust or estate referred to in sub-paragraph (2)(b)(iii), shall be deemed to be situated in Australia.

98 Article 6(2) provides as follows:

(2) For the purposes of this Convention:

(i) a leasehold interest in land, whether or not improved, shall be regarded as real property situated where the land to which the interest relates is situated; and

(ii) rights to exploit or to explore for natural resources shall be regarded as real property situated where the natural resources are situated or sought.

99 Section 3A of the *International Tax **Agreements** Act 1953* (Cth) is also of potential relevance. It provides:

(1) This section applies if:

(a) an agreement makes provision in relation to income, profits or gains from the alienation or disposition of shares or comparable interests in companies, or of interests in other entities, whose assets consist wholly or principally of real property (within the meaning of the agreement) or other interests in relation to land; and

(b) this Act gave that provision the force of law before 27 April 1998.

(2) For the purposes of this Act, that provision is taken to extend to the alienation or disposition of shares or any other interests in companies, and in any other entities, the value of whose assets is wholly or principally attributable, whether directly, or indirectly through one or more interposed companies or other entities, to such real property or interests.

(3) However, subsection (2) applies only if the real property or land concerned is situated in Australia (within the meaning of the relevant agreement).

(4) If, after the commencement of this section, this Act is amended so as to give the force of law to an amendment or substitution of a provision mentioned in subsection (1), this section ceases to apply to that provision from the time that the amendment of the Act takes effect.

(5) In this section:

entity has the same meaning as in the *Income Tax Assessment Act 1997*, but does not include an individual in his or her personal capacity.

100 The primary judge applied the foregoing tests through the prism of an application of Div 855 of the ITAA 1997. That is because his Honour decided that Div 855 is the domestic enactment of the power to tax, allocated to Australia by Art 13, as modified by s 3A of the Agreements Act. Thus at J[87] the primary judge said:

> It is true that s 3A(2) of the Agreements Act modifies the Australian domestic application of the United States Convention to the limited extent of including in the profits or gains from the alienation or disposition of shares or other interests in companies, the value of those assets which are "wholly or principally attributable" to such real property or such interests, *but Division 855 is the means by which that is achieved.*
>
> (Emphasis added.)

101 If it matters, the primary judge's conclusion about the role of Div 855 may not be entirely correct. Division 855, whose provisions are discussed below, permits a foreign resident to disregard a capital gain arising from a capital gains tax (**CGT**) event if that event happens in relation to a CGT asset that is not TARP, as defined. But it is limited in scope to capital gains and losses which are the subject of Pt 3-1 of the ITAA 1997. Here, however, the primary judge found that the profits earned were ordinary income with an Australian source. In that respect, neither party disputed Australia's entitlement to tax such gains, if they otherwise fall within the terms of Art 13. It follows that Div 855 is not, strictly speaking, relevant to this appeal. Unlike *RCF III*, this is a case about ordinary income, and not capital gains taxed as statutory income.

102 Before us the parties were pressed to explain the relevance of Div 855 given the primary judge's finding that the profits were ordinary income. They each responded by stating that

the case below had proceeded on the basis that Div 855 was applicable and they each agreed that if the shares and interests sold by the respondents constituted TARP for the purposes of Div 855, then Art 13 was duly satisfied, and if not, then Art 13 was not satisfied. And whilst RCF IV and RCF V did not formally abandon all of their contentions concerning Arts 13 and 6, these were not pressed before us. Subject to one matter, we are content to decide the case on the agreed basis. As such, we need not be troubled by any difference in language between Art 13 and s 3A of the Agreements Act and the language used in the definition of TARP in Div 855. Relevantly, the language in each case is similar but not the same. Whether those differences are material need not be decided.

103 The remaining matter concerns the meaning of the term "real property" in Art 13(2)(b)(ii). Senior counsel for the respondents contended that the term "real property" in the relevant part of Art 13 does not incorporate the extended meaning of that term as found in Art 6(2), set out above. The primary judge rejected that contention at [81] as follows:

> A word or term may be used in different senses and its defined meaning for one purpose may not govern its meaning in another place or context: see *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* [2015] HCA 48; (2015) 326 ALR 590 at [27]. However, Article 13 does not require that the extended meaning given to real property in Article 6 be excluded from the use of the term "real property" when used in Article 13(2)(b)(ii). The extended meaning of real property to include "rights to exploit or to explore for natural resources" would not otherwise come within the contemplation of real property under the laws of Australia: see *TEC Desert Pty Ltd v Commissioner of State Revenue (WA)* [2010] HCA 49; (2010) 241 CLR 576. For meaning to be given to the expression "real property" in the context of Article 13 it must be intended to encompass real property as contemplated by Article 6, and the language of Article 6(2) incorporates directly the meaning of the words "real property" in Article 13(2)(b)(ii). Rights to explore for, and to exploit for, natural resources are deemed by Article 13(2)(b)(i) to be real property for the purposes of Article 13 if the rights are held by a taxpayer, and those rights are deemed by the terms of Article 6(2) to be real property where the relevant assets held by the taxpayer are shares in a company.

104 We respectfully agree. It would make no sense to include – expressly in Art 13 – the definition of real property in Art 6 (Art 13(2)(b)(i)) – and then exclude that definition in the very next subparagraph. In other words, Art 13 includes as real property "rights to exploit or to explore for natural resources". If such rights are held directly, they fall within Art 13. Article 13(2)(b)(ii) (the next subparagraph) then treats shares or interests in a company whose assets consist wholly or principally of real property as real property. In other words, it deals with the indirect holding of real property. For that purpose, and with respect, it simply makes no sense to exclude as a species of real property, that which is expressly included by Art 13(2)(b)(i), namely "rights to exploit or to explore for natural resources".

Division 855 of the ITAA 1997

105 In *RCF III*, the Full Court of this Court explained the application of Div 855 in the following terms at [37]:

> As RCF is a foreign resident of Australia, it is only assessable on the capital gain that it made from the sale of the SBM shares if the shares were "taxable Australian property": s 855-10 of the 1997 Act. The shares were "taxable Australian property" if RCF's "membership interest" in SBM was "an indirect Australian real property interest": s 855-15 item 2(a); s 855-25; s 960-135 (definition of "membership interest"). RCF's membership interest was "an indirect Australian real property interest" if the membership interest passed the non-portfolio interest test (see s 960-195) and the "principal asset test" in s 855-30. It was common ground that the non-portfolio interest test was passed. In issue was whether the membership interest passed the "principal asset test". RCF's membership interest passed the "principal asset test" if the sum of the market values of SBM's assets that were "taxable Australian real property" ("TARP assets") exceeded the sum of the market values of its assets that were not TARP assets ("the TARP issue"): s 855-30(2).

106 The foregoing passage applies equally here to RCF IV and RCF V if one substitutes those entities for the reference to "RCF" and also substitutes the reference to the shares in "SBM" for the shares and interests in Talison Lithium.

107 Item 2 of s 855-15 of the ITAA 1997 specifies that a CGT asset that is an "indirect Australian real property interest" is a species of TARP. Section 855-20 defines an "indirect Australian real property interest" as being a membership interest held by an entity (called the holding entity) in another entity and that interest passes, amongst other things, the "non-portfolio interest test" and the "principal asset test". It was accepted that the first test was satisfied here. Section 855-30 prescribes the "principal asset test", the application of which was in dispute, relevantly in the following terms:

> (1) The purpose of this section is to define when an entity's underlying value is principally derived from Australian real property (see paragraph 855-5(2)(b)).
>
> (2) A membership interest held by an entity (the ***holding entity***) in another entity (the ***test entity***) passes the principal asset test if the sum of the market values of the test entity's assets that are taxable Australian real property exceeds the sum of the market values of its assets that are not taxable Australian real property.

108 The term "taxable Australian real property", or TARP, is defined by s 855-20 in these terms:

> A CGT asset is ***taxable Australian real property*** if it is:
>
> (a) real property situated in Australia (including a lease of land, if the land is situated in Australia); or
>
> (b) a mining, quarrying or prospecting right (to the extent that the right is not real

property), if the minerals, petroleum or quarry materials are situated in Australia.

109 The issues for determination below, and on appeal, concerned the valuation of the assets of the lithium ore mine at Greenbushes, and a determination of which assets were TARP and which were not. The primary judge described the mining operation at Greenbushes as follows at J[92]–[94]:

> Mr Oliver explained that Talison Lithium operated the Greenbushes lithium operation located near the town of Greenbushes in south-west Western Australia. He joined the Greenbushes operation in 2003 as the Tantalum Secondary Plant Superintendent when the mine was operated by Sons of Gwalia. He remained in the business after it was sold by the administrators of Sons of Gwalia to Talison Minerals in August 2007 and was subsequently promoted to Production Manager, and ultimately to General Manager of Operational Planning and Chief Executive Officer of Talison Lithium, through the corporate reorganisations which were, in part, described above. There had been mining operations at Greenbushes since the late 19th century: tin had been mined at Greenbushes from 1888 and tantalum from the 1940s. Lithium mining began in about 1983, initially as a by-product of the tantalum mining, but over time the lithium business became a business in its own right as specialist markets developed for high purity lithium mineral concentrates. Lithium is highly reactive and is never found in its elemental form, and is either extracted from lithium containing minerals in hard rock or from lithium bearing brines found in a small number of salt (brine) lakes. The largest global market for lithium is in the production of glass and ceramics, although demand for lithium increased with the growth of lithium ion battery technology. The most significant economical sources of lithium are brine lakes or "Salars" in a region of Chile and neighbouring Argentina, however, high purity lithium mineral concentrates are uniquely found at Greenbushes in Western Australia.
>
> Mr Oliver explained the process involved in the production of Chemical Grade or Technical Grade concentrates after extraction. An independent technical specialist review produced by Behre Dolbear Australia Pty Ltd dated 22 October 2012 set out in more detail the production and processing of the ore after extraction from the ground. Ore extracted through mining must undergo primary processing to remove impurities and to increase concentration of the lithium content to produce various grades of mineral concentrates. The Greenbushes lithium mineral concentrates were produced using gravity, heavy media, flotation and magnetic processes. Some parts of the ore body at Greenbushes were able to produce high purity concentrate with very low iron content which is classified as "Technical Grade". Talison Lithium also produced "Chemical Grade" concentrates which undergo further processing to create lithium chemicals used in the manufacture of, amongst other things, lithium batteries. As at March 2013 Talison Lithium was estimated to be producing approximately 100,000 tonnes per annum of Technical Grade concentrate and approximately 250,000 tonnes per annum of Chemical Grade concentrate. Of this, approximately 50% of the profit of the operations was derived from Technical Grade concentrate sales.
>
> The Greenbushes operation included open pit and underground mines, a crushing facility, two lithium mineral processing plants, primary and secondary tantalum processing plants, and associated infrastructure. The difference between Technical Grade and Chemical Grade ores is essentially in the lower iron content in the Technical Grade ore. Iron may be present in the ore body as separate iron minerals

> (which is referred to as "free iron") or it may be bound up in the crystalline lattice of the spodumene mineral at a molecular level. The Technical Grade concentrates produced at Greenbushes have a high concentration of lithium and up to one tenth of the iron content of other spodumene mineral concentrates found elsewhere in the world. The low iron content found in the Greenbushes sites allows the mineral concentrates to be used in some applications of glass and ceramic production without extensive chemical conversion to lithium chemicals and the unique nature of the Greenbushes ore body allowed production of Technical Grade products.

110 The foregoing findings were not challenged on appeal.

111 The primary judge found at J[95] that Talison Lithium held 13 mining leases, two general purpose leases and a miscellaneous licence (in fact, although it matters not, the entity which held these tenements was a subsidiary called Talison Lithium Australia Pty Ltd; for the sake of simplicity in what follows we continue to refer, as the primary judge did, to Talison Lithium). Each of these tenements had been issued pursuant to the *Mining Act 1978* (WA) (**Mining Act**) and each gave Talison Lithium permission to do different things. The differences are important because there was a dispute before us concerning whether the general purpose leases and the miscellaneous licence were TARP because they each constituted a "mining, quarrying or prospecting right" for the purposes of s 855-20(b) of the ITAA 1997. The term "mining, quarrying or prospecting right" is defined by s 995-1 of the ITAA 1997 as follows:

> ***mining, quarrying or prospecting right*** is:
>
> (a) an authority, licence, permit or right under an Australian law to mine, quarry or prospect for minerals, petroleum or quarry materials; or
>
> (b) a lease of land that allows the lessee to mine, quarry or prospect for minerals, petroleum or quarry materials on the land; or
>
> (c) an interest in such an authority, licence, permit, right or lease; or
>
> (d) any rights that:
>
> (i) are in respect of buildings or other improvements (including anything covered by the definition of ***housing and welfare***) that are on the land concerned or are used in connection with operations on it; and
>
> (ii) are acquired with such an authority, licence, permit, right, lease or interest.
>
> However, a right in respect of anything covered by the definition of ***housing and welfare*** in relation to a quarrying site is not a ***mining, quarrying or prospecting right***.

112 The primary judge decided that the general purpose leases and the miscellaneous licence were not mining, quarrying or prospecting rights and thus not TARP as defined. The Commissioner appeals that finding to this Court. The issue is important because it will

determine whether certain key assumptions or instructions given to the valuers retained by each side are correct. For example, the Commissioner's expert valuer, Mr Samuel, was asked to assume that the general purpose leases were TARP; in contrast, the respondents' expert valuer, Mr Pendergast, was asked to assume the opposite.

113 Another important issue was the characterisation of the activities at the mine. This was important for the respondents. They pressed a submission that the operation at Greenbushes comprised three distinct activities: mining, processing and manufacturing. Critical to each respondent's case was the proposition that the mining leases here authorised only the extraction of lithium ore and nothing further. In particular, the mining leases, it was said, did not authorise the processing of lithium. This contention, if correct, would have the consequence of limiting the value to be attributed to the mining leases, which the respondents conceded constituted TARP. It would thus enable the respondents to satisfy more easily their contention that for the purposes of the principal asset test in s 855-30, the underlying value of their membership interests in Talison Lithium was not principally derived from TARP.

