

FEDERAL COURT OF AUSTRALIA

SCCASP Holdings Pty Ltd v Federal Commissioner of Taxation

[2013] FCAFC 45

Lander, Siopis and Gilmour JJ

4 March, 10 May 2013

Taxation — Income tax — Assessment — Complying superannuation fund — Income of trust applied to superannuation fund pursuant to trust instrument — Whether “special income” of superannuation fund — Whether income “derived” by fund, despite not having been received — Income Tax Assessment Act 1936 (Cth), s 273(6).

Section 273(6) of the *Income Tax Assessment Act 1936* (Cth) (the Act) provided that income *derived* by a complying superannuation fund in the capacity of beneficiary of a trust estate was “special income” of the fund (which was taxed at a significantly higher rate than ordinary income). This case concerned the application of that section to statutory income, comprising a net capital gain made by a trust estate that was applied to a superannuation fund pursuant to the trust instrument. The primary judge held that such income did constitute special income pursuant to s 273(6) even though it had not yet been *received* by the trustee of the fund, as the word “derive” therein bore a meaning that extended to include “attributed to” or “imputed to”.

Held: Section 273(6) of the Act does not require the trust to have actually received the income in question for it to be termed “special income” of the trust. [58], [60], [67]

Allen v Federal Commissioner of Taxation (2011) 195 FCR 416, followed.

Appeal from decision of Logan J, [2012] FCA 1052, dismissed.

Cases Cited

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2009) 239 CLR 27.

Allen v Federal Commissioner of Taxation [2012] HCATrans 25.

Allen v Federal Commissioner of Taxation (2011) 195 FCR 416.

Booth v Federal Commissioner of Taxation (1987) 164 CLR 159.

Brent v Federal Commissioner of Taxation (1971) 125 CLR 418.

Nguyen v Nguyen (1990) 169 CLR 245.

Perrett v Commissioner for Superannuation (1991) 29 FCR 581.

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355.

Sentry Life Assurance Ltd v Life Insurance Commissioner (1983) 78 FLR 74.

Stevens v Kabushiki Kaisha Sony Computer Entertainment (2005) 224 CLR 193.

Taxation, Federal Commissioner of v Clarke (1927) 40 CLR 246.

Taxation, Federal Commissioner of v Consolidated Media Holdings Ltd (2012) 87 ALJR 98.

Taxation, Federal Commissioner of v Sun Alliance Investments Pty Ltd (in liq) (2005) 225 CLR 488.

Taxes, Commissioner of (SA) v Executor Trustee and Agency Company of South Australia Ltd (1938) 63 CLR 108.

Tindal v Federal Commissioner of Taxation (1946) 72 CLR 608.

Transurban City Link Ltd v Allan (1999) 95 FCR 553.

Appeal

D Russell QC with *P Bickford* and *IS Young*, for the appellant.

PJ Flanagan SC with *M Brennan*, for the respondent.

Cur adv vult

10 May 2013

The Court

1 This is an appeal from an order of a judge of this Court made on 26 September 2012, dismissing an appeal by the appellant, against the respondent's disallowance of the appellant's objection against its amended assessment.

2 The issue before the primary judge was whether an amended assessment of a superannuation fund, which has been since 1 March 2008 known as the "H & R Super Fund" (Super Fund) of which the appellant, SCCASP Holdings Pty Ltd (SCCASP) is trustee, which was issued by the respondent, the Commissioner of Taxation (Commissioner) on 6 May 2009 in respect of the income year ended 30 June 2004, was excessive.

Facts

3 The relevant facts are uncontroversial. Indeed, the appeal before the primary judge proceeded upon a statement of agreed facts tendered by the parties. The relevant facts, as agreed between the parties and supplemented by uncontradicted evidence which was accepted by the primary judge, can be stated briefly.

4 On 1 June 1979, the "GD Auto Accessories Superannuation Fund Trust", as the Super Fund was then known, was settled on the terms of a deed with "Reg Rowe Agencies Pty Ltd" appointed original trustee.

5 On 1 June 1982, 25 September 1989, 29 June 1992, 31 May 1995, 15 November 2000 and 1 June 2003, Deeds of Variation of the Super Fund's original governing deed were executed.

