TR 2012/8 - Income tax and fringe benefits tax: assessability of amounts received to reimburse legal costs incurred in disputes concerning termination of employment

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Taxation Ruling

Income tax and fringe benefits tax: assessability of amounts received to reimburse legal costs incurred in disputes concerning termination of employment

Contents Para

LEGALLY BINDING SECTION:

What this Ruling is about 1

Ruling 4

Date of effect 24

NOT LEGALLY BINDING SECTION:

Appendix 1:

***Explanation* 26**

Appendix 2:

***Detailed contents list* 63**

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What this Ruling is about

1. This Ruling is about whether or not amounts received to reimburse legal costs incurred in disputes concerning termination of employment[1] are included in assessable income either:

- because they form part of an employment termination payment (ETP) within the meaning of section 82-130 of the *Income Tax Assessment Act 1997* (ITAA 1997);[2] or
- as an assessable recoupment under section 20-20, where the legal costs are deductible under section 8-1.

[1] 'Disputes concerning termination of employment' include disputes which are about termination of employment as well as those that occur as a result of termination of employment.

[2] All legislative references are to the ITAA 1997 unless otherwise indicated.

2. This Ruling does not consider the goods and services tax (GST) and capital gains tax (CGT) consequences of amounts received in respect of legal costs in disputes concerning termination of employment.[3] The Ruling does not apply to legal costs incurred prior to termination, as these are not legal costs incurred in disputes concerning termination of employment.

3. This Ruling applies to both a court ordered award of identified and particularised legal costs and the specified or identifiable amount in relation to professional legal costs included in a dissected settlement sum paid in respect of termination of employment. 'Professional legal costs' are amounts which can be included in a legal practitioner's bill of cost which includes amounts incurred both before and after commencement of litigation.

Ruling

4. An amount received in relation to a dispute concerning termination of employment is not an ETP, nor forms part of an ETP, where the amount is capable of being identified as relating specifically to the reimbursement of legal costs.

5. Where a deduction for legal costs is available to the recipient under section 8-1, a settlement or award in respect of legal costs will be included in the recipient's assessable income as an assessable recoupment under Subdivision 20-A.[4]

6. If the amount of a settlement or court award received is a lump sum where the component of the receipt that relates to legal costs has not been and cannot be determined, then the whole amount is treated as being received in consequence of termination of employment.

Fringe Benefits Tax

7. A reimbursement of legal costs incurred in a dispute concerning termination of employment will not have a sufficient or material connection to the former employment to fall within the meaning of 'fringe benefit' in subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986*.

[3] The capital gains tax consequences of compensation receipts are explained in Taxation Ruling TR 95/35 *Income tax: capital gains: treatment of compensation receipts*.

[4] If a deduction for legal costs is not available under section 8-1, any amount identifiable as a reimbursement of those legal costs will not be included in assessable income.

Examples

Example 1

8. Alice takes legal action seeking compensation for wrongful dismissal (not including any contractual rights to income) and is successful. She is awarded identified and particularised legal costs.

9. Alice's award of legal costs, although made in relation to legal action concerning termination of employment, is paid to indemnify her as the successful party for the cost of the litigation and is not paid in consequence of termination of employment. The award of legal costs is not an ETP.

10. The legal costs incurred by Alice will not be deductible under section 8-1 because the advantage sought in the legal action is of a capital nature. This is the case even if the amount awarded in respect of her claim for wrongful dismissal is calculated by reference to lost income. Alice's award of legal costs is therefore not an assessable recoupment under subsection 20-20(2), nor is it assessable as ordinary income.

Example 2

11. Bernard takes legal action to enforce his entitlement to income under an employment contract after his employment has been terminated.

12. In resolving the dispute, the court enforced Bernard's contractual entitlement to the income due under the employment contract and he was also awarded interest and identified and particularised legal costs.

13. Bernard's legal costs are incurred in gaining or producing assessable income and the character of the advantage sought in the litigation is of a revenue nature. The legal costs are therefore deductible under section 8-1.