114 The Commissioner submitted that the general purpose leases and the miscellaneous licence fell within subpara (d) of the definition of a "mining, quarrying or prospecting right". He especially emphasised the breadth of the phrase "in connection with" in ascertaining the required link between "rights" held and "buildings or other improvements". The primary judge rejected that submission. His Honour reasoned at J[98] as follows:

> Neither the general purpose leases themselves, nor the miscellaneous licence itself, however, gave rights to the buildings or other improvements as contemplated by paragraph (d)(i) of the definition of "mining, quarrying or prospecting right". There is a distinction between mining and the further processing of minerals once they have been extracted from the ground. …

After referring to the decision of the High Court in *Federal Commissioner of Taxation v **Broken Hill** Pty Co Ltd* (1969) 120 CLR 240 in support of that proposition, his Honour went on and said:

> In the present case there was no suggestion that any of the buildings used under General Purpose Lease 01/1 existed before the grant of the general purpose leases and the miscellaneous licence. The evidence was, rather, that they were constructed for the processing of the lithium ore as the business operations developed over time. The general purpose leases themselves do not purport to give rights in respect of any of the buildings or other improvements but only to permit the activities undertaken in them. The connection required by paragraph (d) of the definition between the "rights" and the "buildings or other improvements" is that the former be "in respect of" the latter. That requires there to be a sufficient or material connection between the two: *J & G Knowles & Associates Pty Ltd v Federal Commissioner of Taxation*

> (2000) 96 FCR 402 at [26]. A connection of that kind requires that rights in respect of the buildings or other improvements flow from the rights granted by, in or under the general purpose leases or miscellaneous licence. A sufficient connection is not established if, as was the case here, the entitlement to the buildings arose independently from any rights granted under the general purpose leases and miscellaneous licence. It is true that Talison Lithium had buildings and other improvements in the area covered by the general purpose leases and the miscellaneous licence, it is also true that Talison Lithium had rights in respect of those buildings and other improvements, but they were not rights given by or under, or in respect of, the general purpose leases or the miscellaneous licence.

115 The primary judge ultimately accepted the respondents' submission that the Greenbushes operation comprised distinct activities with the activity of mining, as authorised by the mining leases, being completed upon extraction or recovery of the lithium ore from the earth. At J[101] his Honour said:

> the value of the assets to be determined for purposes of s 855-20 do not include the value of the general purpose leases, the miscellaneous licence or the plant and equipment used by Talison Lithium in the processing of the minerals after extraction by mining: see also *Placer Dome Inc v Commissioner of State Revenue* [2017] WASCA 165. The Greenbushes operations carried on by Talison Lithium comprised two distinct sets of operations, namely mining and mineral processing. The first required a mining lease but the second did not. The first set of operations constituted mining for minerals for which a licence was required under the Mining Act, but the second set of operations, constituting the processing of the minerals, did not require a mining licence. Section 85(2)(b) of the Mining Act expressly provided, subject to the Act and to any conditions to which the mining lease was subject, that the lessee of a mining licence owned all minerals lawfully mined from the land under the mining lease. The ordinary meaning of mining is the "action, process or industry of extracting ores" and that activity was complete upon the recovery of the ore from the earth in the absence of an extended meaning: see Macquarie Dictionary "mining"; *Federal Commissioner of Taxation v ICI Australia Ltd* (1972) 127 CLR 529 at 563-4; cf also *Collector of Customs v Bell Basic Industries Limited* (1988) 83 ALR 251. It follows that on this basis of assessment of the RCF IV and RCF V partners there is to be excluded from the taxable value of the capital gain, the value attributable to the general purpose leases, the miscellaneous licence and the plants used in the processing operations rather than in the mining.

116 His Honour concluded in the first sentence extracted above that neither of the general purpose leases nor the miscellaneous licence were TARP for the purposes of s 855-20 of the ITAA 1997 as they were directed at the downstream activities of manufacturing and processing. It also followed that the value of the mining leases was found to be limited to the right to extract ore. The primary judge had also concluded, however, that the second general purpose lease was TARP for the purposes of s 855-20: J[100]. On balance, notwithstanding this inconsistency, we consider that the primary judge held that the second general purpose lease was TARP.

117 Before us, the following issues were raised for consideration:

(1) whether the mining leases authorised only the extraction of lithium ore and nothing beyond that step; and

(2) whether the general purpose leases and the miscellaneous licence fell within subpara (d) of the definition of "mining, quarrying or prospecting right".

118 A further issue was raised by the Court itself, namely whether either general purpose leases were a "lease of land" for the purposes of s 855-20(a) of the ITAA 1997.

119 Consideration of these issues requires both an analysis of the terms of the Mining Act to ascertain what rights were capable of being conferred in respect of each tenement, and consideration of the terms upon which each tenement had in fact been issued. As will be seen, our ability to perform the second task is hampered by the fact that the actual mining leases, general purpose leases and the miscellaneous licence were not before the Court.

120 We commence with a consideration of the Mining Act. Section 85 of that Act sets out the rights conferred by a mining lease. It provides:

> (1) Subject to this Act and to any conditions to which the mining lease is subject, a mining lease authorises the lessee thereof and his agents and employees on his behalf to —
>
> (a) work and mine the land in respect of which the lease was granted for any minerals; and
>
> (b) take and remove from the land any minerals and dispose of them; and
>
> (c) take and divert subject to the *Rights in Water and Irrigation Act 1914*, or any Act amending or replacing the relevant provisions of that Act, water from any natural spring, lake, pool or stream situate in or flowing through such land or from any excavation previously made and used for mining purposes, and subject to that Act to sink a well or bore on such land and take water therefrom and to use the water so taken for his domestic purposes and for any purpose in connection with mining for minerals on the land; and
>
> (d) do all acts and things that are necessary to effectually carry out mining operations in, on or under the land.
>
> (2) Subject to this Act and to any conditions to which the mining lease is subject, the lessee of a mining lease —
>
> (a) is entitled to use, occupy, and enjoy the land in respect of which the mining lease was granted for mining purposes; and
>
> (b) owns all minerals lawfully mined from the land under the mining lease.
>
> (3) The rights conferred by this section are exclusive rights for mining purposes in relation to the land in respect of which the mining lease was granted.

121 Section 8 of the Mining Act defines the terms "mine", "mining" and "mining operations" as follows:

> ***mine***, as a noun, means any place in, on or under which mining operations are carried on;
>
> ***mine***, as a verb, includes any manner or method of mining operations;
>
> ***mining*** includes fossicking, prospecting and exploring for minerals, and mining operations;
>
> ***mining operations*** means any mode or method of working whereby the earth or any rock structure stone fluid or mineral bearing substance may be disturbed removed washed sifted crushed leached roasted distilled evaporated smelted combusted or refined or dealt with for the purpose of obtaining any mineral or processed mineral resource therefrom whether it has been previously disturbed or not and includes —
>
> (a) the removal of overburden by mechanical or other means and the stacking, deposit, storage and treatment of any substance considered to contain any mineral; and
>
> (b) operations by means of which salt or other evaporites may be harvested; and
>
> (c) operations by means of which mineral is recovered from the sea or a natural water supply; and
>
> (da) operations by means of which a processed mineral resource is produced and recovered; and
>
> (d) the doing of all acts incident or conducive to any such operation or purposes;

122 Section 8 of the Mining Act defines the word "minerals" in these terms:

> ***minerals*** means naturally occurring substances obtained or obtainable from any land by mining operations carried out on or under the surface of the land, but does not include —
>
> (a) soil; or
>
> (b) a substance the recovery of which is governed by the *Petroleum and Geothermal Energy Resources Act 1967* or the *Petroleum (Submerged Lands) Act 1982* ; or
>
> (ba) without limiting paragraph (b), geothermal energy resources as defined in the *Petroleum and Geothermal Energy Resources Act 1967* section 5(1); or
>
> (c) a meteorite as defined in the *Museum Act 1969*; or
>
> (d) any of the following substances if it occurs on private land —
>
> (i) limestone, rock or gravel; or
>
> (ii) shale, other than oil shale; or
>
> (iii) sand, other than mineral sand, silica sand or garnet sand; or
>
> (iv) clay, other than kaolin, bentonite, attapulgite or montmorillonite;

123 Section 86 confers the power to grant a general purpose lease. It is in these terms:

> (1) Subject to this Act, the Minister may, on the application of any person, after receiving a recommendation of the mining registrar or the warden, grant to such person a lease to be known as a general purpose lease for use by him in respect to mining operations on such terms and conditions as the Minister considers reasonable.
>
> (2) Any such person may be granted more than one general purpose lease.
>
> (3) The area of land in respect of which any one general purpose lease may be granted shall not exceed 10 ha, unless the Minister is satisfied that a larger area of land is required for the purposes of the lease, and shall be limited to such depth below the natural surface of the land as may be specified in the lease or, where no depth is so specified, to 15 m below the lowest part of the natural surface of the land.
>
> (4) An application for the grant of a general purpose lease in respect of any land —
>
> (a) shall be made, and may be objected to, in like manner to an application for a mining lease; and
>
> (b) shall be determined in the same manner as an application for a mining lease.
>
> (5) An application for the grant of a general purpose lease in respect of an area of land which exceeds 10 ha shall be accompanied by a statement specifying the reasons why such an area of land is required for the purposes of the lease.

124 Section 87 of the Mining Act describes the purposes for which a general purpose lease may be granted. It provides:

> (1) A general purpose lease entitles the lessee thereof and his agents and employees to the exclusive occupation of the land in respect of which the general purpose lease was granted for one or more of the following purposes —
>
> (a) for erecting, placing and operating machinery thereon in connection with the mining operations carried on by the lessee in relation to which the general purpose lease was granted;
>
> (b) for depositing or treating thereon minerals or tailings obtained from any land in accordance with this Act;
>
> (c) for using the land for any other specified purpose directly connected with mining operations.
>
> (2) The purpose or purposes for which a general purpose lease is granted shall be specified in the lease.

125 Section 91 of the Mining Act provides for the grant of a miscellaneous licence and is relevantly in these terms:

> (1) Subject to this Act, and in the case of a miscellaneous licence for water to the *Rights in Water and Irrigation Act 1914*, or any Act amending or replacing the relevant provisions of that Act, the mining registrar or the warden, in accordance with section 42 (as read with section 92), may, on the application

of any person, grant in respect of any land a licence, to be known as a miscellaneous licence, for any one or more of the purposes prescribed.

(2) A person may be granted more than one miscellaneous licence.

(3) A miscellaneous licence shall —

(a) be in the prescribed form; and

(b) authorise the holder to do such matters and things as are specified in the licence.

[(4), (5) deleted]

(6) A miscellaneous licence shall not be granted unless the purpose for which it is granted is directly connected with mining.

126 Section 155(1) of the Mining Act relevantly provides:

> Subject to subsection (2) a person shall not carry on mining on any land unless he is duly authorised under this or any other Act to do so.

127 The reference to "mining" includes, by reason of s 8, "mining operations" as defined.

Evidence of the Tenements

128 It was common ground that the general purpose leases granted rights over defined areas of land that fell within the boundaries of one of the 13 mining leases, namely Mining Lease 01/6. What those rights were, in addition to the right of exclusive occupation conferred by s 87 of the Mining Act, remains unknown, as neither of the general purpose leases was before us or before the primary judge. Regulation 35 of the *Mining Regulations 1981* (WA) provides that an instrument of lease for a general purpose lease shall be in the form of Form 10. That form, amongst other things, states that the Minister "hereby leases to the Lessee for the purpose set out in the Second Schedule to this lease the land more particularly delineated and described in the Third Schedule". No such lease in this form was tendered into evidence before the primary judge.

129 Instead, we have those details about each general purpose lease which had been entered into the register kept pursuant to s 103F of the Mining Act. Section 103F(1) of the Mining Act obliges the Director General of Mines to cause a register to be compiled and maintained; pursuant to s 103F(2), the register is to contain such particulars relating to mining tenements and applications for mining tenements, as prescribed. Pursuant to s 103C of the Mining Act, dealings (defined to include a transfer of a legal interest) in mining tenements (defined to include a general purpose lease) must be registered. The register may be inspected by third parties.

130 The two documents before us in relation to each general purpose lease are headed "Mining Tenement Register Search" and each states "[t]his Register search issued pursuant to s 103F(4) of the Mining Act at [a particular date]". Each records what was said to be the "purpose" of each lease, which was expressed in one document to be "Concentrating Lithium Ore" (**First General Purpose Lease**) and in the other as being "Depositing of Lithium Ore Tailings" (**Second General Purpose Lease**). In addition, the register records a series of conditions in respect of each lease which evidenced the imposition of, amongst other things, detailed rehabilitation obligations upon termination of each lease as well as duties, for example, to prevent damage to forests. The register also records the amount of annual "rent" payable, and, amongst other things, a historical listing of all "dealings" with each lease. But there is no more than this before us. The rights conferred by either lease are not mentioned.

131 Against that somewhat spartan background the primary judge made the following findings at J[97] about each lease, which were not challenged on appeal:

> The purpose of General Purpose Lease 01/1 was for extracting [sic] lithium ore and covered an area on which were located the two separate processing plants for the processing, respectively, of technical grade and chemical grade product. Each of the two plants had extensive concrete foundations, was contained within roofed structures supported by steel beams that were bolted or welded to the concrete foundations, and to each other, and comprised components that were bolted, welded or otherwise attached to the concrete foundations or steel beams or other components that were so affixed and which formed part of a single integrated processing operation. The physical structures were substantial and could be seen clearly from aerial photographs and from photographs shown on other material which had been tendered through an affidavit of Mr Oliver.

132 Again, a copy of the miscellaneous licence was not in evidence. A copy of the details recorded in the register by the Director General of Mines was before us. One of the details recorded was the "purpose", presumably of the licence, which was described as "For Water". Again, some of the conditions upon which the licence had been issued were also recorded as well as what appeared to be an obligation to pay annual rent and a list of historical dealings. The only finding made about this licence by the primary judge is at J[95] and is in these terms:

> The miscellaneous licence had been granted on 19 March 1986 for the purpose of water and was endorsed to remain in force until the surrender, forfeiture or expiry of Mining Lease 01/2 in respect of which the mining licence was granted.

133 The affidavit material contained in the appeal book did not greatly illuminate the function, purpose or content of either the general purpose leases or the miscellaneous licence. An affidavit of Mr Peter Oliver, company director, sworn on 8 February 2016 exhibited two

satellite images of the mining operations at Greenbushes. The first image contained the area of the First General Purpose Lease which had been coloured in yellow. In addition, annotations in red text had been added. The text identified certain buildings which were described as "Workshops", a "Chemical Grade Plant", a "Technical Grade Plant", a "Chemical Grade concentrate stockpile", a "Technical Grade Storage Shed" and a "Bagged technical grade concentrate (covered in tarpaulins)". Outside of the area coloured in yellow, certain buildings were identified as "Tantalum Primary Plant" and a "GAM's crushing plant". The other image (there was some overlap between the two) was of the Second General Purpose Lease with its area again coloured in yellow and with a building in it described in these terms: "Uncertain – possibly contractor's transportable buildings". The affidavit did not otherwise explain what any of these terms meant. However, in an earlier affidavit sworn on 18 September 2015 (**2015 Affidavit**), Mr Oliver had explained that chemical grade concentrate refers to "the raw material containing 6.0% Li_2O and up to 10 times the iron content of Technical Grade concentrates". There are also the findings by the primary judge at J[97], *supra*, concerning the First General Purpose Lease. We assume, but do not know, that there was additional evidence before the primary judge about these matters.

