

TR 2005/7 - Income tax: the taxation implications of 'partnership salary' agreements

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Taxation Ruling

Income tax: the taxation implications of 'partnership salary' agreements

Contents	Para
What this Ruling is about	1
Date of effect	5
Previous Rulings	6
Ruling	7
Explanation	11
Alternative views	27
Examples	32
Detailed contents list	35

Preamble

*The number, subject heading, **What this Ruling is about** (including **Class of person/arrangement** section), **Date of effect**, and **Ruling** parts of this document are a 'public ruling' for the purposes of **Part IVAAA of the Taxation Administration Act 1953** and are legally binding on the Commissioner. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a 'public ruling' and how it is binding on the Commissioner.*

What this Ruling is about

1. This Ruling considers the assessability to a partner and the deductibility to a partnership of what is commonly referred to as 'partners' salary' or 'partnership salary' drawn by a partner, whether or not for personal services provided by the partner.
2. For the purposes of this ruling 'partnership salary' describes any form of remuneration drawn by a partner from the partnership funds for acting in the partnership business, as agreed among the partners, where the "salaried" partner receives a fixed part of the profits of the partnership before the remaining part falls to be divided among the partners in the appropriate proportions. Although all partners have a right to work in and manage the partnership business, the partners may make arrangements amongst themselves concerning their relative contributions and monetary rewards. As part of these arrangements, it may be agreed that those partners that make a particular contribution to the partnership business are to be entitled to additional remuneration from the partnership funds, which may be called salary, wages, or specified as a fixed sum payable over a period of time for work performed by the partner.
3. The Ruling also considers the effect of a 'partnership salary' agreement on the interests of each of the partners in the net income or partnership loss of the partnership for income tax purposes.

Class of person/arrangement

4. This Ruling only applies where the recipient of the 'partnership salary' is a member of a partnership in the ordinary sense, that is as a member of an association of persons carrying on business as partners. It does not apply to persons who are partners for income tax purposes only because they are members of an association of persons in receipt of income jointly. Whether or not the recipient is a member of an association of persons carrying on business as partners is a question of fact. The factors taken into account in determining whether persons are carrying on business as partners in a given year of income are discussed in Taxation Ruling TR 94/8.

Date of effect

5. This Ruling applies both before and after its date of issue. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Previous Rulings

6. This Ruling replaces Taxation Ruling IT 2218 on 'Partners' Salaries'. Taxation Ruling IT 2218 was withdrawn on 22 May 2002.

Ruling

'Partnership salary' is not deductible to the partnership

7. A 'partnership salary' is not truly a salary, nor is it an expense of the partnership, but instead is a distribution of partnership profits to the recipient partner. Thus, the payment of a 'partnership salary' to a partner, whether or not for personal services provided by the partner, is not taken into account as an allowable deduction under section 8-1 of the *Income Tax Assessment Act 1997* (the ITAA 1997) in calculating the net income or partnership loss of the partnership under section 90 of the *Income Tax Assessment Act 1936* (the ITAA 1936). Therefore, the payment of a 'partnership salary' cannot result in or increase a partnership loss.

Assessability of the 'partnership salary' to the partner

8. An agreement to allow a 'partnership salary' to be drawn varies the recipient partners' interest in the partnership profits and losses. It is taken into account in determining that partner's interest in the net income of the partnership under subsection 92(1) of the ITAA 1936. The recipient partners' interest in the net income will include the partnership salary to the extent that there is available net income.

9. If in a particular income year the 'partnership salary' drawn by a partner exceeds the recipient partner's interest in the available net income of the partnership, the excess advanced to the partner is not, at that time, assessable income of the partner under subsection 92(1) of the ITAA 1936. Nor is an advance of future profits assessable under section 6-5 of the ITAA 1997. An advance of future profits is assessable to the partner in a future income year when sufficient profits are available the partners' interest is accounted for under subsection 92(1) of the ITAA 1936 in determining his or her interest in the net income of the partnership in that year.