6 On 12 June 2003, SCCASP was appointed trustee of the Super Fund effective from 1 March 2003.

7 In the 2004 income year, the Super Fund was known as the "Super Cheap Car Accessories and Spare Parts Superannuation Fund". For that income year, it was a complying superannuation fund (CSF) that was a self-managed fund, and has remained so.

8 On 28 April 1975, the Rowe Family Trust (RFT) was settled and the original trustee of the RFT shortly thereafter commenced trading in the business of the retailing of car accessories, spare parts, hardware and equipment, hand tools, car paints and thinners, oils and lubricants and camping equipment, under the name “Super Cheap Auto”.

9 Until 1 July 2000, the business of Super Cheap Auto was conducted by successive trustees of the RFT (the Trustee Companies). The current trustee of the RFT is “SCA FT Pty Ltd” (SCA). Mr and Mrs Rowe were directors of the Trustee Companies and are directors of SCA.

10 On 1 July 2000, SCA transferred the business of Super Cheap Auto to a wholly owned company, Super Cheap Auto Pty Ltd, and, in doing so, elected to obtain roll over relief pursuant to Subdiv 122-A of the *Income Tax Assessment Act 1997* (Cth) (ITAA 97).

11 On the same day and consequent upon the transfer of Super Cheap Auto, Super Cheap Auto Pty Ltd issued 34,112,591 shares to SCA.

12 After 1 July 2000, the RFT acquired additional (post-Capital Gains Tax (CGT)) shares in Super Cheap Auto Pty Ltd.

13 On 23 April 2004, pursuant to a Sales Agreement, SCA transferred 43,851,004 shares in Super Cheap Auto Pty Ltd to Super Cheap Auto Group Ltd (the Company), in consideration of the issue of the same number of shares in the Company. SCA elected to obtain roll over relief pursuant to Subdiv 124-G of the ITAA 97 in respect of the transfer.

14 On 19 May 2004, the Company conducted a share split, which meant that RFT held 93,909,727 shares in the Company.

15 On 30 June 2004, SCA agreed to sell a portion of its shares in the Company in that income year.

16 In July 2004, the Company was listed on the Australian Stock Exchange.

17 The RFT trust deed defines the “Primary Beneficiaries” of that trust as including Mr and Mrs Rowe, their children and their spouses, and their grandchildren and their spouses: subclause 1(c)(i).

18 The RFT trust deed provides that the trustee (SCA) may apply the whole or any part of the income of the trust to any one or more of the Primary Beneficiaries, any company in which the Primary Beneficiaries are shareholders for the time being, or to the trustee of any trust of which any of the Primary Beneficiaries is a beneficiary, whether present or contingent; and provides that any income not so paid or applied in any year of the income shall be deemed to have been paid or applied for the benefit of the Primary Beneficiaries in equal shares: clause 3.

19 The term “income” is not defined in the RFT trust deed.

20 On 30 June 2004, SCA resolved that the whole of the income of the RFT for the year ended 30 June 2004 would be distributed to SCCASP as trustee of the Super Fund. The resolution was:

The income hereby paid and applied for the benefit of the aforesaid beneficiary be entered into the books of the Trust as having been so distributed and the same be held by the trustee until paid over absolutely on behalf of the beneficiary in accordance with the terms of the trust deed.

21 SCA resolved that \$2,890,000 be paid to SCCASP in part payment of its entitlement.

- 22 On 17 May 2005, SCCASP lodged its income tax return for the Super Fund for the income year ended 30 June 2004, showing \$4,759,424 returned as a special component of the Super Fund's taxable income. The CGT schedule attached to the return showed a net capital gain, being the result of an initial capital gain of \$14,001,128, less prior year net losses of \$4,349 and less a 33.33% CGT discount. The return recorded a net capital gain of \$9,331,187, calculated in accordance with Subdiv 115-C of Pt 3-1 of the ITAA 97, with that amount being included as the standard component of the Super Fund's taxable income. \$1,768,588 was claimed as exempt current pension income, which had the effect of reducing the Super Fund's taxable income.
- 23 On 6 May 2009, the Commissioner issued a Notice of Amended Assessment to SCCASP to increase the tax payable of \$3,114,512.14.
- 24 On 6 July 2009, SCCASP objected to the Notice of Amended Assessment, and the Notice of Assessment and Liability to Pay Penalty, dated 8 May 2009.
- 25 On 15 February 2011, the Commissioner disallowed the objection and, as a result, on 15 April 2011, SCCASP appealed to this Court against that objection.

