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Rowe: A Symmetry Cemetery?

Abstract

The author examines the decision in *FCT v Rowe* for the concept of symmetry in tax matters which appears to underlie the equitable operation of the system. They conclude that, if there is such a principle, it certainly has not been applied in *Rowe's* case. According to the authors, this is probably correct in law, but does not necessarily serve the interests of fairness in tax matters. The authors draw on the experience of the UK and South Africa in dealing with similar situations. They conclude that the UK system has no better answers than the Australian, but that statutory intervention in South Africa has meant that the dispute in *Rowe*, despite the general similarity of the South African tax law, could never arise.

Keywords

tax, tax law, deductible expenses

ROWE: A SYMMETRY CEMETERY?



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The authors examine the decision in *FCT v Rowe* for the concept of symmetry in tax matters which appears to underlie the equitable operation of the system. They conclude that, if there is such a principle, it certainly has not been applied in *Rowe's* case. According to the authors, this is probably correct in law, but does not necessarily serve the interests of fairness in tax matters. The authors draw on the experience of the UK and South Africa in dealing with similar situations. They conclude that the UK system has no better answers than the Australian, but that statutory intervention in South Africa has meant that the dispute in *Rowe*, despite the general similarity of the South African tax law, could never arise.

In Greek mythology sirens, by their seductive singing, lured sailors to their destruction on treacherous rocks. In much the same way, sometimes utterances about "tax symmetry" have the potential to fool one into believing that the judiciary considers that concept to be important. Plainly, however, the majority judges in *FCT v Rowe*² are blameless of making such misleading utterances.

This article deals with the important issues raised by *Rowe*. It is not suggested that the decision and reasoning of the Administrative Appeals Tribunal ("AAT"), nor the majority of the Full Federal Court, are incorrect as a matter of legal precedent. However, it will

¹ The authors gratefully acknowledge the encouragement and advice of Chris Evans, Associate Director of the Australian Taxation Studies Program, University of New South Wales.

² 95 ATC 4691 (Full Federal Court).

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be suggested that Parliament should statutorily reverse the result of that decision, if it considers "tax symmetry" to be a worthwhile objective. After considering how *Rowe* would be decided in other jurisdictions, various ways in which a reversal could be achieved are suggested and discussed.

Background to *Rowe*

In *Rowe*,³ during the 1985-1986 year of income, the taxpayer incurred legal expenses in relation to a State Government inquiry convened to investigate allegations made against him and his suspension from duties as Shire Engineer employed by a local council. That inquiry found in his favour and his suspension was rescinded. The inquiry, however, had no power to award costs. Further, the council refused his request for payment of his legal expenses associated with the inquiry. He was ultimately allowed the amount of those legal expenses, almost \$24,800, as a deduction in that year of income.

The taxpayer was subsequently dismissed by the council. Three years later, in the 1988-1989 year of income, he successfully applied to the State Government for an ex gratia payment in the amount of his legal expenses associated with the State Government inquiry. In his 1989 return, the taxpayer requested the ruling of the Commissioner of Taxation on the assessability of the ex gratia payment, claiming it to be a receipt of capital. The Australian Taxation Office ("ATO"), however, included the amount of the payment in his assessable income. The taxpayer applied to the AAT for review.

The AAT rejected the ATO's submission that the amount was assessable under s 25(1) or s 26(e).⁴ In particular, the AAT rejected the ATO's submission that there is a general principle that the reimbursement of an amount deductible under s 51(1) constitutes assessable income under s 25(1), concluding that the receipt was not "the product of ... the [taxpayer's] employment or any services rendered by him". Further, the AAT concluded that "the necessary nexus between the benefit and the [taxpayer's] employment required for assessability under s 26(e)" was not present.

³ The following summary is taken from an earlier editorial written by one of the authors. See Schabe DM, "Reimbursed deductible expenditure as a windfall gain: A hard *Rowe* to hoe?" [1995] *Butterworths Weekly Tax Bulletin* (No 54) 869.

⁴ Unless otherwise stated, all section references are from the Income Tax Assessment Act 1936 (Cth).

The ATO appealed to the Federal Court. The Full Court dismissed the appeal. Burchett and Drummond JJ, in essentially confirming the AAT's reasoning, held that the receipt was not assessable under either s 25(1) or s 26(e). Beaumont J dissented, concluding that the receipt was assessable under both s 25(1) and s 26(e).

The ATO sought, and has now been granted, special leave to appeal to the High Court.

Assessability under s 25(1)

Both before the AAT and Federal Court, the ATO placed great significance in the fact that the receipt in question was a reimbursement of deductible expenses. Indeed, before both the AAT and Federal Court, the ATO submitted that:⁵

there is a general principle that a payment made by way of reimbursement of or compensation for an expense incurred on revenue account and which is deductible under the Act is itself income under the Act.

The AAT concluded that:⁶

no such general principle exists: See the joint judgment of Barwick CJ and Taylor J in *Allsop*⁷ at ATD 64; CLR 350, and, even more emphatically, Taylor and Owen JJ in *HR Sinclair & Son Pty Ltd v FC of T* (1966) 14 ATD 195, at 195 and 196; (1966) 114 CLR 537, at 542-543 and 545 respectively. ... It is true that in the *HR Sinclair & Son* and *Cromwell Jockey Club* cases⁸ (where there was not the complication as there was in *Allsop* that neither the whole nor any part of the lump sum in issue there could be attributed solely to a refund of the relevant payments) that the refunds in issue were held to be of an income nature, but this was not from application of a general principle of the nature espoused by the respondent, but because in both cases, the relevant receipts were held to have been received as part of the proceeds from the carrying on of the relevant businesses: see in the *HR Sinclair & Son* case, per Taylor J at ATD 195-196; CLR 543-544, and per Owen J at ATD 197;

⁵ Taken from the judgment of Drummond J, 95 ATC 4691 at 4704.