Individual interests of the partners in the partnership net income

10. An agreement by the partners of a partnership to allow a partner to draw a 'partnership salary' is a contractual agreement among the partners to vary the interests of the partners in the partnership (and thus the partnership net income) between the partners. For such an agreement to be effective for tax purposes in an income year the agreement must be entered into before the end of that income year (*FCT v. Galland* (1986) 162 CLR 408; (1986) 18 ATR 33; (1986) 86 ATC 4885, *AAT Case 5303* (1989) 20 ATR 3905; *Case W79* 89 ATC 705 (*Galland*)).

Explanation

The assessment of income derived from a partnership

11. Income derived from a partnership is generally not assessed to the partners under the ordinary income provisions, such as section 6-5 of the ITAA 1997. Rather, Division 5 of Part III of the ITAA 1936 (Division 5) contains the assessing provisions in respect of partnership income.

12. The general structure of Division 5 is that the net income or partnership loss of the partnership is determined under section 90 of the ITAA 1936. Having then determined whether the partnership has a net income or partnership loss for a particular income year, section 92 of the ITAA 1936 then requires that a partner either:

- include in his or her assessable income so much of his or her individual interest in the net income of the partnership (subsection 92(1)); or

- claim as a deduction so much of his or her share of the partnership loss (subsection 92(2)).

13. Consequently, it is not possible for one partner to have an amount of assessable income under subsection 92(1) and another partner to have a loss under subsection 92(2).

The legal nature of 'partnership salary' agreements

14. Pursuant to the various Partnership Acts of the States and Territories no partner is entitled to remuneration for acting in the partnership business;¹ however this provision may be varied in partnership agreements. The partnership agreement often contains a clause to the effect that a 'salary', 'wage' or a fixed amount may be drawn by a partner from the partnership funds for work carried out by that partner in the partnership business. The agreement may or may not specify that such amounts are drawn in anticipation of partnership profits or payable out of the profits of the partnership. However, in the absence of any contrary specification it is to be assumed that such amounts are drawn in anticipation of partnership profits or payable out of profits of the partnership. (This Ruling does not deal with the rare cases where a contrary specification is made).

15. A partnership is not a legal entity with its own personality and existence separate and distinct from the partners (*Rose v. FC of T* (1951) 84 CLR 118) and the ITAA 1936 does not modify this principle for the purposes of the income tax law. A partner is an owner of the partnership business with his or her co-partners, and is entitled, with his or her partners, to an undivided share in all the assets of the business. The relations between the partners, including their share of the profits and assets of the business and the distributions and payments of funds, are agreed internally between the partners.

16. The courts have characterised agreements under which a 'partnership salary' is to be drawn by a partner from partnership funds as not creating a contract of employment or contract for the services of the partner, but rather as an agreement to vary the sharing of partnership profits between the partners (for example *Ellis v. Joseph Ellis & Co.* [1905] 1 KB 324, *MacKinlay (Inspector of Taxes) v. Arthur Young McClelland Moores & Co.* [1990] 2 AC 239 (*MacKinlay*)). An agreement to pay a 'partnership salary' to a partner for his work as a partner is an internal agreement as to how the partnership's funds will be applied as between the partners, and is enforceable on the taking of partnership accounts. A 'partnership salary' is a distribution of partnership funds to the partner, and does not have the character of an expense of the partnership (*MacKinlay*).

¹ Section 24(VI) of the *Partnership Act 1892 (NSW)*; section 28(6) of the *Partnership Act 1958 (Vic)*; section 27(6) of the *Partnership Act 1891 (Qld)*; section 24(VI) of the *Partnership Act 1891 (SA)*; section 34(6) of the *Partnership Act 1895 (WA)*; section 29(f) of the *Partnership Act 1891 (Tas)*; section 29(6) of the *Partnership Act 1963 (ACT)*.