The appeal

- 26 On 16 October 2012, SCCASP filed a notice of appeal seeking an order that the orders made by the primary judge dismissing the appellant's appeal be set aside and in lieu thereof, this Court order that "the Appellant's objection, reference number 1011708776459, dated 6 July 2009, against the Notice of Amended Assessment for year ended 30 June 2004, issued on 6 May 2009, be allowed in full, resulting in a reduction in primary tax payable of \$3,114,512.14".
- 27 The grounds of appeal advanced by SCCASP in that notice of appeal were:
1. The Court erred in concluding, at [51] of its reasons, that the observations concerning "derivation" made by the Full Court of the Federal Court in *Allen and another v Federal Commissioner of Taxation* ("*Allen's case*") at [55] and [56] of the Full Court reasons formed part of the *ratio* of the decision in that case.
 2. Alternatively, the observations concerning "derivation" made by the Full Court in *Allen's case* at [55] and [56] are plainly wrong and ought not to be followed.
 3. The Court erred in concluding, at [51] of the reasons, that the net capital gain included in the assessable income of the Appellant in the 2004 income year ("the net capital gain") was "income derived" for the purposes of section 273(6) of the Income Tax Assessment Act 1936 ("ITAA 36").
 4. The Court erred in concluding, at [56] of the reasons, that "derive" for the purposes of section 273(6) must bear a meaning which extends to include "attributed to" or "imputed to" having regard to the mischief to which sections 273 (6) and (7) are directed.
 5. The Court erred in concluding, at [58] of the reasons, that the net capital gain was "special income" of the Appellant in the 2004 income year by operation of section 273 of the ITAA 36.
- 28 Although separately stated, the appellant conceded that the appellant's grounds of appeal are all to the same effect and that is "that income, including statutory income, is not 'derived', in the relevant context (s 273(6) of the *Income Tax Assessment 1936* (Cth) (ITAA 36)) unless it is actually received, or

when it is applied or dealt with in any way on behalf of the taxpayer or in accordance with the directions of the taxpayer” (citing ss 6-5(4) and 6-10(3) of the ITAA 97).

29 It was common ground between the parties that because of ss 95 and 97 of the ITAA 36 and ss 102-5 and 115-215 of the ITAA 97, the net capital gain of \$9,331,187 returned by the Super Fund in its 2004 income tax return formed part of the Super Fund’s assessable income for that financial year.

30 It was also common ground that the net capital gain was not ordinary income for the purpose of s 6-5 of the ITAA 97. It was accepted that the amount was statutory income for the purposes of ss 6-10(1) and (2) and 10-5 of the ITAA 97 and was statutory income pursuant to s 102-5 of the ITAA 97, not s 97(1) of the ITAA 36.

The primary judge’s reasons

31 The question before the primary judge was whether, because the assessable income was a net capital gain and therefore only statutory income (s 6-10 of the ITAA 97), that amount was special income for the purposes of s 273(6) of the ITAA 36.

32 The primary judge concluded that s 273(6) rendered the income received by the Super Fund “special income” because it derived that income as a beneficiary of the RFT. In arriving at that conclusion, the primary judge reasoned that he was bound to follow a decision of the Full Court in *Allen v Federal Commissioner of Taxation* (2011) 195 FCR 416 (*Allen*), and to hold that the net capital gain was, for the purposes of s 273 of the ITAA 36, income “derived” by the Super Fund in the 2004 income year.

The appellant’s contentions on the appeal

33 On the appeal, the appellant contended that “income derived” means income received. It relied upon the dicta of Gibbs J in *Brent v Federal Commissioner of Taxation* (1971) 125 CLR 418 at 427-428. His Honour said:

The word “derived” is not necessarily equivalent in meaning to “earned”. “Derive” in its ordinary sense, according to the *Oxford English Dictionary*, means “to draw, fetch, get, gain, obtain (a thing from a source)”. It has become well established that unless the Act makes some specific provision on the point the amount of income derived is to be determined by the application of ordinary business and commercial principles and that the method of accounting to be adopted is that which “is calculated to give a substantially correct reflex of the taxpayer’s true income” (*Commissioner of Taxes (S.A.) v Executor, Trustee and Agency Co. of South Australia Ltd. (Carden’s Case)*).