14. Bernard's legal costs award is paid to indemnify him as the successful party for the cost of the litigation and is not ordinary income or an ETP. It is an assessable recoupment under subsection 20-20(2) which provides that an amount received as recoupment of a loss or outgoing is an assessable recoupment if the taxpayer received the amount by way of insurance or indemnity; and the amount is or was deductible under any provision of the *Income Tax Assessment Act 1936* (ITAA 1936) or ITAA 1997.

Example 3

15. Debbie takes legal action against her former employer seeking damages of $170,000 for breach of contract following her dismissal from her senior executive position. (Due to her circumstances, Debbie only has access to common law remedies.)

16. Debbie provides her former employer with her solicitor's bill of costs which show that she has incurred $30,000 in legal costs pursuing the claim. The claim is settled within 12 months after termination. Correspondence between the parties indicates that the parties have agreed to settle for the sum of $120,000 in relation to her dismissal claim and that Debbie's former employer has agreed to pay $20,000, being two thirds of her legal costs shown in the bill.

17. Debbie receives an amount of $140,000 on execution of a Deed of settlement.

18. The $120,000 was received 'in consequence' of termination of employment, within 12 months of that termination and is not covered by the payments mentioned in section 82-135; it is therefore an ETP.

19. However, the $20,000 although paid in relation to legal action concerning termination of employment is paid to indemnify Debbie for the cost of pursuing the litigation. It is not received in consequence of termination of employment and is not an ETP. Nor is the $20,000 an assessable recoupment or assessable as ordinary income.

20. The legal costs incurred by Debbie are not deductible under section 8-1 because the advantage sought by the legal action (compensation for loss of employment) is of a capital nature.

Example 4

21. Colin commences legal action claiming that the termination of his employment was unlawful. On execution of a Deed of settlement, Colin received an undissected amount including an unspecified amount to cover Colin's legal costs, within 12 months of that termination.

22. There is a clear connection between the termination of Colin's employment and the undissected payment made under the deed. The lump sum was paid 'in consequence' of termination of employment, within 12 months of that termination and is not covered by the payments mentioned in section 82-135; it is therefore an ETP.

23. The legal costs incurred by Colin are not deductible because the advantage sought by the legal action (compensation for loss of employment) is of a capital nature.

Date of effect

24. This Ruling applies to years of income commencing 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 a settlement of a dispute with the Commissioner agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

25. Further, the Ruling will not apply to reimbursed legal costs awarded or received (including under a settlement) before the date of issue of the Ruling in circumstances where:

- the reimbursement of legal costs was treated by the taxpayer as forming part of an ETP (including where this treatment was in reliance on a private ruling), and
- that treatment results in the taxpayer receiving a more favourable tax outcome than under this Ruling.

Commissioner of Taxation
28 November 2012

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

Paid 'in consequence' of termination of employment

26. In order for an award or payment of legal costs to be considered to be an ETP, it has to have been paid 'in consequence' of termination of employment.[5]

27. In *Le Grand v. Federal Commissioner of Taxation*[6] (*Le Grand*), Goldberg J applied the test for determining whether a payment is made in consequence of the termination of employment articulated by Gibbs J in *Reseck v. Federal Commissioner of Taxation*[7] (*Reseck*). For a payment to have been made in consequence of the termination of employment, the payment must follow as an effect or result of the termination of employment. There must be a causal connection between the termination and the payment, even though the termination need not be the dominant cause.

28. Taxation Ruling TR 2003/13 explains the Commissioner's view of the meaning of 'in consequence' in relation to eligible termination payments under the ITAA 1936. In relation to settlement of legal proceedings, the ruling states at paragraph 31:

> It is clear from the decision in *Le Grand*, that when a payment is made to settle a claim brought by a taxpayer for wrongful dismissal or claims of a similar nature that arise as a result of an employer terminating the employment of the taxpayer, the payment will have a sufficient causal connection with the termination of the taxpayer's employment. The payment will be taken to have been made in consequence of the termination of employment because it would not have been made but for the termination.

The nature of legal costs

29. Legal cost payments or awards are made to reimburse the legal costs incurred in engaging in legal proceedings. Although an award for legal costs may be paid in relation to litigation concerning the termination of employment, an award for legal costs is not paid 'in consequence' of termination of employment.