17. The entitlement of a partner to a distribution of profits is merely a part of his fractional interest as a partner in the partnership profit; it is not severable from his interest as a partner (*FC of T v. Everett* (1980) 143 CLR 440; (1980) 10 ATR 608; (1980) 80 ATC 4076 at CLR 450; ATR 613; ATC 4081). The effect of an agreement to pay a 'partnership salary' is that the partner receives a fixed part of the profits of the partnership before the remaining part falls to be divided among the partners in the appropriate proportions. The amounts distributed to the partner are brought into account in computing that partner's interest in the profits or assets of the partnership. However, the 'partnership salary' is still regarded as constituting part of the profits of the partnership (*Watson v. Haggitt* [1928] AC 127, *MacKinlay*). In other words, the 'partnership salary' amounts drawn by the partner during the year before partnership accounts are taken and the partnership profit (or loss) ascertained are merely advances.

'Partnership salary' is not deductible to the partnership

18. As the 'partnership salary' payment is a distribution or drawing in respect of partnership profits it cannot be characterised as an expense of the business and therefore is not taken into account as an allowable deduction under section 8-1 of the ITAA 1997 in calculating the net income or partnership loss of the partnership under section 90 of the ITAA 1936 ((1952) 3 CTBR(NS) Case 11; 3 TBRD Case C22 142, (1966) CTBR(NS) Case 110; 16 TBRD Case R59 271, (1968) 14 CTBR(NS) Case 59; 18 TBRD Case T69 353, (1985) 28 CTBR(NS) Case 81; Case S75 85 ATC 544 and *Scott v. FC of T* (2002) 50 ATR 1235; 2002 ATC 2158). Therefore, the payment of 'partnership salary' to a partner cannot result in or contribute to a partnership loss for the purposes of section 90 of the ITAA 1936.

Assessability of the 'partnership salary' to the partner

19. Under subsection 92(1) of the ITAA 1936 the individual interest of a partner in the net income of the partnership is included in the assessable income of the partner. A partner's assessable income from a partnership is ordinarily derived at the end of the income year when the net income of the partnership is ascertained (*Galland*). Therefore derivation of income by a partner occurs independently of distributions to, or drawings by, the partners during the year, including 'partnership salary' amounts received by a partner.

20. However, although the 'partnership salary' amounts have no effect on the recipient partner's liability for tax under the partnership they are taken into account in determining the recipient partner's interest in the net income (or partnership loss) of the partnership at the end of the income year under section 92 of the ITAA 1936.

21. This means that where available partnership profits are sufficient, the distributions or drawings of 'partnership salary' increase that partner's share in the net income of the partnership before the remaining profits are divided among the other partners and are assessable to the partner under subsection 92(1) of the ITAA 1936 at the end of the income year (refer example 1).

22. However, there may be cases where partnership profits in a particular income year are not sufficient to cover the 'partnership salary'. Usually, 'partnership salary' is payable out of profits, and thus drawings of 'partnership salary' are made in advance or anticipation of future profits. The entitlement to 'partnership salary' affects the partners' interests in the profits in respect of more than one year. Thus, if partnership profits are not sufficient in one income year the 'partnership salary' may be met from profits of subsequent years (refer to example 2 and example 3).

23. The effect of this is that the excess distributions or drawings will be assessable to the recipient partner under subsection 92(1) of the ITAA 1936 in the future income year when profits are sufficient (and are debited against profits in that year). In the event that sufficient profits are not otherwise made by the partnership before retirement or the partnership dissolves, it is expected that the partner would be liable to repay them. Drawings, or otherwise repayable amounts, are not derived as income at the time of advance under section 6-5 of the ITAA 1936.

Individual interests of the partners in the net income

24. The various State Partnership Acts² provide that all partners share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the partnership. However, this can be varied by express or implied agreement between the partners.

25. An agreement to pay a 'partnership salary' to a partner takes effect as a contractual agreement among the partners to vary the distribution of partnership profits among the partners so that one partner receives an additional share of the profits. Accordingly, such an agreement, if effective, will vary any previous agreement as to the division of partnership profits.