134 The evidence relating to the mining leases is, if anything, more unsatisfactory. None of the 13 leases were in evidence, but copies of the details recorded by the Director General of Mines in the register were before us. Those details were of a similar kind to those recorded for the general purpose leases save that the stated "purpose" had in each case been left blank. Other than this, there was no evidence before us concerning the terms and conditions of any of the mining leases other that what is provided for in s 85 of the Mining Act. In that respect, it will be recalled that s 85(1)(d) authorised the doing of all acts and things necessary to effectually carry out "mining operations", a term which includes the act of refining. This creates a difficulty in identifying which tenements, mining lease or general purpose lease, authorised the activities identified by the respondents as "processing" and "manufacturing".

135 It also creates difficulty in determining whether the general purpose leases or miscellaneous licence conferred rights which fall within the definition of a "mining, quarrying or prospecting right". That is because, as the Full Court of this Court made clear in ***Mitsui & Co (Australia) Ltd v Federal Commissioner of Taxation*** (2012) 205 FCR 523, that definition, save in the case of subpara (d), refers to tenements or titles, or interests therein, of a particular type issued or granted by an Australian law. Thus, subpara (a) of the definition addresses

tenements of a kind or type that enable the holder to "mine, quarry or prospect for minerals, petroleum or quarry materials". As the Full Court said at [47]:

> It follows that the type of asset that is an "authority", "licence", "permit" or "right" under an Australian law is a mining title under an Australian law, together with all underlying rights that are incidents of the mining title. It is not simply one of the underlying rights that happen to be incidents of such a mining title. The word right, as used in relation to the first type of asset, as distinct from the word rights, as used in relation to the third type of asset, is clearly intended to be of the same character as an authority, licence, permit or lease. The word "right" in the first type does not refer to something that is merely an incident of something else granted under an Australian law. Accordingly, the word "right", as distinct from the word "rights", does not refer to the underlying statutory rights conferred by a mining title, which might be an authority, licence, permit, right or lease. A "right" in relation to the first type of asset is not a mere incident of an authority, licence or permit. It is something of the same nature and character as an authority, licence or permit and allows those different rights, such as mining, quarrying and prospecting, to be exercised.

136 At [50] the Full Court said:

> Thus, the words "authority", "licence", "permit", "right" and "lease" are descriptive of the various types of mining titles that might arise under various Australian laws. The fact that a particular Australian law dealing with a mining title might use a different term to convey the concept of authority, permission or licence to mine, quarry or prospect, such as the term "retention lease" in the Petroleum Act, does not mean that that mining title cannot fall within the definition. It will do so if it can fairly be characterised as an authority, licence, permit or right to mine, quarry or prospect for minerals or petroleum.

137 Had the Commissioner pressed the point about there being only secondary evidence of each lease, we may have been minded to have decided that the respondents had failed to discharge their onus of proving that the only relevant TARP assets were the mining leases. However, because that point was not made, we are left to do our best to characterise the tenements in issue.

Mining, Quarrying or Prospecting Right

138 The first question for determination is whether the mining leases (more particularly Mining Lease 01/6) only authorised the excavation of lithium ore from the ground and nothing further. The answer to that question turns upon examination of the rights conferred by each instrument. As the plurality said in *Western Australia v **Ward*** (2002) 213 CLR 1 at [186]: "the proper order of inquiry is first to examine what are the rights granted and only then to classify the grant". Here, unfortunately, and as already mentioned, we have only secondary evidence of Mining Lease 01/6 and of some of the terms of the First General Purpose Lease, and no evidence of what specific "rights" were conferred by either instrument, save for those rights which may be inferred from the statutory scheme.

139 For the reasons that follow, we are unable to determine definitively whether the mining leases conferred only the limited rights contended for by the respondents. Having said that, we infer, on balance, that the First General Purpose Lease probably conferred the rights to process lithium ore into lithium concentrate. We have also concluded that the activity of processing the lithium ore into lithium concentrate constitutes, in any event, and on the facts of this case, mining, so that the instrument which authorised that activity, was an instrument which conferred a right to mine minerals for the purposes of subpara (a), or perhaps subpara (b), of the definition of "mining, quarrying or prospecting right". It follows that a critical element of the respondents' case, and the judgment below, was relevantly misconceived. Either the Mining Lease 01/6 (conceded to be TARP) included the right to process the lithium, and was accordingly undervalued; or that right was conferred by the First General Purpose Lease, making that asset TARP.

140 In that respect, for the reasons which follow, we also do not accept that the processing which took place at the Greenbushes mine site, did not require authorisation under the Mining Act. Because, in our view, that processing constituted "mining operations", as defined, it was prohibited by s 155 of the Mining Act unless authorised by a tenement of some kind (here either the mining leases or the general purpose leases).

141 As for the Second General Purpose Lease, we note that the finding below that it was a "mining, quarrying or prospecting right", and thus TARP, was not challenged by the respondents.

142 What follows are the reasons for the foregoing conclusions.

143 The rights and obligations conferred by a mining lease are prescribed by Div 3 of Pt IV of the Mining Act and they relevantly include the following:

(1) the Minister may grant a mining lease on such terms and conditions as the Minister considers reasonable (s 71);

(2) the initial term of a mining lease is 21 years (s 78);

(3) every mining lease is granted subject to the conditions included in the lease about, amongst other things, the rent and royalties payable, the use of the land for mining purposes, and compliance with prescribed expenditure conditions (s 82);

(4) a mining lease authorises the lessee to "work and mine the land"; to take and remove minerals; and to "do all acts and things that are necessary to effectually carry out mining operations in, on or under the land" (s 85).

144 The rights and obligations conferrable by a general purpose lease are prescribed by Div 4 of Pt IV of the Mining Act. Relevantly they provide:

(1) the Minister may grant a "lease", which is "to be known as a general purpose lease" for use in respect of mining operations (s 86);

(2) the lease is to be "on such terms and conditions as the Minister considers reasonable" (s 86);

(3) the lease shall be in the "prescribed form" (s 89);

(4) the lease shall be in respect of land not exceeding 10 ha (unless the Minister decides otherwise) and shall be limited to a specified depth below the natural surface of the land, or if none is specified, to 15 m below the lowest part of the natural surface of the land (s 86);

(5) a lease entitles "the lessee" and his agents and employees "to the exclusive occupation of the land" for one or more of the purposes set out above (s 87). Those purposes are all tied to mining operations. So, for example, s 87(1)(c) prescribed that one of the purposes might be "for any other specific purpose directly connected with mining operations";

(6) the term of a general purpose lease is determined by s 88.

145 With respect, the distinction between mining and processing is perhaps not as clear-cut as the respondents contend. Neither Div 3 nor Div 4 of Pt IV of the Mining Act delineate any bright line between extraction and processing. Both divisions authorise the issue of a tenement which permits the carrying on of "mining operations" (defined to include refining) or the conduct of activities for a purpose "directly connected with mining operations". As Lockhart J observed in *Commissioner of Taxation v Northwest Iron Co Ltd* (1986) 9 FCR 463: "it is a question of fact in each case" to determine what is and what is not mining (at 474). In *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation* (1956) 94 CLR 509, Dixon CJ, Williams and Taylor JJ said at 522:

> The meaning of the words "mine" and "mining" like the word "minerals" is by no means fixed and is readily controlled by context and subject matter. Few words have occasioned the courts more difficulty than "minerals" but in some degree that is

> because in legal instruments it is seldom, if ever, used in its accurate or scientific sense and yet the word possesses no secondary meaning at once accepted and definite.

146 Subsequently in *Broken Hill*, Barwick CJ, McTiernan and Menzies JJ emphasised the importance of identifying the "object of the taxpayer's mining operation" and said at 273:

> We do not doubt that to separate what it is sought to obtain by mining from that which is mined with it, e.g., the separation of gold from quartz by crushing etc., or the separation of tin from dirt by sluicing, is part of a "mining operation" but we would not extend the conception to what is merely the treatment of the mineral recovered for the purpose of the better utilization of that mineral. Thus to crush bluestone in a stone crushing plant so that it can be used for road making, or to fashion sandstone so that it becomes suitable for building a wall or a town hall is not, as we see it, a mining operation. Nor would the cutting of diamonds or opals which have been recovered by mining operations fall within the description of mining operations. In *Federal Commissioner of Taxation v. Henderson* [(1943) 68 CLR 29] it was decided that to obtain gold from gold-bearing material, i.e., slum dumps, by sluicing, screening, filtering and chemical treatment was a mining operation and this, of course, we accept. The reason for so deciding, however, has no application to a process that does no more than either reduce in size lumps of ironstone of manageable size taken from the earth, or, to increase the size of small fragments of ore taken from the earth in order that the ore which has been mined can be conveniently carried away from the mine and utilized in steel making. In *Henderson's Case* the object of the taxpayer's mining operations was to obtain gold and those operations comprehended all the steps in the recovery of gold from the slum dumps; here *the object of the taxpayer's mining operations* is to obtain iron ore – the end product – and those operations comprehend all the steps taken to do so, but once the iron ore is obtained in manageable lumps then its further treatment, either to reduce or increase its size so that it can be conveniently transported from the mine and better utilized in industry, forms no part of the mining operation.
>
> (Emphasis added.)

147 It follows that a critical factor in determining what is mining is the identification of the object of the particular mining operations in question. A process of separation after excavation or extraction in order to secure that object may constitute mining.

148 In *Federal Commissioner of Taxation v* ***Henderson*** (1943) 68 CLR 29, referred to in *Broken Hill, supra*, the taxpayer owned shares in a company which carried on a business of recovering gold from "slum dumps" in Victoria. These "dumps" represented soil which had been raised from the beds of gold mines from which gold had been previously removed, but which still contained a proportion of fine gold which was not visible. Four dumps, near Carisbrook, were worked in *Henderson*. These were the product of a gold mine which had closed in 1906. Each dump was about three to four acres in extent with the deeper parts twenty feet deep. The method of getting the gold from them – a chemical treatment called the vacuum filtered process – was described by the primary judge, Williams J, in these terms:

> The slum was first mixed with water into a pulp, and alkaline cyanide with lime of soda or potassium added, which dissolved the gold. The pulp containing the dissolved gold was then filtered to separate the solution from the solids. The solution was then clarified and passed through a precipitating plant which consisted of a small filter charged with finely divided zinc. By bringing the cyanide of gold solution in contact with the finely divided zinc, a chemical reaction took place whereby some of the zinc went into the solution and the gold was deposited in solid form. This was then treated with further chemicals to get rid of the excess zinc, and the residue was washed, roasted and smelted for the recovery of the bullion. He said that the plant for these operations, which had a working capacity of 500 to 600 tons a day, must have cost from £25,000 to £30,000. It was placed in a central position so as to serve all four dumps. The slum was propelled to the treatment plant by subjecting the dumps to a sluicing process. For this purpose the deceased put in pumps which gave water under very high pressure in pipes, the dumps were subjected to a high pressure jet of water from these pipes, and this caused the slum to disintegrate and flow along a main gutter with side gutters to the treatment plant, where the sand and any worthless material was separated by screening, leaving a smooth slimy pulp to subject to the treatment already mentioned.

149 The issue for determination was whether the taxpayer was entitled to an allowable deduction for certain calls paid by him in a mining company. That issue turned on whether it could be said, for the purposes of former s 78 of the ITAA 1936, that the company had been carrying on mining operations in Australia for gold. The Commissioner contended that the dumps were treated material and also chattels, and that mining operations could not include the treatment of chattels, but needed to involve some form of working or excavating the land. That submission was rejected. On appeal, Latham CJ was influenced by the nomenclature of the *Mining Act 1928* (Vic) and said at 44:

> The *Mines Act* 1928 of Victoria , to which appellant's counsel referred, may be used to show that the word "mine," and the word "mining" used adjectivally, are not limited either to excavation or to subterranean excavation: See *Mines Act*, s. 3:— definition of "mine" to include a place wherein "any operation for or in connexion" with mining purposes is carried on upon Crown land; definition of "mining purposes" as the purpose of obtaining gold or minerals by any mode or method &c.; and of "to mine" so as to include to "carry wash sift smelt refine crush or otherwise to deal with any earth by any mode or method whatsoever for the purpose of obtaining gold or minerals." Definitions enacted for the purpose of a State statute cannot control the interpretation of a Federal statute, but these definitions show that it would not be inconsistent with the use of those terms in State legislation to hold that the sluicing and treatment of tailings were mining operations.

150 Latham CJ decided that Williams J correctly accepted expert evidence that the gold mining could take place without extraction but instead by treatment by a chemical process "when carried out at the place where the gold-bearing material was obtained" (at 45). His Honour also agreed with Williams J's acceptance of expert evidence that a different conclusion would have been reached if the processing had taken place at another location. Rich J substantially agreed with Latham CJ.

151 Starke J also agreed that the chemical processing was a mining operation. At 50, his Honour said:

> The operation carried on by Gold Dumps Pty. Ltd. was, I agree with my brother *Dudley Williams*, a mining operation. The company had no right to mine the slum dumps, but still I think that its operations were mining operations and that it is consequently rightly described as a mining company, as also appears from its memorandum of association. Large dumps of mined material were stacked on the surface of the ground, and this material was conveyed by means of hydraulic power to a plant where it was treated by a cyanide process and the gold contained in it recovered. Had this operation been carried out in series when the gold-bearing material was mined and brought to the surface, there can be little doubt, though not conceded in argument, that the operation would have been properly described as a mining operation. And there is no reason why such an operation should not fall within the indefinite description "mining operations" because it is carried out at a later date and by another operator. The dumps were worked by methods in common use amongst mining men for the recovery of gold, and the gold was recovered by an ordinary mining method or process.

152 *Henderson* and *Broken Hill* were cases concerning the composite phrase "mining operations". The cases which are considered below also address the meaning and application of that phrase. We are mindful that in subpara (a) of the definition of "mining, quarrying or prospecting right", the word "operations" is not used; rather, subpara (a) is concerned with whether a particular instrument "can fairly be characterised as an authority, licence, permit or right to mine" minerals, to use the language of *Mitsui*. In *Parker v Federal Commissioner of Taxation* (1953) 90 CLR 489, Dixon CJ relevantly said at 494:

> Mining operations means operations pertaining to mining and operations is a very large expression.