(Footnotes omitted.)

34 The appellant relied on the first meaning of the word “derive” in the *Macquarie Dictionary* (5th ed) which is given as “to receive or obtain from a source or origin”. It contended that meaning is the sense in which the word has been construed in tax jurisprudence in Australia for 80 years: *Federal Commissioner of Taxation v Clarke* (1927) 40 CLR 246 per Isaacs ACJ at 261; *Tindal v Federal Commissioner of Taxation* (1946) 72 CLR 608 per Starke J at 624 (*Tindal*); *Commissioner of Taxes (SA) v Executor Trustee and Agency Company of South Australia Ltd* (1938) 63 CLR 108 at 155 per Dixon J; *Booth v Federal Commissioner of Taxation* (1987) 164 CLR 159 at 166-167 per Mason CJ.

35 It argued that the drafter of s 273(6), (7) and (8) of the ITAA 36 must have
been aware of those decisions: *Stevens v Kabushiki Kaisha Sony Computer
Entertainment* (2005) 224 CLR 193 per McHugh J at [124].

36 It contended that the decision in *Allen* is distinguishable or is wrongly
decided.

37 Finally, it contended that the ordinary meaning of the word “derived” requires
there to be an actual receipt or at least an entitlement or right to receive the
income. There is, it was argued, no ambiguity in s 273(6) of the ITAA 36. The
ordinary grammatical meaning (of s 273(6)) has the consequence that the person
who is made liable to pay the penal tax is the person who has actually received,
or is entitled to receive, the underlying amount the subject of the penal rate of
tax. In this case, it was said, the appellant as trustee of the Super Fund could not
be said to have derived the net capital gain because it never received any
portion of the net capital gain and may never do so and never had any right or
entitlement to obtain any portion of that net capital gain.

38 The question to be determined on the grounds of appeal is whether s 273(6)
contemplates as income, derived income not actually received but deemed to be
income by the statute.

Consideration

39 Part IX of the ITAA 36 has been repealed: *Superannuation Legislation
Amendment (Simplification) Act 2007* (Cth), Sch 1, Pt 1, s 8. However, at the
relevant time, it applied to superannuation and related businesses.

40 Section 272 applied to eligible entities. It provided:

The taxable income of an eligible entity shall be calculated as if the trustee were a
taxpayer and:

- (a) if the eligible entity is a non-resident superannuation fund in relation to the
year of income concerned — a non-resident; or
- (b) otherwise — a resident.

41 The Super Fund was an eligible entity because, in the relevant year of
income, it was an eligible superannuation fund because it was a complying
superannuation fund: s 267 of the ITAA 36. Section 272 means that an eligible
entity was treated as if it were a taxpayer. Therefore, the general provisions of
the ITAA 36 and the ITAA 97 applied to that entity.

42 Section 273(1) provided:

- (1) This section applies to income derived in a year of income by a fund or
unit trust (in this section called the *entity*) that is a complying
superannuation fund, a complying ADF or a PST in relation to the year of
income.

43 Thus, s 273 applied to the Super Fund. Section 273(2), (3), (6) and (7)
provided:

- (2) A dividend paid to the entity by a company that is a private company in
relation to the year of income of the company in which the dividend was
paid is special income of the entity unless the Commissioner is of the
opinion that it would be reasonable not to treat the dividend as special
income of the entity; ...
- (3) For the purposes of subsection (2), income that, in the opinion of the
Commissioner, was derived by the entity indirectly from a dividend paid

by a company, being a private company in relation to the year of income of the company in which the dividend was paid, shall be deemed to have been a dividend paid to the entity by the company.

...

- (6) Income derived by the entity in the capacity of beneficiary of a trust estate (other than by virtue of holding a fixed entitlement to the income) is special income of the entity.
- (7) Income derived by the entity in the capacity of beneficiary of a trust estate by virtue of holding a fixed entitlement to the income is special income of the entity if:
 - (a) the entity acquired the fixed entitlement under an arrangement (see subsection (8)), or the income was derived under an arrangement, some or all of the parties to which were not dealing with each other at arm's length in relation to the arrangement; and
 - (b) the amount of the income is greater than might have been expected to have been derived by the entity if those parties had been dealing with each other at arm's length in relation to the arrangement.