[5] See subsection 82-130(1).
[6] 2002 ATC 4907; (2003) 51 ATR 139
[7] (1975) 133 CLR 45, 75 ATC 4213; (1975) 5 ATR 538

30. The rationale for the general rule that costs follow the event has a public as well as a private dimension, as identified by McHugh J in *Oshlack v. Richmond River Council*:[8]

> The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party. If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation.

31. The award of legal costs and the quantum of those costs are subject to the discretion of the Court.[9] In an action for breach of contract or tort, a party cannot seek to recover their legal costs as part of the claim for damages in that action, or in any subsequent legal action between the same parties.[10]

32. Although on the broadest test of causation legal expenses would represent recoverable damages, the nexus between the underlying cause of action and costs is broken because:

- legal costs are incurred after the cause of action arose;
- at the time that the costs are incurred there is no right to recover those costs and there is no certainty as to the amount that might be recovered (costs can only be awarded at the discretion of the Court);[11] and
- the costs do not form part of the damages for the underlying cause of action.[12]

33. The same principles apply to an award of costs in an action relating to termination of employment. Incurring legal costs in respect of a dispute concerning termination of employment will be an intervening event that severs the causal connection between the termination and an amount received specifically as reimbursement of those legal costs.

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[8] [1998] HCA 11; (1998) 193 CLR 72 at 97

[9] See for instance *Oshlack v. Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72 per Gaudron & Gummow JJ at 85; McHugh J at 95.

[10] *Cockburn v. Edwards* (1881) 18 Ch D 449 at 462-463; *Seavision Investments SA v. Norman Thomas Evennett and Clarkson Puckle Ltd (The 'Tiburon')* [1992] 2 Lloyd's Rep 26; *Queanbeyan Leagues Club Ltd v. Poldune Pty Ltd* [2000] NSWSC 1100

[11] *The 'Tiburon'* [1992] 2 Lloyd's Rep 26, per Scott LJ ' to notice that items of costs fall within the boundaries set by the rules relating to remoteness of damage does not change the nature of those items or remove them from the clutch of the discretionary power conferred by [the court rules]. The items are costs of the proceedings and, if they are to be recovered from B, must be the subject of an order for costs.'

[12] (Quick on Costs [2.170]; McGregor on Damages (15th Edition, 1988) para 662).

34. Although a successful party may have an expectation that they will receive an award of legal costs, this is at the discretion of the court, and that discretion is exercised by taking into account the way in which the parties conduct the litigation, and not the conduct which gave rise to the right to seek compensation in the first place.

35. The award of particularised legal costs is to ensure that the successful party is not out of pocket for their legal expenses as a result of being required to bring or defend an action.

36. A reimbursement of legal costs under a court ordered award identifying and particularising legal costs is not an ETP, nor forms part of an ETP.

37. Similarly a settlement sum paid in respect of a claim for legal costs is for the purpose of indemnifying the successful party for the professional legal expenses incurred in bringing the legal action to the point at which it is settled. A settlement sum in respect of a claim for legal costs is not paid 'in consequence of termination' of employment; it is paid to indemnify the employee for the outgoings incurred in respect of legal costs.

Deductibility of legal costs

38. Legal costs take their quality as an outgoing of capital or revenue nature from the cause or purpose of incurring the expenditure.[13] If the advantage to be gained is of a revenue nature, then the costs incurred in gaining the advantage will also be of a revenue nature.[14]

39. Broadly, section 8-1 allows a deduction for losses and outgoings to the extent to which they are incurred in gaining or producing assessable income except to the extent the outgoings are of a capital or private or domestic nature, or relate to the earning of exempt income or non-assessable non-exempt income.

40. Where the legal costs are incurred to enforce a contractual entitlement which relates to a right to income, even if they were incurred after employment has ceased, the taxpayer will be entitled to a deduction under section 8-1.

41. The question of deductibility of legal costs under section 8-1 to enforce a contractual entitlement to a lump sum payment in lieu of notice was considered in *Romanin v. Commissioner of Taxation (Romanin)*.[15]

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[13] See *Hallstroms Pty Ltd v. Federal Commissioner of Taxation* (1946) 72 CLR 634; (1946) 3 AITR 436; (1946) 8 ATD 190 per Dixon J at CLR 647

[14] The character of legal costs is not determined by the success or failure of the legal action.