153 Noting that observation, we nonetheless are of the view that an instrument which authorises "mining operations" could fairly be considered to be one which permitted the mining of minerals for the purposes of subpara (a) of the definition of a "mining, quarrying or prospecting right". It follows that cases concerning that composite phrase should be of assistance here. Indeed, both parties relied on such cases.

154 In *Commissioner of Taxation (Cth) v* ***Reynolds*** *Australia Alumina Ltd* (1987) 18 FCR 29, it was held by the Full Court of this Court that a 51 kilometre conveyor which carried low grade bauxite to a refinery, where the bauxite was converted into vendible alumina, was "for use in the mining industry in carrying out mining operations" for the purposes of the former *Sales Tax (Exemptions and Classifications) Act 1935* (Cth). Beaumont J said at 35:

> The notion of "mining" is a flexible rather than fixed one so that, conceptually, it is capable of accommodating technological change …

155 In concluding that the conveyer belt was used in carrying on mining operations, his Honour was influenced by the following two factors:

(1) the fact that the conveyer belt commenced at the mine site so that it was physically proximate to the mine; and

(2) that the conveying of the mineral to the refinery was an integrated operation.

156 Relevantly, Beaumont J said at 35:

> It follows, in my view, that the ultimate question of characterisation in the present case, one of degree and thus of judgment, is whether the conveyor facility may fairly be seen to be part of the activities carried on at the mine site in the sense of being ancillary to those activities or whether, on the other hand, the conveyor facility should be perceived as something which stands apart from, and is independent of, the activities at the mine site: see *Federal Commissioner of Taxation v Henderson* (1943) 68 CLR 29 at 39, 45, 50 and *Commissioner of Taxation (Cth) v Broken Hill Pty Co Ltd* (1969) 120 CLR 240 at 244-245, 272-273, 275.
>
> The conveyor facility should, I think, be seen as something ancillary to the activities at the mine site and therefore part of the mining operations conducted by the respondents: cf *Lopinot Limestone Ltd v Attorney-General of Trinidad and Tobago* [1988] AC 45 at 51-52. As has been said, to determine when mining operations begin and end is one of fact and degree. The considerations which, in my view, indicate a sufficient connection for present purposes between the conveyor operations and the actual process of winning the product at the mine site are as follows: First, the circumstance that the conveyor belt activity commences within the mine site area is, I think, significant. It emphasises the physical proximity between the various activities at the mine site, especially the recovery, withdrawal and movement of the mineral product. The conveyor is anchored, so to speak, in the mine site. Secondly, the conveying of the product is part of a single, integrated operation which commences at the surge pile and continues until the product is dumped and then blended at the stockpiles at the refinery. Given this proximity and this integration, any attempt to fragment the respondents' activities into a number of distinct compartments must run the risk of producing an artificial and unrealistic result.

157 Additionally, Burchett J said at 47:

> The key to the application of the concept of "mining operations" in differing technological contexts, according to both cases, is to identify the desired end product of the mining activities, or, as it was called in the *BHP* case [(1983) 68 FLR 132; 14 ATR 389] at 273, "what it is sought to obtain by mining".

158 In ***Robe River*** *Mining Co Pty Ltd v Federal Commissioner of Taxation* (1990) 21 ATR 1068, the issue for determination was similar to that considered in *Reynolds*, save that on this occasion the equipment was a 190 kilometre railway line that transported iron ore from the mine site to a crushing and blending facility. The blending and crushing was a necessary step in the production of the marketable product that Robe River Mining Co Pty Ltd (**Robe**)

exported. Lee J decided that the railway was part of the mining operations. His Honour said at 1078:

> Circumstances may be conceived where an activity that would normally be part of a mining operation ceases to be so: see *FCT v Henderson* (1943) 68 CLR 29; 2 AITR 440 per Latham CJ at (CLR) 45, per Starke J at (CLR) 50 but in the present case, the integrated activities of extracting the iron ore, reducing its size to fines and blending the product for some degree of chemical consistency are fundamental to the presentation of a marketable product. That is the mining operation. There could be no mining without the undertaking of the interlocking steps and the consent to mine granted by the state of Western Australia to the joint venturers is plainly predicated upon that premise. The recitals and clauses of the formative agreement between the state and Basic (the Basic Agreement), approved by and scheduled to the Iron Ore (Cleveland-Cliffs) Agreement Act 1964 which became the foundation of the joint venture operation, speak very clearly to that fact.

159 Critically, his Honour rejected decisively the respondents' proposition here, accepted below, that mining finishes with extraction or excavation. Lee J said at 1078:

> Mining as a commercial activity is more than the excavation or removal of minerals. The nature of mining will vary with the nature of the substance being mined but above all it will be the winning of a product for a market.

We respectfully adopt the foregoing proposition.

160 His Honour also decided that the crushing and blending were also part of the mining operation, notwithstanding the great distance between the mine site and the crushing facility. Lee J, in reaching that conclusion, placed great emphasis on the integrated nature of the facilities, and upon the identification of what commodity Robe wanted to obtain from the activity of mining. His Honour reasoned as follows at 1078–1079:

> In the present case the entire history of the joint venture operation showed that the blasting of ore reserves and loading of the mined ore on railway wagons for transport would not provide a product for which there was a market.
>
> It is of great importance that the whole venture was conceived as an integrated project. The joint venturers only obtained permission to extract this type of iron ore in the Robe River valley upon undertaking to provide an entire activity in which the state could be confident that a marketable commodity would be produced capable of providing a financial return to the state and of achieving the best and most efficient use of the state's resources. The efficient mining of the Robe River ore deposits depended upon the ore being either pelletised or reduced to fines and a process of blending undertaken so that run-of-mine ore which otherwise may have had an unacceptably high level of contaminants could be distributed amongst other ore and the blended ore meet market specifications
>
> Because the project was undertaken as an integrated activity, the joint venturers received the grant of contiguous leasehold interests to provide premises for the entire operation. Although it was an operation spread over many kilometres, it was understood by all that to conduct that operation the joint venturers would require the exclusive possession of the relevant areas provided by freehold or leasehold estates:

> see the Basic Agreement cl 8(b).
>
> When those circumstances are appreciated, it becomes less difficult to accept that the transportation of the ore from Pannawonica to Cape Lambert for crushing remained part of the mining operation, notwithstanding that incidentally it also may have been part of the means of transporting the ore for shipment.
>
> It is not difficult to regard the crushing activity as being sufficiently proximate to the excavation of the ore to be part of the mining operation having regard to the vastness of scale of operations and distances involved in that part of the state. Notwithstanding the distance involved, the unbroken rights of possession between mine site and wharf allow Robe to conduct the railway facility as an integrated part of a continuum. The fact that in circumstances of exigency ore may be stockpiled at the mine or loading operations continued at Cape Lambert if the railway is temporarily inoperative, does not alter the essential nature of activities. There is complete and integrated control exercised between the loading operations at the mine site at Pannawonica and unloading of the ore at the crusher at Cape Lambert. Although responsibility for use of the railway within the environs of the mine and Cape Lambert is in the hands of respective yard foremen at either end of the railway, there is a supervening coordination of those activities and control of the continuity of railway operations carried out by a railway controller to ensure that the railway functions as part of an integrated exercise.
>
> It should be concluded that the machinery, implements and apparatus which constitute the railway are for the use in the mining industry and in carrying out mining operations. The dedicated and integrated nature of the railway operation used to convey the extracted ore to a crushing facility is part and parcel of the mining operation conducted by the joint venturers and is within the meaning of the terms of the exemption provided by Item 14(1).

161 The principles to be extracted from the foregoing cases were helpfully summarised by the Full Court of this Court in *Regional Director of Customs (WA) v Dampier Salt (Operations) Pty Ltd* (1996) 67 FCR 108 at 120 in the following terms, which we respectfully adopt:

> (1) The point where a mining operation starts and finishes will be a question of fact to be decided in each case. However, the Court should not adopt a narrow view of the extent of "mining operations" so as to frustrate the legislative intent of providing a concession to the mining industry.
>
> (2) Relevant to this factual conclusion will be the ascertainment of the object of the particular taxpayer's operations.
>
> (3) Generally the mining operation will continue until there has been produced that which is the object of the particular taxpayer's operation of mining.
>
> (4) The mining operation will not necessarily be complete when a mineral has been extracted from ore, or where salt is produced, immediately there has been a recognisable salt product, be that brine or crystallised salt. It will be necessary that the mineral (salt) produced be saleable.
>
> (5) The mere fact that a mineral is saleable will not necessarily be determinative, if the production of that mineral at that place by that taxpayer would be uneconomic. Perhaps everything can be said to be saleable for a price, but what is necessary is that the mineral in question be economically saleable at least by a person in the position of the particular taxpayer.

(6) Activities directed to improving that which is extracted, for example pelletising, may fall outside the ambit of the "mining operation". However, they may form part of the mining operation where the activity is closely associated with the actual extraction of the mineral. Normally this close association may be indicated by physical proximity, but lack of physical proximity will not necessitate the conclusion that the mining operation has concluded: *Northwest Iron* [(1986) 9 FCR 463]. The degree of integration of the activity with the actual mining process will, obviously, thus be relevant.

162 The desired product here was technical grade and chemical grade lithium concentrate. The "Annual Information Form" for Talison Lithium for the year ended 30 June 2012, described the objects of the mining operations at Greenbushes in these terms:

> Talison Lithium produces two categories of lithium concentrates at the Greenbushes Lithium Operations: (i) technical grade lithium concentrates, which have low iron content ...; and (ii) a chemical grade lithium concentrate...

163 Just as in *Robe River* "the blasting of ore reserves and loading of the mined ore on railway wagons for transport would not provide a product", so too here the mineral-bearing ore excavated was not the product sought by Talison Lithium. As the primary judge found, neither concentrate could be obtained by simple excavation or extraction. Lithium is highly reactive and is never found in its elemental form. Each product needed to be extracted from "lithium containing minerals in hard rock" (at J[92] below). This is described in the "Annual Information Form" in these terms:

> The Greenbushes ore body is a highly mineralized zoned pegmatite with a strike length of more than 3 km. The pegmatite contains zones of spodumene and tantalum rich minerals which can be mined and processed selectively.

164 As Mr Oliver said in the 2015 Affidavit:

> Lithium is also produced from hard rock mining of spodumene, a lithium aluminium silicate mineral (and to a much smaller extent other lithium bearing minerals).
>
> ...
>
> Ore extracted through mining must undergo primary processing to remove impurities and increase concentration of the lithium content to produce various grades of mineral concentrates. The Greenbushes lithium mineral concentrates are produced using gravity, heavy media, floatation and magnetic processes.

165 The "Annual Information Form" describes the process at Greenbushes in these terms:

> The ore is crushed through a four-stage crushing circuit prior to processing. Ore containing 2.8% to 4.2% Li_2O is fed into the processing plants which upgrade the lithium mineral, using gravity, heavy media, floatation and magnetic processes, into a range of lithium concentrates for bulk or bagged shipment.

166 The lithium ore needed to be processed "to remove impurities and to increase concentration of the lithium content to produce various grades of mineral concentrates" (at J[93] below). Inferentially, that processing (at J[93] below), took place at one or more of the buildings identified in the satellite images that were within the boundaries of at least one of the general purpose leases.

167 In our view, the separation and processing at those buildings of the different grades of lithium concentrate from the ore extracted may fairly be seen as mining because:

(1) the object of the Greenbushes mine was the winning of two types of lithium concentrate, not lithium containing minerals in hard rock, and those products were first won following the processing into lithium concentrate. That processing was not an improvement of the mineral mined, but a step in obtaining the mineral sought;

(2) all of this processing took place at the mine site;

(3) this processing was not a distinct activity from excavation, but was a step in a single integrated process to produce the product sought to be won by Talison Lithium. This integration can be seen in the way in which Talison Lithium itself described the Greenbushes operations in its "Annual Information Form":

> The Tenements cover an area totalling approximately 10,000 hectares ("ha") and cover the historic Greenbushes tin, tantalum and current lithium mining areas. The operating lithium mining and processing plant area covers approximately 2,000 ha comprising Mining Leases M01/06, M01/07 and M01/16. These three leases contain the entire lithium measured, indicated and inferred mineral resource and all lithium mining activities, including tailings storage, processing plant, open pits and waste rock dumps, are currently carried out within the boundaries of Mining Leases M01/06, M01/07 and M01/16 plus General Purpose Leases G01/01 and G01/02.

(4) the foregoing passage draws no distinction between the activities of extraction, said to be mining by the respondents, and the activities of processing. Rather, what are described as the "lithium mining activities" expressly includes the tailings storage and the processing plant, which activities are said to take place on both the mining leases *and* the general purpose leases. In contrast, downstream processing of the lithium concentrate into lithium chemical would not constitute mining. That processing does not take place at the mine site. As the Annual Information Form states:

> Talison Lithium does not currently produce lithium chemical products itself. Instead, it sells lithium concentrate to customers for processing into lithium chemicals, primarily lithium carbonate.

(5) like Latham CJ in *Henderson*, we are also influenced by the nomenclature of the Mining Act. The term "mine", as a verb, is defined by s 8 of the Mining Act to mean any manner or method of "mining operations" and that term refers to a number of different means of refining a mineral. In our view, it includes the processing that takes place to convert the ore into concentrate.

168 Senior counsel for the respondents disagreed with the proposition that the reference to refining in the definition of "mining operations" in s 8 of the Mining Act encompassed the processing of lithium ore into concentrate. He submitted that the activities listed in that definition are directed at activities for the extraction of the mineral and no more. He emphasised that the activities listed are concerned with the "purpose of obtaining any mineral", to use the language of the definition, and that the definition of "mineral" refers to a "naturally occurring substance". Lithium concentrate is obviously not a naturally occurring substance. On that basis, it was submitted, the processing of lithium ore into lithium concentrate did not constitute a mining operation for the purposes of the Mining Act.

169 We reject that submission. Section 8 of the Mining Act commences with the words "unless the contrary intention appears". The word "mineral" is being used in a definition of "mining operations" which lists activities such as leaching, roasting, distilling, evaporating, smelting, combusting, refining, stacking, depositing, storing as well as the "treatment of any substance considered to contain any mineral". Many of these activities will not result in a mineral being obtained, as that term is defined by s 8, because the activities will result in a product which is, at least in part, "man-made": see *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1997) 36 ATR 65 at 70. In other words, the intervention of, for example, leaching, roasting, smelting or refining, may well preclude the characterisation of the resultant mineral from being seen as "naturally occurring". It follows that the word "mineral" in the definition of "mineral operations" must bear a broader meaning and is not limited to naturally occurring substances. In that respect, we accept that lithium concentrate is man-made but it is nonetheless a mineral for the purposes of the definition of "mining operations".