² Section 24(l) of the *Partnership Act 1892 (NSW)*; section 28(1) of the *Partnership Act 1958 (Vic)*; section 27(1) of the *Partnership Act 1891 (Qld)*; section 24(l) of the *Partnership Act 1891 (SA)*; section 34(1) of the *Partnership Act 1895 (WA)*; section 29(a) of the *Partnership Act 1891 (Tas)*; section 29(1) of the *Partnership Act 1963 (ACT)*.

26. An agreement to pay a 'partnership salary' to a partner made after the end of the income year when the net income or partnership loss of the partnership is ascertained is not effective for tax purposes to alter what has been derived or incurred at the close of the income year. As discussed earlier at paragraph 19, a partner derives income from a partnership under section 92 at the end of the income year when the net income of the partnership is ascertained (*Galland*). An agreement made after this time cannot alter retrospectively the respective share of the partners in that income as ascertained (*AAT Case 5303* (1989) 20 ATR 3905; *Case W79 89 ATC 705*). The tax law does not require the agreement to be in writing. However, some kinds of agreement may be required by other laws to be in writing to be enforceable, and a written document is prima facie evidence that an agreement exists. Agreements can be in respect of a fixed or variable amount of 'partnership salary'.

Alternative views

27. A view has been put that the payment of 'partnership salary' to a partner may, in some circumstances, depending on the precise terms of the agreement, be characterised as an expense of the partnership. It is argued that the case law characterising 'partnership salary' as a distribution of profits has not taken account of the effect in State laws³ of provisions based on section 82 of the *Law of Property Act 1925* (UK). For example, section 72 of the *Conveyancing Act 1919* (NSW) overcomes the general law position that a person cannot enter into a contract with him or herself and another or others jointly by providing that such a contract will be 'construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone'.

28. In Australia these words have been interpreted by the courts as validating the actual agreement entered into by the parties (*Stewart v. Hawkins* (1960) SR (NSW) 104, *Browne v. Commissioner of State Revenue* (2002) 51 ATR 184; 2002 ATC 4872). Thus, the alternative view is that in some circumstances the 'partnership salary' agreement is able to be characterised as an agreement by the partnership to pay a sum of money for additional services rendered by the recipient partner.

³ Section 72 of the *Conveyancing Act 1919* (NSW); section 82 of the *Property Law Act 1958* (Vic); section 50 of the *Property Law Act 1974* (Qld); section 40 of the *Law of Property Act 1936* (SA); section 52 of the *Property Law Act 1969* (WA); section 62 of the *Conveyancing and Law of Property Act 1884* (Tas). All these provisions are based on section 82 of the *Law of Property Act 1925* (UK).

29. Accordingly, it is argued that if the partnership profits cover part of the 'partnership salary', then that much of the payment will be a partnership distribution to that partner under section 92 of the ITAA 1936 but the excess will be deductible under section 8-1 of the ITAA 1997 when calculating the net income or partnership loss of the partnership under section 90 of the ITAA 1936.

30. The Commissioner does not agree with this view. We think the better view is that 'partnership salary' agreements are valid as an agreement among all the partners and that no recourse to section 72 of the *Conveyancing Act 1919* (NSW) and its equivalents in other State jurisdictions is necessary or appropriate. In our view 'partnership salary' agreements are internal agreements and operate as an agreement among all the partners, not as an agreement between the partnership and a particular partner. Such agreements are enforceable by a winding up order on the taking of partnership accounts.

31. Furthermore, the validating provisions cannot change the character of the agreement; and thus cannot convert an agreement as to the distribution of funds between the partners into something else. 'Partnership salary' drawn by a partner for work as a partner is a matter which is between the partners and not an outgoing incurred by the partnership. Thus we do not agree that the excess over profits, as an amount of remuneration drawn by a partner for work as a partner, would be properly characterised as a working expense deductible under section 8-1 of the ITAA 1997.