[15] [2008] FCA 1532; 2008 ATC 20-055; (2008) 73 ATR 760

42. In *Romanin* , McKerracher J held, at paragraph 52, in terms of the positive limb nexus:

> In my view, the requisite connection exists between the outgoing claimed (legal expenses) and the incurrence (sic) of assessable income. On this point, I accept Mr Romanin's submission that he pursued proceedings in the Commission to obtain income that was contractually owed to him and that the costs incurred in doing so are deductible under s 8-1(1) of the ITAA.

43. McKerracher J also held at paragraph 56 of *Romanin*, that the character of the advantage sought was not on capital account, notwithstanding that it was a lump sum payment.

44. A deduction for legal costs by an employee depends on the particular facts of any case. To be deductible the occasion of the expenditure must be found in what is productive in the gaining of assessable income by the employee. If costs are incurred to dispute the receipt of income contractually owed under an employment contract, then the costs are on revenue account and allowable as a deduction.[16]

45. Compensation for loss of employment, such as in an action for wrongful dismissal or loss of office, is a capital receipt (*Scott v. Commissioner of Taxation*).[17] Legal costs incurred in seeking such compensation are not deductible because the nature of the advantage sought is capital. This is so, even if the amount of compensation awarded is calculated by reference to unpaid salary or lost income, or is assessable as statutory income.[18]

Assessable recoupment

46. Although a court ordered award or settlement sum identifiable as an amount paid in relation to legal cost is not an ETP, those costs may be an assessable recoupment if the recipient's underlying legal costs were deductible.

47. The High Court held in *FC of T v. Rowe*[19] that there is no general principle that amounts received by way of reimbursement or compensation for deductible expenses are assessable. The money received must be income according to ordinary concepts or statutory income, to be assessable.

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[16] See Taxation Determination TD 93/29 *Income tax: if an employee incurs legal expenses recovering wages paid by a dishonoured cheque, are these legal expenses an allowable deduction under section 8-1 of the Income Tax Assessment Act 1997?*

[17] (1935) 35 SR (NSW) 215.

[18] See for instance Examples 3 and 4 in this Ruling. Even though the amounts recovered through legal action were assessable as statutory income as an ETP, the legal costs were not deductible under section 8-1.

[19] (1997) 187 CLR 266; 97 ATC 4317; (1997) 35 ATR 432.

48. If an amount is not ordinary income, the amount may still be included in assessable income by another provision of the tax law (statutory income). Particular types of statutory income are listed in Guide material in section 10-5. Included in that list is Subdivision 20-A which deals with amounts received by way of recoupment for deductible losses or outgoings.

49. Under Subdivision 20-A, certain amounts received by way of insurance, indemnity or other recoupment are assessable income if the amounts are not income under ordinary concepts or otherwise assessable. Amounts included in assessable income under Subdivision 20-A are statutory income within the meaning of section 6-10.

50. Subsection 20-20(2) of the ITAA 1997 provides that an amount received as recoupment of a loss or outgoing is an assessable recoupment if the taxpayer received the amount by way of insurance or indemnity; and the amount of the loss or outgoing is or was deductible under any provision of the ITAA 1997 or ITAA 1936.

Indemnity

51. For an award of legal costs to be an assessable recoupment it must be a recoupment. Recoupment as defined in paragraph 20-25(1)(a) includes an indemnity in respect of the loss or outgoing.

52. In the decision of *Cachia v. Hanes*[20] the High Court considered an appeal on the disallowance of the appellant's claim for compensation for the loss of his time spent in the preparation and conduct of his case and for out of pocket expenses, being travelling expenses associated with the preparation and conduct of his case. In the preliminary observations of the law the Full Court stated at paragraph 11:

> ...It has not been doubted since 1278, when the Statute of Gloucester ((4) 6 Edw.I c.1.) introduced the notion of costs to the common law, that costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation.