170 Further, the processing at the mine site is different, in our view, from the crushing of bluestone, the fashioning of sandstone and the cutting of diamonds or opals, as described in *Broken Hill, supra*. Rather, we view the obtaining of technical grade and chemical grade lithium concentrate to be more analogous to the obtaining of gold from the gold-bearing

material as described in *Henderson.* Both the mine in *Henderson* and the mine at Greenbushes involve the treatment of soil or ore to obtain the product sought. In the case of *Henderson* it was gold-bearing soil, in the case of Greenbushes it is lithium-bearing mineral. Significantly, as in *Henderson*, here the processing takes place at the mine site.

171 It follows that bifurcating the activities at Greenbushes, in the way submitted by the respondents, and accepted below, is, in our view, "an artificial and unrealistic result", to use the language of Beaumont J in *Reynolds*.

172 Our conclusion that the processing of the lithium into concentrate formed part of the "mining operations" at Greenbushes, as that composite phrase has been construed by the authorities, also applies to the meaning of that term under the Mining Act. In our view, the processing was refining for the purposes of the definition of "mining operations" in s 8. It follows that, unless authorised by an instrument issued under the Mining Act, such processing at the mine site was illegal: s 155 of the Mining Act.

173 It is not clear to us which buildings or structures which appear to be on the First General Purpose Lease were used to produce the lithium concentrate sought at Greenbushes. However, we infer that one or more buildings were so used. Strictly speaking, it is also not clear which instrument of title authorised that necessary processing, whether that be Mining Lease 01/06 or the First General Purpose Lease. They both cover land on which the buildings (or some of them) are located. Further, as already mentioned, there is an ostensible overlap between Divs 3 and 4 of Pt IV of the Mining Act: the provisions ostensibly gave the Minister power to issue a mining lease which authorises the carrying out of mining operations (s 85) and to issue a general purpose lease for a "specified purpose directly connected with mining operations" (s 87). In other words, whilst it may accepted that a mining lease should be the primary tenement for the extraction of ore, both instruments could potentially have authorised the processing of ore into concentrate. However, because of the stated purpose of the First General Purpose Lease ("Concentrating Lithium Ore"), and notwithstanding the paucity of the evidence before us, we would, on balance, infer that this was the instrument which authorised this processing. Because we have decided that the processing here formed part of the mining operations undertaken at Greenbushes, it follows that the First General Purpose Lease is a mining title which can fairly be characterised as an "authority, licence, permit or right" to mine minerals for the purposes of subpara (a), or perhaps subpara (b), of the definition of "mining, quarrying or prospecting right", and for that reason, is TARP.

174 Having said that, as already mentioned, it may not matter which instrument authorised the processing. If the First General Purpose Lease conferred the right to carry on the refining processes, then it will constitute, on the view we have formed, TARP. Alternatively, if Mining Lease 01/6 conferred the processing right, then the value of that mining lease, which is admitted to be TARP, would need to increase to reflect the value of that right. On that basis, Mining Lease 01/6 authorised more than mere extraction of the hard rock. Either way, the approach taken by the primary judge, of severing the process of excavation from that of refining, was misconceived.

Subpara (d) of the Definition

175 The next issue for determination is whether the judge below was correct in rejecting the Commissioner's primary argument that the First General Purpose Lease fell within subpara (d) of the definition of "mining, quarrying or prospecting right". As previously mentioned, his Honour otherwise decided that the Second General Purpose Lease fell within the words of that subparagraph. This was not challenged by the respondent on appeal.

176 His Honour construed the words "in respect of" in subpara (d) of the definition as requiring a sufficient connection between the "rights" on the one hand and the "buildings" on the other. The content of that connection was described by the primary judge at J[98], *supra*.

177 We agree with the primary judge's description of the content of the required connection between the rights which must be held and the buildings, for the purposes of subpara (d). It will be recalled, however, that at J[98] his Honour went on to decide that because the First General Purpose Lease did not confer rights in respect of the buildings which were located on the leased land, it followed that the First General Purpose Lease was not a "mining, quarrying or prospecting right". Given that the terms of the First General Purpose Lease were not before the Court below, it is unclear to us how the primary judge was able to reach that conclusion. We do not know what specific rights were conferred by the First General Purpose Lease, other than those rights contemplated by ss 86 and 87 of the Mining Act, such as a right of exclusive possession. Whether that lease conferred rights in relation to the buildings which appear to be in the leased area is unclear.

178 In any event, senior counsel for the respondent submitted that the First General Purpose Lease could not be a "mining quarrying or prospecting right" within subpara (d) because it could not meet the second limb of subpara (d), viz, the rights were not "acquired with" an authority, licence, permit, right, lease or interest therein, as an historical fact. That

submission should be accepted. In general terms, it was submitted that the word "with" should be read in a temporal way as meaning "accompanied by" or "at the same time". The Commissioner agreed with that construction of the provision but not with the time for testing whether the rights were acquired with a mining tenement.

179 The respondents' contention is supported by the legislative history. In simple terms, the definition of a "mining, quarrying or prospecting right" had its origins in former Div 10 of Pt III of the ITAA 1936 which, amongst other things, provided for a deduction for mining capital expenditure to be written off over a period of years. Those rules have now been subsumed within Div 40 of the ITAA 1997. In 1968, a new Div 10 was inserted into the ITAA 1936 by *Income Tax Assessment Act (No.2) 1968* (Cth). That amending Act introduced provisions that enabled un-deducted capital expenditure to be transferable to another taxpayer upon the sale to that taxpayer of a relevant mining or prospecting right or mining information. To facilitate that ability, the definition of "mining or prospecting right" in former s 122 was enacted in this form:

> 'mining or prospecting right' means an authority, licence, permit or right to mine or prospect for minerals in a particular area in Australia, or a lease of land in Australia by virtue of which the lessee is entitled to mine or prospect for minerals on the land, and includes an interest in such an authority, licence, permit, right or lease *and, for the purposes of provisions relating to the acquisition by a person of a mining or prospecting right from another person, also includes any rights in respect of buildings or other improvements (including housing and welfare) on the land concerned, or used in connexion with operations on the land concerned, that are acquired with the mining or prospecting right*;
>
> (Emphasis added.)

180 The words that appear in italics are the origin of the words that appear in the second limb in subpara (d) of the definition of "mining, quarrying or prospecting right". The Explanatory Memorandum to the Income Tax Assessment Bill (No. 2) 1968 (Cth) (**1968 Explanatory Memorandum**) explained the operation of the new provision permitting the transfer of un-deducted expenditure (s 122B) in these terms:

> This section relates to the acquisition of a "mining or prospecting right" ... The meaning of [this term has] been explained in the notes on section 122.
>
> As previously explained in relation to section 122A(1)(d), capital expenditure incurred by a taxpayer in acquiring such a right or information from another person may, within certain limits, be included in the allowable capital expenditure of the purchaser for the purposes of the proposed new Division 10. This course is followed only where an appropriate notice is given to the Commissioner by the vendor and the purchaser. Broadly, the practical effect of the notice will be to transfer to the purchaser of a right or information the entitlement of the vendor to have the relevant

expenditure deducted over the life of the mine.

181 The 1968 Explanatory Memorandum also relevantly explained the definition of "mining or prospecting right" in these terms:

> For the purposes of the provisions relating to the acquisition by a person of a mining or prospecting right or mining or prospecting information, the definition also includes any rights in respect of buildings or other improvements on the land concerned or used in connection with operations on the land concerned, that are acquired with the mining or prospecting right - see notes on section 122B later in this memorandum.

182 The purpose of the words in italics in the definition of "mining or prospecting right" was to address a sale of rights in respect of buildings included as part of a sale of a mining right or mining information.

183 In 1997, Div 10 was rewritten into the ITAA 1997 as Div 330. Section 330-240 replaced the former definition of "mining or prospecting right" with a definition of "mining, quarrying or prospecting right" in the following terms:

> (1) A ***mining, quarrying or prospecting right*** is:
>
> (a) an authority, licence, permit or right under an Australian law to mine, quarry or prospect for minerals or quarry materials in a particular area; or
>
> (b) a lease of land that allows the lessee to mine, quarry or prospect for minerals or quarry materials on the land; or
>
> (c) an interest in such an authority, licence, permit, right or lease; or
>
> *(d) any rights that:*
>
> *(i) are in respect of buildings or other improvements (including anything covered by the definition of housing and welfare) that are on the land concerned or are used in connection with operations on it; and*
>
> *(ii) are acquired with such an authority, licence, permit, right, lease or interest.*
>
> However, a right in respect of anything covered by the definition of housing and welfare in relation to a quarrying site is not a ***mining, quarrying or prospecting right.***

184 The words in italics are equivalent to the words used in subpara (d) of the current definition. The legislative scheme for the transfer of un-deducted capital expenditure upon the sale of a mining right or information otherwise was also moved into Div 330. The equivalent in Div 330 of s 122B was s 330-235.

185 Div 330 was repealed in 2001 and replaced by Div 40 which provides for the depreciation of assets more generally. In broad terms, a taxpayer now has the ability to deduct progressively the cost of plant and equipment used in a mining operation, and that includes the cost of a "mining, quarrying or prospecting right", which, being an intangible asset, is expressly included within Div 40 as a depreciating asset by s 40-30. There is, however, no longer a specific equivalent in Div 40 to former s122B of the ITAA 1936 or former s 330-235 of the ITAA 1997.

186 Senior counsel for the respondents submitted that any rights in respect of buildings for the purposes of subpara (d)(ii) of the definition needed to be acquired when the mining leases here were acquired. Here, and as already mentioned, it would appear not to be disputed that the buildings in question fell within the boundaries of Mining Lease 01/6. That lease was granted in 1984. Each general purpose lease, however, was granted in 1986. It follows, that reading the phrase "are acquired with" in subpara (d)(ii) of the definition in accordance with statutory history, and assuming that the First General Purpose Lease conferred rights in respect of the buildings in the required sense, those rights were not "acquired with" or at the same time, as Mining Lease 01/6. No other tenement capable of being described as an authority to mine was otherwise identified as having been acquired with the general purpose leases. In that respect, it is unnecessary for us to decide whether the word "acquired" is apt to include the grant of a right.

187 Senior counsel for the Commissioner contended that 1986 was the wrong time to assess whether rights in respect of buildings had been acquired with the mining leases. In his submission, the correct time to test that proposition is in 2012 when the shares and interests in Talison Lithium were sold. That is the time to apply Div 855 and the definition of "mining, quarrying or prospecting right". At the time of sale, it was said, rights to mine and rights in respect of buildings were both rights which subsisted with the relevant entity. With respect, that submission should be rejected. There was no "acquisition" of rights when the shares and interests were sold. Indeed, we assume that the relevant subsidiary, Talison Lithium Australia Pty Ltd, continued to retain all of its tenements following the sale here by the respondents of their shares and interests in Talison Lithium.

188 It follows that we are not satisfied that the First General Purpose Lease satisfied the language of subpara (d) of the definition of "mining, quarrying or prospecting right".

The Second General Purpose Lease

189 As for the Second General Purpose Lease, the primary judge reasoned at J[100]:

> The position of a tailings dam, however, used to deposit tailings arising in the mining operations may be different. The Commissioner correctly submitted in relation to the tailings dam that the right to deposit tailings on the land conferred by General Purpose Lease 01/2 was a right "in respect of" an improvement in the sense that it was a right "to make use of the improvement – in this case, a tailings dam". The applicants' submission to the contrary cannot be accepted because the right given by General Purpose Lease 01/2 was a right to deposit tailings by permitting the depositing of lithium ore tailings in the area identified. That conclusion may require some recalculation by the experts of the value of taxable Australian real assets before making final orders in the proceedings.

190 One of the assumptions the respondents' valuer was required to make was that *only* the mining leases were relevantly TARP. By reason of the finding made at J[100], that assumption was incorrect. It should follow that the figures relied upon by the valuer were, at least in part, incorrect and possibly also that his conclusion was mistaken. But, these potential consequences of his Honour's unchallenged finding about the Second General Purpose Lease would ostensibly appear not to have been explored below, and were not the subject of any debate before us. The finding was not the subject of a notice of contention by the respondents.

The Miscellaneous Licence

191 Similarly, other than the brief finding concerning the miscellaneous licence described above, thereafter the licence did not appear to play any distinct role in the primary judge's reasons for decision. They were not the subject of separate analysis or consideration. Rather, the fate of that licence would appear to have been bound up with the fate of the First General Purpose Lease. The Commissioner, before us, made no complaint about that.

Lease of Land

192 Having concluded that the First General Purpose Lease is, on balance, a "mining, quarrying or prospecting right", it is strictly not necessary for us to consider whether it is also a "lease of land" for the purposes of s 855-20(a) of the ITAA 1997. Neither party had contended that either general purpose lease was a lease of land. It was, however, raised with the parties at the hearing of the appeal and, being an important issue, for the sake of completeness we should record our views. In that respect, as the High Court observed in ***TEC Desert*** *Pty Ltd v Commissioner of State Revenue (WA)* (2010) 241 CLR 576 at [20]:

> The general proposition respecting the conduct of appeals is that the substantial

> issues between the parties are to be settled at trial. Nevertheless, save for any special provision for costs of the litigation, TEC and AGL should not be held to concessions or assumptions upon legal issues of general public importance concerning the operation of the *Stamp Act* and the mining legislation of Western Australia.
>
> (Footnotes omitted.)

193 The same observations apply to legal issues of general public importance concerning the ITAA 1936 and the ITAA 1997; the issues here are of that kind: cf *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592 at [80].

194 Section 855-20(a) was amended to include a reference to a "lease of land" by *Tax laws Amendment (2009 Measures No.4) Act 2009* (Cth). The term "lease of land" is not defined. In the context of Div 855, in our view the term "lease of land" should bear its ordinary technical legal meaning. Inferentially, s 855-20 was amended to expressly include a lease of land precisely because at common law a leasehold interest is not real property: *City Mutual Life Assurance Society Ltd v Smith* (1932) 48 CLR 532 at 539. While the lease gives a tenant an interest in the land, the lease itself is not real property.