44 The Commissioner contended, and the appellant demurred, that s 273(6) applied to the Super Fund.

45 Section 273(7) was the subject of the decision in *Allen*.

46 At the relevant time, s 278 of the ITAA 36 required the trustee of a complying superannuation fund to pay tax on the taxable income of the fund of the year of income.

47 Also at the relevant time, ss 284 and 285 of the ITAA 36 addressed the special and standard components of taxable income under this Part. They provide:

284 The special component of the taxable income of a complying superannuation fund is the amount (if any) remaining after deducting from the special income:

- (a) any allowable deductions that relate exclusively to the special income; and
- (b) so much of any other allowable deductions as, in the opinion of the Commissioner, may appropriately be related to the special income.

285 The standard component of the taxable income of a complying superannuation fund is the amount (if any) remaining after deducting the special component from the taxable income.

48 It can be seen that the special income of a complying superannuation fund informed the special component of taxable income which in turn regulated the rate at which the complying superannuation fund would be taxed. In relation to the special component, it was taxed at 47 cents in the dollar; whilst a standard component was taxed at the rate of 15 cents in the dollar.

49 As can be seen from s 284, special component is informed by s 273 which identifies a complying superannuation fund's special income for the purpose of the Part.

50 The purpose of s 273 is to identify that which is special income which, as we have said, will inform the special component. The component, as s 285 provides, is that income which is left over after identification of the special component which, itself, is the excess of the special income over allowable deductions related to that special income.

51 As we have said, it was not disputed that, because of s 272, the appellant, as

trustee of the Super Fund, was subject to the other provisions of the ITAA 36 relating to trust income. In particular, it was accepted that the appellant and the Super Fund was subject to s 97 of the ITAA 36 which, relevantly, provides:

- (1) Subject to Division 6D, where a beneficiary of a trust estate who is not under any legal disability is presently entitled to a share of the income of the trust estate:
 - (a) the assessable income of the beneficiary shall include:
 - (i) so much of that share of the net income of the trust estate as is attributable to a period when the beneficiary was a resident; and
 - (ii) so much of that share of the net income of the trust estate as is attributable to a period when the beneficiary was not a resident and is also attributable to sources in Australia; ...

52 Net income is defined in s 95 to be:

... in relation to a trust estate, means the total assessable income of the trust estate calculated under this Act as if the trustee were a taxpayer in respect of that income and were a resident, less all allowable deductions ...

53 Section 101 provides:

For the purposes of this Act, where a trustee has a discretion to pay or apply income of a trust estate to or for the benefit of specified beneficiaries, a beneficiary in whose favour the trustee exercises his discretion shall be deemed to be presently entitled to the amount paid to him or applied for his benefit by the trustee in the exercise of that discretion.

54 Section 101 applies to the appellant and to the Super Fund, and as a consequence of the interaction of those sections, the appellant rightly conceded that the capital gain that had been made by the discretionary trust (RFT) became assessable income in the appellant trustee's hand and liable to taxation even though the capital gain had not then been received by the trustee. This form of income, which is part of a taxpayer's assessable income, is called "statutory income": s 6-10(2) ITAA 1997. Assessable income includes both ordinary income and statutory income: ss 6-10, 6-5 ITAA 1997. The capital gain was statutory income for the purposes of defining the trustee's assessable income and not ordinary income. However, it was contended that although the capital gain may be assessable income it was not special income but rather ordinary income and that the tax rate therefore should be as if the capital gain were part of the ordinary component for the purpose of s 285 of the ITAA 36. In other words, it was contended by the appellant that, notwithstanding the capital gain was assessable income in the hands of the trustee and the Super Fund, it was not income that had been derived by the Super Fund in its capacity as a beneficiary of a trust estate. It had not been derived, so it was contended, because it had not been actually received. It was contended that whilst the capital gain is assessable income and statutory income, it was not income derived by the trustee or the Super Fund in its capacity as a beneficiary of the RFT.

55 There was no dispute as to the principles of statutory construction. The ITAA 36 and ITAA 97 are to be construed like any other statute according to settled principles: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at [57].

56 In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, the plurality said at [69]:

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all of the provisions of the statute.