53. Particularised legal costs are awarded to the successful party by way of indemnity; they are awarded to indemnify the successful party for the cost of the litigation. They are an assessable recoupment under subsection 20-20(2) of the ITAA 1997 if the amount recouped is or was deductible under any provision of the ITAA 1997 or ITAA 1936.

[20] [1994] HCA 14; (1994) 179 CLR 403; (1994) 120 ALR 385; (1994) 68 ALJR 374.

54. Similarly, if an amount is recouped by way of settlement of a claim for legal costs, it will be an assessable recoupment under subsection 20-20(2) where the purpose of the settlement is to indemnify the recipient for professional legal costs actually incurred in the conduct of litigation,[21] where the legal costs were deductible.

Legal costs where a settlement of all claims in respect of termination of employment leads to a lump sum award

55. Where the payment of a lump sum award is in respect of various heads of claim that are accepted under a settlement which treats them as a single, undissected amount, then that amount must be considered as a whole.

56. The High Court in *McLaurin v. FC of T*[22] (*McLaurin*), stated:[23]

> It is true that in a proper case a single payment or receipt of a mixed nature may be apportioned amongst the several heads to which it relates and an income or non-income nature attributed to portions of it accordingly. ...But while it may be appropriate to follow such a course where the payment or receipt is in settlement of distinct claims of which some at least are liquidated ... or are otherwise ascertainable by calculation ... it cannot be appropriate where the payment or receipt is in respect of a claim or claims for unliquidated damages only and is made or accepted under a compromise which treats it as a single, undissected amount of damages. In such a case the amount must be considered as a whole.

57. A settlement lump sum payment, made in consequence of termination, in respect of a claim for an unliquidated sum is not prevented from being an ETP by the fact that it includes a component for legal costs that has not been and cannot be quantified. The lump sum will be considered as a whole and will satisfy paragraph 82-130(1)(a) of the definition of ETP.

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[21] A settlement amount received by way of indemnity for legal expenses could not exceed the professional legal costs actually incurred in the conduct of the litigation. Simply labelling an amount as legal costs does not make it legal costs. In *FC of T v. Broken Hill Pty Company Ltd* (2000) 179 ALR 593 at 603; 2000 ATC 4659 at 4668 Hill J said:

> The true position is that the label that a party uses to characterise payment, in the present case the word 'interest', will not be determinative, although it may have some relevance...(w)hat that relevance may be will depend on the particular circumstances of the case...So, it may be said that an amount payable does not become interest, if the parties chose to adopt that word, if in law it is not.

[22] (1961) 104 CLR 381; (1961) 12 ATD 273; (1961) 8 AITR 180

[23] (1961) 104 CLR 381 at 391

58. On the other hand, a lump sum of the kind discussed in Taxation Determination TD 93/58 may be apportioned in the circumstances set out in that Determination.[24] An agreement between the parties to the dispute as to the apportionment of a lump sum payment between damages and costs may be implied from the terms of the settlement agreement. Those terms may be expressed in the settlement deed, or set out in correspondence between the parties. In those circumstances, a separately identifiable amount in respect of legal costs will not be an ETP, nor form part of an ETP.

Fringe Benefits Tax

59. A 'fringe benefit' for the purposes of the *Fringe Benefits Tax Assessment Act 1986* includes a benefit provided to an employee, including a former employee, by an employer 'in respect of the employment of the employee'.

60. The expression 'in respect of the employment of the employee' was considered by the Full Federal Court in *J & G Knowles v. FCT* [2000] FCA 196; 2000 ATC 4151; (2000) 44 ATR 22. The Full Federal Court noted that:

> … Whatever question is to be asked, it must be remembered that what must be established is whether there is a sufficient or *material*, rather than a causal connection or relationship between the benefit and the employment.

61. Where the link between the payment in respect of legal expenses and the termination of employment has been severed such that the payment is not 'in consequence' of termination of employment, the payment will also not be 'in respect of employment of the employee', unless there is some other factor in the litigation which suggests a sufficient or material connection between the benefit and the employment.