195 It is trite law that an instrument which relevantly confers exclusive possession of land will usually be a lease. As Windeyer J said in *Radaich v Smith* (1959) 101 CLR 209 at 222:

> What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a *legal right of exclusive possession* of the land for a term or from year to year or for a life or lives. If he was, he is a tenant.

196 Of course, whether an instrument is a lease does not turn upon the presence of the nomenclature of demise and lease. As the High Court said in *Western Australia v Brown* (2014) 253 CLR 507 at [43]:

> As with the mining leases considered in *Ward* [(2002) 213 CLR 1], the rights and obligations of the joint venturers are not to be determined by fastening upon the use of the words "lease" or "demise", or by noticing that there was a demise of land as well as mines. As Toohey J said in *Wik Peoples v Queensland* [(1996) 187 CLR 1], "[a] closer examination is required". It is necessary to identify the rights which are actually conferred upon the joint venturers.
>
> (Footnotes omitted.)

197 Having said that, the nomenclature used is not irrelevant in the objective ascertainment of the intention of the parties. As Mahoney JA said in *Lewis v Bell* (1985) 1 NSWLR 731 at 735:

> But the use, in the operative part of the document, of words such as "lease" or "devise" will ordinarily be understood to involve the grant of such a right. Conversely, if what is granted is not in terms exclusive possession or if the words used in the grant are not words understood to convey the right of exclusive possession, then (subject to what I shall say) the transaction is prima facie not one of lease. Thus, if that which is granted is not of its nature the right to possession or exclusive possession but, eg, the right to use the premises only for a defined and particular purpose, there will prima facie be no lease.

See also: ***Living and Leisure*** *Australia Ltd v Commissioner of State Revenue* (2017) 106 ATR 910 per Croft J; upheld on appeal at [2018] VSCA 237 per Ferguson CJ and Whelan JA.

198 In that respect, in our view the legislative regime set out in Div 4 of Pt IV of the Mining Act may be distinguishable from those statutory regimes which create interests of a lesser kind than a lease, which are *sui generis* in nature, such as the pastoral leases considered by the High Court in ***Wik Peoples*** *v State of Queensland* (1996) 187 CLR 1. As Croft J observed in *Living and Leisure* at [28]:

> The significance of the plurality judgment in *Western Australia v Ward* (2002) 213 CLR 1; 76 ALJR 1098; 191 ALR 1 to the present case is the distinction which emerges between a statutory "lease" which is indistinct from its legislative genesis, and a statutory power to grant a lease which will then be governed by the terms of the agreement and the common law. This is consistent with the decision in *Wik Peoples v Queensland* (1996) 187 CLR 1; 71 ALJR 173; 141 ALR 129, in which each of the majority judges emphasised that the pastoral tenures considered in that case were "a creature of statute", that they were "not the creations of the common law" but were "entirely anchored in statute", that they were "*sui generis* interests" created under statute, "statutory devices" or a "peculiar statutory interest".
>
> (Footnotes omitted.)

199 In our opinion Div 4 reposes in the relevant Minister a limited power to grant a lease which confers exclusive occupation, as that term is ordinarily understood by the law, whose character will mostly, or at least in part, be informed by the terms and conditions of its grant. The power is limited to the grant of leases for the purposes specified in s 87 of the Mining Act. It is not, however, a power to grant only a statutory interest which is *sui generis* in nature.

200 On balance, each general purpose lease here is probably a "lease of land" for the purposes of s 855-20(a) of the ITAA 1997. And that is so, even though we only have secondary and incomplete evidence concerning the contents of each lease. We have reached this conclusion from the confined material before us, and in particular, from the provisions of Div 4 of Pt IV of the Mining Act, and in the absence of contradictory material for the following reasons.

201 First, an important consideration here is the creation of an entitlement under s 87 of exclusive occupation upon the grant of each lease. In our view, that constitutes a grant of exclusive possession. Unlike a mining lease, which gives exclusive rights to mine over a given area, the language of s 87 is much wider; it confers "exclusive occupation of the land".

202 Secondly, that conclusion is also supported by the stated purposes for the grant of a general purpose lease, as set out in s 87. Those purposes include the erection and operation of machinery, the depositing and treatment of tailings, and other specific purposes directly connected with "mining operations", a term which includes a broad range of refining activities. Inferentially, these are all activities which require the ability to exclude others from entry and occupation. What is conferred, in that respect, is not an exclusive right to undertake those activities, but exclusive occupation to a limited depth. The depth limitation emphasises that what is conferred are rights of occupation on the surface of the land. In that respect, it would be odd, if not anomalous, if the lessee in each case here did not enjoy exclusive possession in order to be able to undertake processing of lithium ore and the depositing of tailings.

203 Thirdly, our conclusion is also supported by the language used in Div 4; that language includes the phrases and words "grant to such person a lease" to be "known as a general purpose lease", to a "lessee" for "exclusive occupation of the land" for a "term". Section 97 which, amongst other things, deals with the forfeiture of a general purpose lease, refers to the "estate and interest of the lessee". Whilst the presence of such language is not decisive, it is supportive of a conclusion that each general purpose lease is a "lease of land". As Ferguson CJ and Whelan JA observed in *Living and Leisure Australia Ltd v Commissioner of State Revenue* [2018] VSCA 237, in support of their Honours' conclusion that the instrument considered in that case was a lease, at [6]:

> The terminology employed in the instruments is the terminology of a lease. The terms used are 'lease', 'demise', 'rent', 'lessor', and 'lessee'. The demise itself is in the conventional terms of a lease. It covers not just the surface but the sub-surface to a specified depth. It is for a term of 50 years. Other provisions recognise expressly that what is conveyed is an interest in the land (cl 5.3.1 and cls 10.4–10.5). The lessee covenants to 'deliver up the demised land' at the expiration of the lease (cl 9.1). These matters are not determinative, but they are relevant.
>
> (Footnotes omitted.)

204 In that context, we consider that when Parliament refers in s 86 to a "grant" of a "lease" on "terms and conditions" it means precisely that. It was intended to confer a power to grant

demises of land to facilitate mining operations. On the slender material before us there is nothing to suggest that each general purpose lease conferred a more confined interest analogous to the pastoral leases considered in *Wik Peoples*.

205 Finally, our conclusion is further supported by the statutory context. A power to grant a lease to be known as a general purpose lease subsists within an Act which also provides for the grant of a mining lease and the grant of a miscellaneous licence; these tenements constitute statutory interests which do not constitute a demise of land. The Mining Act also provides for the issue of "Miner's rights" (s 40C), prospecting licences (s 40), exploration licences (s 57), and retention licences (s 70B). Each of these tenements provide different ways for exploring for, and then extracting, natural resources. In contrast, a general purpose lease, having regard to the purposes for which it may be issued under s 87, does not authorise either exploration for natural resources or the actual extraction of natural resources. It confers exclusive possession of land for the purpose of undertaking activities on the surface of that land, some of which may be prohibited by s 155 of the Mining Act if they constitute, relevantly, mining operations (like the lithium processing here), in the absence of an authorising tenement. Reposing an express power in the Minister to grant leases of land, albeit for limited purposes, is consistent with the statutory context which also provides for the grant of statutory rights to undertake specific activities. Context does not support the reading down of the power to confer leases in s 86, so that it is also limited to the grant of only statutory rights, precisely because it is not directed at giving permission to undertake identified activities.

206 The foregoing conclusion is arguably also supported by the following two contextual considerations:

(1) the absence in the Mining Act of an equivalent to former s 273 of the *Mining Act 1904* (WA) which provided:

> Every mining tenement, and every share and interest therein, shall be deemed and taken in law to be a chattel interest, and, subject to this Act and the regulations, the holder may transfer and encumber the same …

(2) the presence in the current Mining Act of s 162A which provides:

> In accordance with the *Personal Property Securities Act 2009* (Commonwealth) section 10 the definition of ***licence*** paragraph (d), the following rights, entitlements or authorities are declared not to be personal property for the purposes of that Act —
>
> (a) a prospecting licence granted under section 40(1), 56A(6) or 70(6);

(b) an exploration licence granted under section 57(1);

(c) a retention licence granted under section 70B(1);

(d) a mining lease granted under section 71;

(e) a general purpose lease granted under section 86(1);

(f) a miscellaneous licence granted under section 91(1).

207 Counsel for the respondents strongly submitted, and counsel for the Commissioner with less force contended, that the decision of the High Court in *TEC Desert* stood in the way of any conclusion that either general purpose lease was a lease of land. The issue for decision in that case was whether a certain sale agreement of assets used to generate electricity for the carrying on of a mining operation was a dutiable instrument under the *Stamp Act 1921* (WA). That issue involved an enquiry into whether the instrument provided for the transfer of land or interest therein. Some of the assets sold were on freehold land owned by the vendor, whilst others, being certain power stations, were on land the subject of mining leases issued pursuant to the Mining Act and also held by the vendor. Those assets, classified by the parties as "fixtures", were the subject of separate licence agreements providing access to them. The Western Australian Court of Appeal had decided that the assets sold which were found to be fixtures, were interests in land, rendering the sale agreement dutiable. The High Court disagreed. It decided that those interests were personal property. That was because the Court decided that the mining leases did not confer any interest in land; rather they were statutory rights which were personal property. General purpose leases are not mentioned in the reasons of the High Court, although it may be accepted that the vendor had power generation systems over land in respect of which both mining leases and general purpose leases had been issued (see *Commissioner of State Revenue v TEC Desert Pty Ltd* (2009) 40 WAR 344 at [145] per McLure JA). The High Court, however, expressly confined itself to a consideration of the plant and equipment on the land over which mining leases had been issued or which was freehold land. Thus at [17]-[18] the High Court said under the heading "The WMC mining tenements":

> The Leinster and Kambalda power stations were situated on land the subject of mineral leases held by WMC under the *Mining Act 1904* (WA) (the 1904 Act). The Mt Keith power station was on land the subject of a mining lease held by WMC under the *Mining Act 1978* (WA) (the 1978 Act). Mineral leases granted under the 1904 Act are deemed by the 1978 Act to be mining leases granted under the 1978 Act but subject generally to the terms and conditions of the grant under the 1904 Act that are not inconsistent with the 1978 Act. These WMC mining tenements were in respect of land otherwise largely the subject of pastoral leases. Pastoral leases are a creature of statute or regulation and confer a limited entitlement to use Crown land;

> the relevant legislation in Western Australia received detailed consideration in *Ward* [(2002) 213 CLR 1].
>
> The case before the primary judge and the Court of Appeal had been run on the footing that if the Commissioner could not succeed in respect of the power generation facilities, the Commissioner could not succeed in respect of the transmission facilities. Accordingly, in this Court, the primary focus of argument was upon the stamp duty assessment with respect to the power stations, and, in particular, to those items attached to the land the subject of the WMC mining tenements.
>
> (Footnotes omitted.)

208 This description of the "WMC mining tenements" did not include any reference to general purpose leases. The High Court then considered the nature of the rights conferred by a mining lease, referred to *Ward* and to the proposition that a mining lease is directed at preventing others from mining on the relevant land, and said at [35]:

> Section 85 of the 1978 Act describes the authorities conferred by a mining lease as exclusive rights for mining purposes in relation to the land in respect of which the mining lease was granted, and confers ownership of all minerals lawfully mined from that land, subject to the Act and any conditions to which the mining lease is subject. Mining leases under the 1978 Act commonly contain conditions requiring removal of all buildings and structures from the site at the completion of operations under the mining lease. Further, s 114 makes detailed provision where a mining tenement expires or is surrendered or forfeited for the removal by the holder of the mining tenement, or in default thereof at the direction of the Minister, of "mining plant". This term is defined as "any building, plant, machinery, equipment, tools or any other property of any kind *whether affixed to land or not so affixed*" (s 114(1)) (emphasis added). Section 114 thus operates upon the statutory assumption that what is "mining plant" is not determined by the general law respecting the affixture of chattels to the freehold, of which they then became part and to which the general law respecting removal of tenant's fixtures applies.
>
> (Footnotes omitted.)

209 There is no analysis here of any of the provisions found in Div 4 of Pt IV of the Mining Act concerning general purpose leases and the rights conferred by such leases. At [41], the High Court concluded as follows:

> Accordingly, unless s 70(2) applies, the appeal must succeed with respect to the items affixed to land the subject of the WMC mining tenements.

210 That is a conclusion based upon consideration of the rights conferred by a mining lease. It is not, and could not be, a conclusion concerning the characterisation of general purpose leases which confer different rights and obligations. As McLure JA said in the Western Australian Court of Appeal ((2009) 40 WAR 344) at [182]:

> A mining lease, general purpose lease (GPL) and miscellaneous licence are separate and distinct statutory interests under the *Mining Act*. They differ in nature and

content.

211 For these reasons we are not satisfied that the decision in *TEC Desert* precludes us from deciding that each general purpose lease here is a lease of land for the purposes of s 855-20(a).

SEVENTH ISSUE: VALUATION

212 As the Full Court of this Court observed in *RCF III* at [49], the "principal asset test" in s 855-30(1) expressly requires identification of two figures: (1) "the sum of the market values of the test entity's TARP assets"; and (2) "the sum of the market values of the test entity's non-TARP assets".

213 The expert valuation evidence was directed to two issues: first, the TARP assets of Talison Lithium; and, secondly, the market value of plant and equipment.

214 The joint expert report (**JER**) of Mr Pendergast and Mr Hine (RCF IV and RCF V's experts) and Mr Samuel (the Commissioner's expert) addressed the first issue. Mr Hine was instructed to provide a "referenced and sourced expert report establishing a methodology for determining the value of the resource at the 'Valuation Point' that being immediately after the resource has been extracted and severed from the ground": JER at [2.3]. Mr Pendergast applied Mr Hine's methodology. Mr Pendergast was instructed to assume that once the minerals were extracted and severed from the ground they became the property of the miner and were chattels and that only the mining leases were a "mining, quarrying or prospecting right". He was asked to value on two bases: Case 1 – that the leases continued for the full length of the life of the mine; Case 2 – that the leases continued only until the end of the current term, in 2028. Mr Samuel's competing approach was described as the "market approach". He was instructed to assume that the mining leases, the general purpose leases and the miscellaneous licence were TARP: JER at [2.9].

215 A central issue dividing Mr Samuel and RCF's experts was the use by Mr Pendergast of what was described as a "netback method", propounded by Mr Hine. This method was used to determine the value of ore at a point before its further processing. The further processing was conducted for the purpose, amongst other things, of extracting the desired product.