57 More recently, in *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 87 ALJR 98; 293 ALR 257, the High Court, comprising French CJ, Hayne, Crennan, Bell and Gageler JJ, said at [39]:

This Court has stated on many occasions that the task of statutory construction must be given with the consideration of the [statutory] text. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and insofar as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.

58 There is no good reason, in our opinion, for reading s 273(6) of the ITAA 36 as requiring the trust to have actually received the income referred to in s 273(6) for it to be termed “special income” of the trust.

59 Section 273(2) and (3) have been set out at [43] above to show that the drafter in s 273 discriminated in those sections between a “dividend paid” and “income derived” in the later subsections. If it had been intended in s 273(6) to limit the special income of a complying superannuation fund to income received as a beneficiary of a trust estate, it could easily have been said by referring to income paid by the trust estate or income received by the entity. The drafter used the expression “dividend paid” in the earlier subsections to distinguish that income from a dividend declared by a private company.

60 The appellant contended that ss 6-5(4) and 6-10(3) of the ITAA 97 indicate that the word “derived” used in the ITAAs support the contention that income must be actually received. In our opinion, those subsections do not support the proposition put. Section 6-5(4) is a timing provision and identifies, for the purpose of the statute, when “ordinary income” is taken to be received. It is in the nature of a deeming provision. Section 6-10(3) is also a deeming provision and provides a circumstance where an amount would otherwise be statutory income apart from the fact that it has not been received. It does not require the taxpayer to have received the amount before it becomes statutory income. It is enough for s 6-10(3) that it becomes statutory income as soon as it is applied or dealt with in any way on behalf of the taxpayer or by the taxpayer’s direction.

61 It is not possible, in our opinion, to discern from the ITAA 36 or ITAA 97 a technical meaning of the word “derived”. It must bear whatever meaning is relevant, having regard to the context in which it appears in the Acts and by reference to the purpose for which the provision in which it is included is designed.

62 The purpose of s 272 of the ITAA 36 is to identify when a complying superannuation fund has received a particular type of income for the purpose of determining whether that income should be taxed at the rate applicable to a special component or an ordinary component.

63 Section 273 of the ITAA 36 operates on the separate amounts which make up the complying superannuation fund’s assessable income under the other provisions of the income tax law.

64 As s 273(1) shows, s 273 is concerned with identifying, for the purpose of determining the appropriate rate, the type of income which has been included in the assessable income by reference to special income or otherwise.

65 The importance of s 273(6) is to identify the particular type of income so that it may be described as “special income”.

66 The reason why the word “derived” is used in s 273(6) is to identify the source of the income: *Sentry Life Assurance Ltd v Life Insurance Commissioner* (1983) 78 FLR 74 at 88. It is only that income which is sourced from a trust estate that is special income. The purpose of the use of the word “derived” in s 273(6) is to identify the source, not the receipt.

67 For that reason, in our opinion, s 273(6) is concerned with source, not with receipt. What s 273(6) seeks to do is to classify as special income, income derived from a particular source. It seeks to do so in order that the particular income, whether received or not, will be taxable at the ordinary rate. It seeks to prevent that income being classified as ordinary income and being assessed at the concessional rate.

68 Section 273 contemplates the entity to which it refers, which is a complying superannuation fund in this case. The Super Fund will be deriving income in its capacity as a beneficiary of a trust estate. The entity will only derive income as a beneficiary of a trust estate if the entity becomes entitled to the income in its capacity as a trustee for that beneficiary.

69 Whether the entity (the Super Fund) actually receives the money is a matter between the beneficiary and the trustee of the discretionary trust (RFT).

70 The decisions to which the appellant referred did not assist in determining the meaning of the word “derived” in the context of s 273, Pt IX of the ITAA 36 and the general provisions of the ITAA 36 and the ITAA 97. Indeed, not all of the decisions assisted the appellant. For example, in *Tindal* at 624, Starke J said:

“Derived” is not a technical word. It means arising or accruing or coming in by way of income not necessarily actually received “but ordinarily that is the mode of derivation”.

71 The construction at which we have arrived is consistent with the construction arrived at by the Full Court in *Allen*. In that case, the Full Court was concerned with s 273(7) of the ITAA which is set out above. The Full Court determined that s 273(7) operates upon assessable income.