Examples

Example 1

32. Anna and Robert formed a partnership under which it was agreed that they share the profits and losses of the partnership equally. The partnership agreement allowed the partners to draw a salary if the partners so agreed. It was agreed at the beginning of the income year that Anna would draw a salary of \$20,000, for managing the business, and that the balance of profits and losses would be shared equally. The 2003-2004 year's net profit after paying Anna's salary was \$35,000. Determination of the net income, for the purpose of completing the Statement of Distribution on the Partnership return, is as follows:

Partnership profit (after deducting salary)	\$35,000
Plus:	
Anna's salary	\$20,000
Net income	\$55,000

The net income is then distributed, in accordance with the partnership agreement, being 50%, 50%, as follows:

Anna:

Salary	\$20,000
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Plus interest in balance of net income:

50% of (55,000 - 20,000)	\$17,500
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Distribution	\$37,500
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Robert:

Interest in balance of net income:

50% of (55,000 - 20,000)	\$17,500
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Distribution	\$17,500
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Total distribution	\$55,000
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Example 2

33. Christine and Julia formed a partnership under which it was agreed that they share the profits and losses of the partnership equally. The partnership agreement provided that in addition to this Christine would be entitled to draw \$20,000 a year for managing the business. The 2003-2004 year's net (accounting) loss, after paying Christine's salary, was \$10,000. Determination of the net income, for the purpose of completing the Statement of Distribution on the Partnership return, is as follows:

Partnership net loss (after deducting salaries)	\$(10,000)
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Plus:

Christine's salary	\$20,000
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Net income	\$10,000
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The net income is then distributed, in accordance with the partnership agreement, being 50%, 50%, as follows:

Christine:

Salary:	\$10,000
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Interest in partnership net income:

50% of (\$10,000 - 10,000)	\$0
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Distribution	\$10,000
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Julia:

Interest in partnership net income:

50% of (\$10,000 - 10,000)	\$0
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Distribution	\$0
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Total distribution	\$10,000
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The \$20,000 was taken by Christine as drawings in advance of profits. Christine's drawings do not affect her liability to tax, other than to determine her individual interest in the net income and loss of the partnership under section 92 of the ITAA 1936.

The \$10,000 drawn in excess of available profits will be met from profits in future years and be assessable to Christine under subsection 92(1) of the ITAA 1936 in that future year when sufficient profits are available. If the partnership is wound up before this time, the \$10,000 excess is repayable by her and thus not assessable under subsection 92(1) of the ITAA or section 6-5 of the ITAA 1997.

Example 3

34. Christine and Julia formed a partnership under which it was agreed that they share the profits and losses of the partnership equally. The partnership agreement provided, however, that Christine would be entitled to draw \$20,000 a year for managing the business. The agreement regarding the sharing of profits or loss is to be construed as an agreement to share equally in profits remaining after the salary is taken into account, if any, and equally in losses. The 2003-2004 year's net (accounting) loss, after paying Christine's salary, was \$30,000. Determination of the net loss, for the purpose of completing the Statement of Distribution on the Partnership return, is as follows:

Partnership net loss (after deducting salaries)	\$(30,000)
Plus:	
Christine's salary	\$20,000
Net loss	\$(10,000)

The net loss is then distributed, in accordance with the partnership agreement, being 50%, 50%, as follows:

Christine:

Interest in partnership net loss 50% of \$(10,000)	\$(5,000)
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Distribution	\$(5,000)
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Julia:

Interest in partnership net loss 50% of \$(10,000)	\$(5,000)
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Distribution	\$(5,000)
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Total distribution	\$(10,000)
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The \$20,000 'partnership salary' cannot create or increase a partnership loss. The salary was taken by Christine as drawings in advance of profits. Christine's drawings do not affect her liability to tax, other than to determine her individual interest in the net income or loss of the partnership under section 92 of the ITAA 1936.