216 The primary judge preferred RCF's approach. His Honour explained at J[118]:

> It is not necessary to consider in detail all of the differences between Mr Pendergast and Mr Samuel, or those between Mr Samuel and Mr Hine. For present purposes it is

> sufficient to make some general observations as to why the expert evidence of Mr Pendergast and Mr Hine was preferred to that of Mr Samuel. The earlier conclusion that the general purpose leases and the miscellaneous licence did not come within the definition of "mining, quarrying or prospecting right" required their exclusion in the calculation of the value of the mining leases contrary to the approach taken by Mr Samuel upon instruction. Mr Samuel's valuation effectively included the value of the processing and production operations after the point at which the minerals were extracted and had become the property of Talison Lithium. He thereby included that which in Mr Pendergast's terminology was the value of the downstream operations with the result of an overstatement of the value of the assets constituting the taxable Australian real property for the purposes of Division 855 …

217 It is useful to understand in a little more detail the competing methodologies.

218 Mr Samuel's approach was to commence with the purchase price paid by Windfield Holdings Pty Limited for the shares in Talison Lithium, that being a market transaction which coincided with the valuation date. He then allocated the value so ascertained across Talison Lithium's assets, both tangible and intangible. The assets of Talison Lithium other than the mining leases had readily ascertainable values about which there was either no dispute or very narrow dispute – see: JER at [7.39]. Goodwill was of little significance, Mr Pendergast concluding there was goodwill of $8.328 million and Mr Samuel concluding there was none. Mr Samuel concluded that the residue of the value, after allocation to the tangible and intangible assets, should fall to the mining leases. Those were the assets which drove Talison Lithium's cash flows. A not dissimilar approach was accepted by Sundberg J in *Orica Ltd v Federal Commissioner of Taxation* (2010) 78 ATR 710, involving allocation of residual value to a Distribution Agreement.

219 The "netback method" was more complicated. As applied by RCF's experts, it involved the following steps:

(1) First, an overall value for Talison Lithium's Greenbushes Lithium Project of $712.369 million was identified – see: JER at [7.3]. This was calculated by using Talison Lithium's life of mine (**LOM**) model and a discounted cashflow (**DCF**) approach. This amount was also referred to as the value of the "Greenbushes Lithium Operations".

(2) Secondly, Talison Lithium's operations were divided into two "notional distinct and separate" entities:

  (a) an **Upstream Operator** comprising the assets and activities "prior to the resource being extracted and severed from the ground" (operations relating to drill and blasting (but nothing beyond) were considered "upstream" operations) **(Valuation Point)** – see: JER at [8.11]; and

(b) a **Downstream Operator** comprising the assets and activities "immediately post the resource being extracted and severed from the ground" – see: JER at [8.10].

(3) Thirdly, a "long term contract" was hypothesized between the Upstream Operator and Downstream Operator according to which the latter charged the former for its services – see: JER at [8.13]. It was assumed that the contract dated back to when operations commenced in 1996: T345.23-27.

(4) Fourthly, a "netback charge" was identified. This was calculated on assumptions which included:

(a) first, that the Downstream Operator would require a return on and of the capital invested in its assets of 17.7% of their "replacement with new" value (RWN value); and

(b) secondly, that the Downstream Operator would require a return of its internal operating costs plus a mark-up of 7.4% – see: JER [7.6] and [8.13].

(5) Fifthly, the LOM model, using a DCF approach, was adjusted to include the netback charge to identify a "Greenbushes Upstream Value" – see: JER at [7.7].

(6) Sixthly, from the "Greenbushes Upstream Value" (plus "resources") was deducted the value of:

(a) "upstream plant and equipment"; and

(b) the value of mining information

to identify a value of Greenbushes mining leases – see: JER at [7.8].

(7) Seventhly, a "VBML Intangible" of $117.871 million was calculated. The mining leases expired in 2028. The "VBML Intangible" represented the net present value of the forecast cash flows beyond 2028 (plus resources) – see JER at [7.12].

(8) Eighthly, a "Downstream Residual" of $70.738 million was calculated by taking the overall value of the Greenbushes Lithium Operations (plus "resources") and subtracting the value of:

(a) the mining leases identified at step 6;

(b) a "VBML Intangible" identified at step 7;

(c) mining information;

(d) Talison Lithium's other assets ("property, plant and equipment" and "inventories") – see: JER at [7.10].

(9) Finally, the "Upstream Value" and "Downstream Value" were calculated:

(a) the "Upstream Value" was the sum of the values of the mining lease (calculated at step 6), the mining information and "upstream" plant and equipment;

(b) the "Downstream Value" was the sum of "downstream" property plant and equipment, inventories, the "VBML Intangible" and the "Downstream Residual" – see: JER at [7.13].

220 On "Case 2" – which, as mentioned, valued on the basis of the mining leases expiring in 2028 – the application of the "netback method" resulted in greater than 50% of the value of the "Greenbushes Lithium Operations" being attributed to "Downstream Value". It was the VBML Intangible which drove this result because it took $117.871 million away from the mining leases (which were "upstream") and moved that value to "Downstream Value", to an asset (the VBML Intangible) which was not in fact an asset – see: JER at [7.14].

221 The methodology set out above was inapt to determine the value of the assets in the present case because of the conclusion that we have earlier reached that the value of the mining leases lay beyond the right merely to extract minerals and that, irrespective of that, the general purpose leases were TARP. It was also flawed because post "Valuation Point" processing was necessary to extract the lithium concentrate from the ore – see: J[92]–[93]. Accordingly, the hypothetical and rigid divide in operations was artificial.

222 There are other difficulties with the methodology described above in its application to the statutory task. Before turning to them, it is perhaps useful to say something more general about the "netback method".

223 The method was considered by Finkelstein J in ***Bob-Jane T-Marts*** *v Federal Commissioner of Taxation* (1999) 42 ATR 43. The question in that case to which the issue would have been relevant (if it had been pressed) was the ascertainment of the notional wholesale price for which the taxpayer could have sold its tyres in circumstances where the retail price was known. His Honour said at [91]–[93]:

> Whilst the Commissioner did not press his third proposed declaration, namely that

the fair market wholesale value of the goods is the retail sale price (inclusive of sales tax) less the commission paid to the franchise agent, I should say something about that approach.

I am aware of cases where the market value of a commodity in a particular state or condition has been determined by deducting certain costs and expenses from the sale price of that commodity. The issue has arisen in the United States in respect of oil and gas leases. Such leases often contain a royalty clause requiring the payment of a royalty calculated as a percentage of the market value of the oil and gas produced. Difficulties arise when the oil and gas is not marketable. For example, it is often the case that gas that is produced is "sour", that is it contains hydrogen sulphide, and that the oil that is recovered is unstabilised. It is difficult to determine the market value of sour gas and unstabilised oil because there is usually no market for such products. One method of determining the market value of sour gas and unstabilised oil is the net back method. This matter was discussed in *Piney Woods Country Life School v Shell Oil Co*(1984) 726 F2d 225 (cert denied 471 US 1005 (1985)) a decision of the 5th Circuit of the United States Court of Appeals. As to the net back method the court said (at 238):

> "A number of courts have struggled with the question of how to prove market value. The only general rule that emerges from these cases is that the method of proof varies with the facts of each particular case. In determining market value at the well, the point is to determine the price a reasonable buyer would have paid for the gas at the well when produced. Comparable sales of gas at other wells may be used to do this. Another method is to use sales of processed gas and deduct processing costs. Yet another relevant measure is the one proposed by Shell, the actual sale price of the gas less costs. 'This is the least desirable method of determining market price', *Montana Power*, 586 P2d at 303-04, but its persuasiveness is a matter for the factfinder. (Citations omitted.)"

See also *Freeland v Sun Oil Co* (5th Cir 1960) 277 F2d 154 (cert denied 364 US 826 (1960)) where the court said (at 157, 159):

> "In determining the market value of such gas [sour gas] at the well where there is no established criteria of a market, the Louisiana approach, which is binding on us, is to consider the end product of the extraction process as a factor. But it is a factor in reconstructing a market value at a place where in fact there was no, or little, market and consequently an appropriate deduction must be made.
>
> ...
>
> To put it another way: in the analytical process of reconstructing a market value where none otherwise exists with sufficient definiteness, all increases in the ultimate sales value attributable to the expenses incurred in transporting and processing the commodity must be deducted."

These cases suggest that the net back method of valuation is a method of last resort. This is no doubt correct when the question to be determined is what is the objective market value of a commodity. But that is not the question in this case. Here the question is at what notional wholesale price could the taxpayer have sold its tyres in circumstances where the retail price is known. On one view, in order to arrive at a wholesale price the only matter that must be determined is the retail cost (including the retail profit) of selling the goods. If the retail cost is deducted from the retail price the figure arrived at should approximate the wholesale value of the goods. Thus, if the fact was that franchise agents only carried out functions of a retail nature it is

> certainly arguable that the difference between the actual price and the commission is the wholesale value of the tyres. It will be remembered that the rate of commission was struck by Bob Jane to be an approximation of the costs incurred by a franchise agent plus a reasonable rate of return. Mr Ryding said that as a general rule a franchise agent requires a commission of C% to break even (that is to recover his direct and indirect costs) and that the commission that is paid to them is around 1.2C%; the additional 0.2C% being paid to enable a franchise agent "to make a reasonable profit".

224 In Australia, the method has been used to ascertain the price of a commodity in a particular state or condition for the purpose, for example, of calculating a royalty. In *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 16)* [2017] WASC 340 it was used for determining the FOB price of iron ore fines for the purpose of calculating a royalty. In *Oil Basins Ltd v BHP Petroleum Pty Ltd* (unreported, Supreme Court of Victoria, Kaye, Fullagar and Hampel JJ, 27 May 1988) it was used in the context of a royalty for hydrocarbons. Finkelstein J in *Bob-Jane T-Marts*, although describing the method as one of last resort, was "quite attracted" to applying it to determine the wholesale value of the tyres in the case before him; however, his Honour did not apply it because both parties opposed that course: at [96]. None of the experts in the present case suggested the method had been used previously to determine the market value of mining leases. None of that means it was necessarily inappropriate as a method in the present case. However, for the reasons outlined earlier and the further reasons provided below, the actual methodology employed in this case was inapt to provide a reliable answer to the value of the mining leases or the market value of the TARP and non-TARP assets.

225 Returning to the application by Mr Pendergast of the methodology propounded by Mr Hine to the task under s 855-30 in the present case, the principal difficulties are these:

(1) The methodology revolved around the determination of a hypothetical sale price for ore, which was not the end product which Talison Lithium had the object of winning, determined by notionally separating the "test entity" into two hypothetical operators and identifying what a hypothetical "Downstream Operator" could pay for the ore if it were to charge a mark-up on costs and achieve certain returns on assets (assumed to be wholly for the purpose of the downstream operations). There was no warrant to create fictional entities assumed to be dealing with each other in this fashion for the purpose of valuing a product which was not the end product which it was the purpose of Talison Lithium to obtain.

(2) The methodology relied upon fictional assets and required allocation of value to those fictional assets. Section 855-30 directs attention to the value of actual assets not fictional assets. The "Downstream Residual" of $70.738 million was not an asset at all to which value could be ascribed. It was a valuation device or an element in a process of reasoning or application of a methodology. The "VBML Intangible" of $117.871 million was also not an actual asset. It was these fictional assets which allowed RCF IV and RCF V to achieve the result that non-TARP assets had a greater value than TARP assets.

226 Having regard to those matters, the methodology employed in this case, more fully described at [219] above, could at best only accidentally happen upon the amount which a willing but not anxious purchaser might be prepared to pay for the various assets of the whole of the test entity in the context of a simultaneous sale of all of the test entity's assets to a single purchaser – as to which, see: *Spencer v Commonwealth* (1907) 5 CLR 418; *RCF III* at [54].

227 There is one further difficulty which should be mentioned. The primary judge accepted that, because the leases expired in 2028, the VBML Intangible (which represented residual value) could not be attributed to the mining leases: J[122]. However, as Mr Pendergast conceded, the VBML Intangible necessarily assumed that there would be mining after 2028. Mr Pendergast accepted that it was a "standard assumption" in valuing mining operations that renewals would be obtained for the period of the LOM model. He also accepted – consistently with common sense – that, if mining continued after 2028, it was appropriate to assign the value of the VBML Intangible to some right to allow Talison Lithium to mine. Further, as the primary judge recognised, it was the mining leases themselves which might be renewed and which made possible the generation of cash flows beyond 2028. There was no other asset to which those cash flows could be attributed. The fictional VBML Intangible was not properly attributable to "Downstream Operations" and was clearly attributable to a right to mine and thus TARP.

228 There were a number of other valuation issues which it is not necessary to pursue in light of the foregoing conclusions with respect to valuation and our conclusions on the other issues in the proceedings.

CONCLUSION

229 In our view, the appeal should be allowed. The orders of the primary judge should be set aside and, instead, there should be an order affirming the objection decision and dismissing the proceedings with costs.

I certify that the preceding two hundred and twenty-nine (229) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Besanko, Middleton, Steward and Thawley.

Associate:

Dated: 2 April 2019

REASONS FOR JUDGMENT

DAVIES J:

230 I have had the advantage of reading a draft of the joint judgment of Besanko, Middleton, Steward and Thawley JJ and in these reasons adopt the same abbreviations. I am in general agreement with their Honours' reasons on issues one, three, four, six (but for the question as to whether the general purpose leases were leases of land) and seven. On issue five, I have reached the view that a corporate limited partnership, as distinct from the partners themselves, can rely on the DTA. I express no view on issue two or issue six in relation to whether the general purpose leases were leases of land as neither of these issues were the subject of argument.

231 In relation to issue one, I wish to add a reference to *Rose v Commissioner of Taxation* (1951) 84 CLR 118 ("***Rose***"). In *Rose*, the High Court held that the provisions applicable to partnerships under Div 5 of the ITAA 1936 did not displace the general law position that partnerships are not separate entities distinct from the partners. The Court stated at 124:

> The commissioner's case must therefore depend on making good the proposition that for the purpose of s. 36 a partnership is to be considered a separate entity distinct from the individuals who compose it, so that when the taxpayer vested what was his as an entirety in himself and his two sons as partners having co-ownership, he is to be considered for the purposes of s. 36 as having "disposed of" the property as an entirety in the assets to a distinct legal entity. A partnership is not a distinct legal entity according to English law. In Scots law a firm is a legal person distinct from the partners of whom it is composed. But in our law it is far otherwise with partnerships. "The members of these do not form a collective whole, distinct from the individuals composing it; nor are they collectively endowed with any capacity of acquiring rights or incurring obligations": *Lindley* on *Partnership*, 11th ed. (1950), vol. 1, ch. 1, s. 4. **If, therefore, a partnership is to be treated for the purpose of s. 36 as a distinct legal entity, it must be because of an assumption which the *Income Tax Assessment Act* requires, not because of the general law.** But an examination of that Act discloses no ground for construing it as requiring that such an assumption should be made. By s. 6 the word "partnership" is defined to mean an association of persons carrying on business as partners or in the receipt of income jointly but not to include a company. Division 5 of Part III, which deals with partnerships, is based upon the view that the collective income earned by the partnership belongs according to their shares to the partners regardless of its liberation from the funds of the partnership, that is, its actual distribution. There appears to be no foundation for importing into s. 36 a conception of a partnership varying from that adopted by the general law.
>
> (Emphasis added.)