72 The Full Court pointed out in *Allen* that s 273 does not impose a liability to pay tax, but it assumes that there is a liability to pay tax by reason of s 278 of the ITAA 36.

73 The Court said at [55]:

As to whether the income can be said to have been “derived”, in *Federal Commissioner of Taxation v Sun Alliance Investments Pty Ltd (in liq)* (2005) 225 CLR 488 at [42] the High Court stated that the first step in ascertaining the meaning of “derived” is to refer to the thing that is said to be derived. In this case the distribution was received by the Super Fund by virtue of its 100% entitlement to the income of the Fixed Trust. Pursuant to s 97 of the ITAA 1936, the beneficiary of a trust estate is treated as having derived income equivalent to its share of the s 95 net income. As we have seen, this share will include an amount attributable to a net capital gain which is included in the assessable income.

74 At [57] the Court said:

If the “income derived” by the CSF as a beneficiary of a trust estate did not

include trust distributions, s 273(6) could have no operation at all. The Court should shrink from a construction which would deprive a statutory provision of all operation. And there can be no doubt that the phrase “income derived” has the same operation in s 273(6) and (7).

75 At [62] the Court said:

The mischief at which both s 273(6) and (7) of the ITAA 1936 were evidently aimed is the movement of assessable income, which would otherwise be taxed at the rate of 47% in the hands of the person who derived it, into a CSF by the mere exercise of a discretion (in the case of a discretionary trust) or by non-arm’s length dealing in the case of a fixed trust entitlement. On the taxpayers’ behalf it was suggested, by reference to the examples given in the Explanatory Memorandum, that the mischief targeted by s 273(7) was limited to the distribution of assets at undervalue. But s 273(6) is clearly aimed at a wider target, and there is no reason to think that s 273(7) was more limited in its scope. And, of course, s 273(7) is not expressed in terms confined to the distribution of assets at an undervalue. It would be to attribute to the legislature an absurd inconsistency of intention in seeking to catch transfers of assets at modest undervalues while saying nothing about transfers for no value at all.

76 The Full Court should follow a previous decision of the Full Court of this Court unless satisfied that the decision is plainly wrong.

77 The decision complained of was subject to an application for special leave to appeal to the High Court of Australia. The application was dismissed: *Allen v Federal Commissioner of Taxation* [2012] HCATrans 25.

78 Chief Justice French said in dismissing the application:

This application for special leave involves the construction of section 273(7) of the 1936 Act and, in particular, the term “income derived by the entity in the capacity of beneficiary of a trust estate” which appears in that subsection. A key question raised by the applicants is whether the term “income” there refers to income according to ordinary concepts. The application for special leave raises a question of statutory construction in a particular context. The Full Court adopted the construction which it did by reference to both purpose and context. In so doing, in our opinion, it applied correct principle. The decision is unattended with sufficient doubt to warrant the grant of special leave. Special leave will be refused with costs.

79 This Court, although not technically bound by its previous decisions, will only depart from them in rare circumstances: *Nguyen v Nguyen* (1990) 169 CLR 245 at 268-269. The Court will follow its previous decisions unless convinced that the previous decision that is challenged is plainly wrong: *Perrett v Commissioner for Superannuation* (1991) 29 FCR 581 at 592. The decision must be plainly wrong; it is not sufficient that the decision is one in which minds might differ: *Transurban City Link Ltd v Allan* (1999) 95 FCR 553 at 560-561.

80 It is true, as the appellant contended, that it was not necessary for the Court to opine on s 273(6) of the ITAA 36 for the purposes of its decision, which directly addressed s 273(7).

81 It follows that the Court’s comments in regard to s 273(6) do not form part of the ratio of the decision. That said, however, the Court’s reasons would apply to a consideration of s 273(6).

82 The appellant faced a formidable task in persuading this Court that the Full Court in *Allen’s* decision was wrong.

83 In our opinion, it has failed to do so. We are not persuaded that *Allen* was wrongly decided. We think that the reasoning in that decision, to which we have referred to above, is dispositive of the issue on this appeal. The appeal must be dismissed and the appellant must pay the respondent's costs.

Orders accordingly

Solicitors for the appellant: *Clayton Utz*.

Solicitors for the respondent: *Australian Government Solicitor*.

SARAH SOMERSET