62. The following are reasons why there is not a sufficient or material connection between the reimbursement of the legal costs and the employment of the employee:

- the incurring of the legal expenses will be an intervening event which occurs after the termination of employment;
- at the time that the costs are incurred there is no right to recover those costs, as costs can only be awarded at the discretion of the Court;

[24] The Commissioner's view on the circumstances in which a lump sum settlement sum may be apportioned for the purposes of former subsection 25(1) of the ITAA 1936 is set out in Taxation Determination TD 93/58 *Income tax: under what circumstances is the receipt of a lump sum compensation/settlement payment assessable?* At sub-paragraph 1(b) it is stated that an expressed or implied agreement between the parties as to apportionment may lead to an amount being identifiable and quantifiable.

- the costs do not form part of the damages for the underlying cause of action resulting from the termination of employment; and
- the (former) employment relationship is not objectively a consideration in the employer's decision to make the reimbursement, either because:
  - the court orders the employer to make a payment towards costs; or
  - the employer makes a commercial decision to settle a claim against them, including costs, in order to avoid the need to defend litigation.

Appendix 2 – Detailed contents list

63. The following is a detailed contents list for this Ruling:

	Paragraph
What this Ruling is about	**1**
Ruling	**4**
Fringe Benefits Tax	7
Examples	8
Example 1	8
Example 2	11
Example 3	15
Example 4	21
Date of effect	**24**
Appendix 1 – Explanation	**26**
Paid 'in consequence' of termination of employment	26
The nature of legal costs	29
Deductibility of legal costs	38
Assessable recoupment	46
Indemnity	51
Legal costs where a settlement of all claims in respect of termination of employment leads to a lump sum award	55
Fringe Benefits Tax	59
Appendix 2 – Detailed contents list	**63**

References

Previous draft:

TR 2012/D2

Related Rulings/Determinations:

TR 95/35; TR 2003/13; TR 2006/10; TD 93/29; TD 93/58

Subject references:

- assessable recoupments
- employment termination
- legal expenses

Legislative references:

- ITAA 1936
- ITAA 1936 25(1)
- ITAA 1997
- ITAA 1997 6-10
- ITAA 1997 8-1
- ITAA 1997 10-5
- ITAA 1997 Subdiv 20-A
- ITAA 1997 20-20
- ITAA 1997 20-20(2)
- ITAA 1997 20-25(1)(a)
- ITAA 1997 82-130
- ITAA 1997 82-130(1)
- ITAA 1997 82-130(1)(a)
- ITAA 1997 82-135
- FBTAA 1986 136(1)
- TAA 1953
- Fair Work Act 2009

Case references:

- Cachia v. Hanes [1994] HCA 14; (1994) 179 CLR 403; (1994) 120 ALR 385; (1994) 68 ALJR 374
- Cockburn v. Edwards (1881) 18 Ch D 449
- FC of T v. Broken Hill Pty Company Ltd (2000) 179 ALR 593; 2000 ATC 4659; (2000) 45 ATR 507
- FC of T v. Rowe (1997) 187 CLR 266; 97 ATC 4317; (1997) 35 ATR 432
- Hallstroms Pty Ltd v. Federal Commissioner of Taxation (1946) 72 CLR 634; (1946) 3 AITR 436 (1946); 8 ATD 190
- J & G Knowles v. FCT [2000] FCA 196; 2000 ATC 4151; (2000) 44 ATR 22
- Le Grand v. Federal Commissioner of Taxation 2002 ATC 4907; (2003) 51 ATR 139
- McLaurin v. FC of T (1961) 104 CLR 381; (1961) 12 ATD 273; (1961) 8 AITR 180
- Oshlack v. Richmond River Council [1998] HCA 11; (1998) 193 CLR 72
- Queanbeyan Leagues Club Ltd v. Poldune Pty Ltd [2000] NSWSC 1100
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- Romanin v. Commissioner of Taxation [2008] FCA 1532; 2008 ATC 20-055; (2008) 73 ATR 760
- Scott v. Commissioner of Taxation (1935) 35 SR (NSW) 215
- Seavision Investments SA v. Norman Thomas Evennett and Clarkson Puckle Ltd (The 'Tiburon') [1992] 2 Lloyd's Rep 26

Other references:

- Quick on Costs [2.170]; McGregor on Damages (15th Edition, 1988)

ATO references

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