In contrast, Div 5A of the ITAA 1936 operates to displace the general law. Whereas Div 5 treats a partnership "as if" it were a taxpayer only for the purposes of calculating the amounts to be included in the individual returns of the partners, the treatment of corporate limited partnerships under Div 5A is different. Subject to s 94V, Div 5A displaces the general law by treating corporate limited partnerships as if they were companies for income tax purposes, including for purposes of assessment and objection and review/appeal rights under Part IVC of the TAA 1953, not as ordinary partnerships under the general law: s 94H, s 94J and the definition of "income tax law" in s 94B. The decision in *Rose* does not compel a contrary answer.

232 In relation to the fifth issue, I am of the view that Art 4(1)(b)(iii) of the DTA has the effect that a partnership, as distinct from its United States resident partners, is treated as a resident of the United States for the purposes of the application of the DTA if, but only "to the extent that", its income is subject to United States tax in the hands of its United States resident partners or is exempt from United States tax in their hands for reasons other than that such partners are not United States residents.

233 Article 4(1)(b) of the DTA relevantly defines "residence" for the purposes of the DTA as follows:

> **Residence**
>
> (1) For the purposes of this Convention:
>
> ...
>
> (b) a person is a resident of the United States if the person is:
>
> (i) a United States corporation;
>
> (ii) a United States citizen, other than a United States citizen who is a resident of a State other than Australia for the purposes of a double tax agreement between that State and Australia; or
>
> (iii) any other person (except a corporation or unincorporated entity treated as a corporation for United States tax purposes) resident in the United States for purposes of its tax, provided that, in relation to any income derived by a partnership, an estate of a deceased individual or a trust, such person shall not be treated as a resident of the United States except to the extent that the income is subject to United States tax as the income of a resident, either in its hands or in the hands of a partner or beneficiary, or, if that income is exempt from United States tax, is exempt other than because such person, partner or beneficiary is not a United States person according to United States law relating to United States tax.

234 The word "person" for the purposes of Art 4(1)(b)(iii) includes a "partnership": see Art 3(1)(a) which provides:

> For the purposes of this Convention, unless the context otherwise requires:
>
> (a) the term "person" includes an individual, an estate of a deceased individual, a trust, a partnership, a company and any other body of persons; ...

235 On the construction of those provisions, the primary judge held Art 3(1)(a) did "not create a category of taxable entities which is separate from the partners or agents through which the partners carry on an enterprise". His Honour reasoned at [59] and [62]–[64] that:

> Article 4 does not provide, and does not warrant a construction, that a partnership should be treated as a separate person with a separate residence. Article 3(1)(a) provides that "person" includes a partnership but the words "any other person" when used in Article 4(1)(b)(iii) do not create a category of taxable entities which is separate from the partners or agents through which the partners carry on an enterprise. The terms of Article 4(1)(b)(iii) do not suggest that a partnership was intended to be included as a person separate from, and in addition to, the partners who comprised it, and the proviso in Article 4(1)(b)(iii) would, in any event, exempt partnerships from the category of persons who are resident in the United States. That is because the article expressly excludes "such person" (that is, "a corporation or unincorporated entity treated as a corporation for United States tax purposes") who "is not a United States person according to United States law relating to United States tax".
>
> ...
>
> The definition of "person" in Article 3(1)(a) ensures that the provisions apply to the activities carried on by partners in a partnership but does not require that the words "any other person" in Article 4(1)(b)[iii] be understood to give to the partnership a residence separate from the partners. That construction is supported by the proviso in Article 4(1)(b)(iii) which makes clear that persons resident in the United States for the purposes of its tax are encompassed within the phrase "any other person" to the extent that such a person derives income through a partnership. The proviso expressly excludes "such persons" from the class of United States residents except to the extent that the income is subject to tax in the United States as income of a resident in the manner specified. The reference to "such person" in the proviso is to a category of person dealt with by the whole of Article 4(1)(b)(iii), which refers to the "any other person" appearing in the beginning of that clause....
>
> This construction is supported also by a United States Treasury Department Technical Explanation of the Convention. Article 31 of the *Vienna Convention on the Law of Treaties* requires a treaty to be interpreted in "good faith in accordance with the ordinary meaning to be given to the terms of the Convention in their context and in the light of its object and purpose". Recourse may be had to supplementary means of interpretation to confirm the meaning resulting from the application of Article 31 or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable: see *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338, 344, 349-350, 356-7; *Federal Commissioner of Taxation v SNF (Australia) Pty Ltd* (2011) 193 FCR 149, [113]-[120]. The United States Treasury Department Technical Explanation of the Convention explained the residence provision in Article 4(b) as follows:

> Subparagraph (b) provides that a resident of the United States means a US corporation and any other person resident in the United States for the purposes of its tax. However, a partnership, estate or trust is a resident of the United States for purposes of the Convention only to the extent that the income it derives either is subject to US tax as the income of a resident (either at the level of the entity or in the hands of a partner or beneficiary), or is exempt from US tax for reasons other than the recipient's not being a US person.

The limitation of residency in this technical explanation to a partnership confines its application to the extent that the income derived is subject to US tax. That would be so when, as the explanation contemplates, it is taxable "in the hands of a partner".

A general approach in the United States Convention of treating a partnership as fiscally transparent may also be seen in Article 7(9) which was introduced by protocol in 2001. Article 7(9) provides:

> (9) Where:
>
> (a) a resident of one of the Contracting States is beneficially entitled, whether directly or through one or more interposed fiscally transparent entities, to a share of the business profits of an enterprise carried on in the other Contracting State by the fiscally transparent entity (or, in the case of a trust, by the trustee of the trust estate); and
>
> (b) in relation to that enterprise, that fiscally transparent entity (or trustee) would, in accordance with the principles of Article 5 (Permanent Establishment), have a permanent establishment in that other State, that enterprise carried on by that fiscally transparent entity (or trustee) shall be deemed to be a business carried on in the other State by that resident through a permanent establishment situated in that other State and that share of business profits shall be attributed to that permanent establishment.

This Article is concerned with residence where a business is carried on through a permanent establishment and, therefore, does not directly deal with the issue in dispute between the Commissioner and the partners of RCF IV and RCF V. It proceeds on the general assumption, however, that a partnership is to be treated as a fiscally transparent entity in the sense that the residence that would be that of a partnership if it were a separate entity is deemed to be that of the partners: see also C. Garbarino *Judicial Interpretation of Tax Treaties,* [2.14].

236 Neither party sought to argue that the primary judge was wrong to conclude that Art 4(1)(b)(iii) did not have application to RCF IV and RCF V. However, it seems to me that it is open to construe Art 4(1)(b)(iii) differently, albeit I acknowledge that I have reached that view without the benefit of considered argument by the parties. In my view, though framed as a proviso, the proviso, properly understood, does not operate as a qualification to when a person is a resident of the United States for the purposes of its tax but, rather, the purpose of the proviso is to identify when a partnership, estate of a deceased individual or a trust, each of

which is a "person" for the purposes of the DTA, is to be "treated as a resident" of the United States for the purposes of the DTA.

237 The proviso applies only "in relation to any income derived by a partnership, an estate of a deceased individual or a trust". In that context, the reference to "such person" should be understood not as a reference back to "any other person" in the opening words of Art 4(1)(b)(iii) but as a reference to the partnership, estate of a deceased individual or trust in question. This is made clear by the concluding words of Art 4(1)(b)(iii) where "such person" is plainly a reference to the partnership, estate of a deceased individual or trust in question. Furthermore, whereas "any other person" must be a resident of the United States "for the purposes of its tax" to meet the residency requirement, there is no requirement that a partnership, estate of a deceased individual or trust must also be a resident of the United States "for the purposes of its tax". Rather, the effect of Art 4(1)(b)(iii) is simply to treat partnerships, estates of deceased individuals or trusts as "resident[s] of the United States" if, and only "to the extent that", the income derived by "such persons" is subject to tax in the United States in the hands of United States resident partners or beneficiaries or, if the income is exempt from United States tax, it is exempt "other than" because "such person, partner or beneficiary is not a United States person according to United States law relating to United States tax". The text indicates that the Article does not disqualify a partnership, estate of a deceased individual or trust from residency simply because United States law does not recognise "such persons" for United States tax purposes. Further, although the proviso is expressed negatively – "shall not be treated as a resident of the United States" – when read as a whole, the proviso makes sense if it is directed at identifying when a partnership, estate of a deceased individual or trust is to be treated as a resident for the purposes of the DTA. There is an obvious tension if the proviso is construed as a proviso to the residency of "any other persons" who otherwise would meet the requirement of being "resident in the United States for purposes of its tax", given that partnerships are "persons" as defined for the purposes of the DTA but are "look through" entities for the purposes of United States tax. The proviso would otherwise have no application to a partnership (at the least) which, as a "look through" entities for the purposes of United States tax, has no tax residency status.

238 On this construction, although under United States tax law a partnership is a fiscally transparent entity, the proviso in Art 4(1)(b)(iii) would attribute a residency status to a partnership separate from its partners for the purposes of the application of the DTA where income of the partnership is taxable in the hands of the United States partners (or if exempt

from United States tax, it is exempt other than because such partners are not United States residents). On this construction, it is the residency of the United States partners for United States tax law purposes which would dictate whether a partnership is a resident of the United States for the purposes of the DTA. On this construction also, there is no separate and additional requirement that partnerships be recognised by the United States as a resident of the United States. Rather, partners who are United States residents and taxable in the United States on the partnership income may claim through the partnership to get the benefit of the DTA, whether or not the partnership is a United States domestic partnership.

239 Article 31 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, [1974] ATS 2 (entered into force 27 January 1980) requires a treaty to be interpreted in "good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". In my view, this construction neither strains the language of Art 4(1)(b)(iii) nor is it inconsistent with the context, object and purpose of the DTA. It would mean that although Australia and the United States treat corporate limited partnerships differently for tax purposes, for DTA purposes the United States partners of a corporate limited partnership (which is fiscally transparent for United States tax purposes) can nonetheless still get the benefit of the DTA through the corporate limited partnership where Australia taxes the corporate limited partnership as the relevant taxpayer. In my view, such a construction is both open on the language and consistent with the purpose and object of the DTA as it removes the tension caused by recognising a partnership as a "person" capable of having residency for the purposes of the DTA but which, for United States tax purposes, is treated as fiscally transparent. It also gives a cohesiveness to the application of the DTA between the contracting states by applying the DTA to the corporate limited partnership as a "person" as defined by Art 3(1) and, thus, within the scope of the DTA. I do not read the United States Treasury Department Technical Explanation of the Convention (extracted at [63] of the judgment below) as against this construction. Thus, in my view, RCF IV and RCF V could rely on the DTA to the extent that the partnership income is taxable in the hands of its United States resident partners.

240 It follows that I disagree with their Honours at [78] of these reasons and, with respect, would not follow the decision of Edmonds J in *Resource Capital Fund III LP v Commissioner of Taxation* (2013) 95 ATR 504 that the definition of "resident" in Art 4(1)(b)(iii) imposes a dual requirement to be satisfied, namely that the partnership was a resident of the United States for tax purposes and the income of the partnership had to be subject to United States

tax. Par [56] records the Commissioner's submission in *Resource Capital Fund III v Commissioner of Taxation* (2013) 95 ATR 504 that:

> Art 4(1)(b)(iii) of the [DTA] should not be read as literally requiring that partnerships must be recognised by the United States as a resident separate from the requirement that income of the partnership must be taxed in the hands of a United States resident partner, as such a requirement would defeat the clear intention of the [DTA] to recognise partnerships as being capable of being "residents" for treaty purposes. The reason for this, according to the Commissioner, is because there is no principle of United States tax law that a partnership's residence is based on where it is organised.

His Honour rejected that submission, reasoning that it was consistent with the position under the 1953 DTA between Australia and the United States that only a partnership "created or organised in or under the laws of the United States qualified as a resident of the United States for the purposes of the 1953 [DTA]". His Honour stated that "[i]mplicit in that was that such a partnership was resident in the United States for United States tax purposes and a foreign partnership, such as [RCF], was not". At [43], his Honour said:

> Under art II(1)(g) of the 1953 [DTA], a partnership created or organised in or under the laws of the United States (a United States domestic partnership) was a resident of the United States for the purposes of the 1953 [DTA] whether or not the partners were liable to United States tax on the income of the partnership. If the partners in the United States domestic partnership were foreign companies (that is, incorporated outside the United States) and the partnership income was not effectively connected with the conduct of a trade or business carried on in the United States, neither the partnership (because it was fiscally transparent) nor the partners would be liable to United States tax on the partnership income, but because the partnership was a resident of the United States for the purposes of the 1953 [DTA], it was entitled to the benefits of the 1953 [DTA] vis-à-vis Australian source income. **The negotiators of the [DTA] were conscious of this anomaly when drafting art 4(1)(b)(iii);** thus, under the [DTA], even a United States domestic partnership will only be a resident of the United States for the purposes of the [DTA] to the extent that the income of the partnership is subject to United States tax in the hands of a partner or, if that income is exempt from United States tax, is exempt other than because such partner is not a United States person according to United States law relating to United States tax.
>
> (Emphasis added.)

241 The Commissioner on appeal did not contest the primary judge's finding that Resource Capital Fund III was not a resident of the United States for the purposes of the DTA: *RCF III* at [18]. Accordingly this construction point was not considered by the Full Court.

242 Researches have not uncovered any extrinsic materials explaining the reason for drafting Art 4(1)(b)(iii) in the form in which it takes or, more particularly, that it was intended by Art 4(1)(b)(iii) both to retain the requirement that a partnership be a United States resident as well as to impose a further and dual requirement that there be United States resident partners liable to tax on the income derived by the partnership. In the circumstances, it seems to me

that the Article should be construed consistently with the meaning conveyed by the text of that Article.

I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Davies.

Associate:

Dated: 2 April 2019