The \$20,000 drawn in excess of available profits will be met from profits in future years and be assessable to Christine under subsection 92(1) of the ITAA 1936 in that future year when sufficient profits are available. If the partnership is wound up before this time, the \$20,000 excess is repayable by her and thus not assessable under subsection 92(1) of the ITAA or section 6-5 of the ITAA 1997.

Detailed contents list

35. Below is a detailed contents list for this draft Ruling:

	Paragraph
What this Ruling is about	1
Class of person/arrangement	4
Date of effect	5
Previous Rulings	6
Ruling	7
'Partnership salary' is not deductible to the partnership	7
Assessability of the 'partnership salary' to the partner	8
Individual interests of the partners in the partnership net income	10
Explanation	11
The assessment of income derived from a partnership	11
The legal nature of 'partnership salary' agreements	14
'Partnership salary' is not deductible to the partnership	18
Assessability of the 'partnership salary' to the partner	19
Individual interests of the partners in the net income	24
Alternative views	27
Examples	32
Example 1	32
Example 2	33
Example 3	34
Detailed contents list	35

Commissioner of Taxation

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Previous draft:

TR 2004/D4

Related Rulings/Determinations:

TR 92/1; TR 92/20; TR 94/8;
TR 97/16

Previous Rulings/Determinations:

IT 2218

Subject references:

- partnership salaries

Legislative references:

- ITAA 1936 Pt III Div 5
- ITAA 1936 90
- ITAA 1936 92
- ITAA 1936 92(1)
- ITAA 1936 92(2)
- ITAA 1997 6-5
- ITAA 1997 8-1
- TAA 1953 Pt IVA
- Conveyancing Act 1919 (NSW) 72
- Conveyancing and Law of Property Act 1884 (Tas) 62
- Law of Property Act 1925 (UK) 82
- Law of Property Act 1936 (SA) 40
- Partnership Act 1891 (Qld) 27(1)
- Partnership Act 1891 (Qld) 27(6)
- Partnership Act 1891 (SA) 24(I)
- Partnership Act 1891 (SA) 24(VI)
- Partnership Act 1891 (Tas) 29(a)
- Partnership Act 1891 (Tas) 29(f)
- Partnership Act 1892 (NSW) 24(I)
- Partnership Act 1892 (NSW) 24(VI)
- Partnership Act 1895 (WA) 34(1)
- Partnership Act 1895 (WA) 34(6)
- Partnership Act 1958 (Vic) 28(1)

- Partnership Act 1958 (Vic) 28(6)
- Partnership Act 1963 (ACT) 29(1)
- Partnership Act 1963 (ACT) 29(6)
- Property Law Act 1958 (Vic) 82
- Property Law Act 1969 (WA) 52
- Property Law Act 1974 (Qld) 50

Case references:

- (1952) 3 CTBR(NS) Case 11;
3 TBRD Case C22 142
- (1966) CTBR(NS) Case 110;
16 TBRD Case R59 271
- (1968) 14 CTBR(NS) Case 59; 18
TBRD Case T69 353
- (1985) 28 CTBR(NS) Case 81;
Case S75 85 ATC 544
- AAT Case 5303 (1989) 20 ATR
3905; Case W79 89 ATC 705
- Browne v. Commissioner of State
Revenue (2002) 51 ATR 184; 2002
ATC 4872
- Ellis v. Joseph Ellis & Co. [1905] 1
KB 324
- FC of T v. Everett (1980) 143 CLR
440; (1980) 10 ATR 608; (1980)
80 ATC 4076
- FC of T v. Galland (1986) 162
CLR 408; (1986) 18 ATR 33;
(1986) 86 ATC 4885
- MacKinlay (Inspector of Taxes) v.
Arthur Young McClelland Moores &
Co. [1990] 2 AC 239
- Rose v. FC of T (1951) 84 CLR 118
- Scott v. FC of T (2002) 50 ATR
1235; 2002 ATC 2158
- Stewart v. Hawkins (1960)
SR (NSW) 104
- Watson v. Haggitt [1928] AC 127

ATO references:

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