⁶ 94 ATC 400 at 410.

⁷ *Allsop v FCT* (1965) 113 CLR 341; (1965) 14 ATD 62.

⁸ *Cromwell Jockey Club v Commr of Inland Revenue (NZ)* (1954) 10 ATD 431; (1954) 6 AITR 188; cited by the Commissioner as authority supporting his submission.

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CLR 547; and in the *Cromwell Jockey Club* case at ATD 433-4 and 434-5.

In the Full Federal Court, Drummond J concluded that the ATO's argument was rejected in *HR Sinclair & Son*. Interestingly, Drummond J continued:⁹

The Commissioner acknowledged in oral argument that this decision is binding on this Court as authority that no universal principle of the kind for which he contends exists.

Given that admission by the ATO, it is therefore somewhat surprising that Beaumont J considered the issue to be "an open question",¹⁰ and Burchett J did not expressly deal with the issue. It is, however, submitted that Burchett J can also be taken to have rejected the ATO's submission, given that his Honour stated that he was "in agreement with the approach adopted by Drummond J"¹¹ on the question of assessability of the receipt under s 25(1).

Before the Full Federal Court the ATO made an alternative submission which had not been put to the AAT. The ATO submitted that:¹²

even if there is no universal principle of the kind contended for ..., the fact that the payment was made by way of reimbursement for outgoings so connected with the [taxpayer's] employment that they are deductible is of itself sufficient to colour that payment as income in the [taxpayer's] hands.

But Drummond J quickly dealt with this second submission, which is a thinly-disguised recasting of the ATO's first submission. His Honour concluded:¹³

Even though the legal expenses which the ex gratia payment replaced were properly deductible, that in my opinion provides no ground sufficient of itself for characterising the reimbursement as income within s 25. Whether a receipt by an employee will be income within ordinary concepts is to be determined having regard to all the circumstances of the case. That the payment here in question was made to reimburse the [taxpayer] for an

⁹ 95 ATC 4691 at 4704.

¹⁰ 95 ATC 4691 at 4701.

¹¹ 95 ATC 4691 at 4703.

¹² Taken from the judgment of Drummond J, 95 ATC 4691 at 4704.

¹³ 95 ATC 4691 at 4707.

outgoing deductible from his assessable income does suggest that there is a connection between the reimbursement payment and the respondent's employment. But that is only one circumstance. That it was paid by a person other than his employer and that it was paid ex gratia are other considerations just as relevant to the question whether it was itself income in the [taxpayer's] hands.

Again, it would appear reasonable to regard Burchett J as supporting Drummond J's view, given Burchett J's "agreement with the approach adopted by Drummond J"¹⁴ on the question of assessability of the receipt under s 25(1).

Assessability under s 26(e)

Given the breadth of expression used in s 26(e),¹⁵ one can imagine that the ATO were shocked to "lose" on that section. However, the ATO's loss was essentially a result of the findings of fact rather than the law. In particular, the AAT was satisfied that "any connection between the receipt and the [taxpayer's] employment with the Shire Council was no more than a mere historical one",¹⁶ and concluded that "the necessary nexus between the benefit and the [taxpayer's] employment required for assessability under s 26(e) is not present".¹⁷ Likewise, in the Full Federal Court Drummond J considered that:¹⁸

provided there is a causal connection between the receipt and any employment in the sense that the existence of an employer/employee relationship between someone and the taxpayer, either at the time the payment was made or at some other time, can be seen to provide a reason why the payment was made, the receipt will be assessable under s 26(e); but if the receipt was paid to the recipient in circumstances in which the existence, at some time, of an employer/employee relationship involving the recipient was no more than a background fact to the making of the payment, that will not bring it within s 26(e). It will be enough that the existence of that

¹⁴ 95 ATC 4691 at 4703.

¹⁵ Section 26(e) provides that the assessable income of a taxpayer shall include "the value to the taxpayer of all allowances, gratuities, compensations, benefits, bonuses and premiums allowed, given or granted to him in respect of, or for or in relation directly or indirectly to, any employment of or services rendered by him".

¹⁶ 94 ATC 400 at 411.

¹⁷ 94 ATC 400 at 412.

¹⁸ 95 ATC 4691 at 4710.

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relationship was only indirectly a reason for the making of the payment: but it must still be seen to be a reason for that being done. A mere connection between the employment relationship and the payment that does not have this causal element to it will not suffice to bring the payment within s 26(e).

...

The employer/employee relationship between the Council and the [taxpayer] was in my view merely part of the background facts against which the ex gratia payment was made.

Further, Burchett J stated that he would have made the same finding of fact as the AAT, "that any connection between the receipt and the [taxpayer's] employment with the Shire Council was no more than a mere historical one", and concluded that the receipt was "too remote from employment to be caught by s 26(e)".¹⁹

Assessability on some other basis?

Whilst our ultimate conclusion is that the receipt would not have been assessable under s 26(j) nor Part IIIA, given the following analysis of their applicability, it strikes us as odd that the ATO did not, at least alternatively, argue assessability on those bases.

Assessability under s 26(j)

Section 26(j) provides that the assessable income of a taxpayer includes:

any amount received by way of insurance or indemnity for or in respect of any loss:

- (i) of trading stock which would have been taken into account in computing taxable income; or
- (ii) of profit or income which would have been assessable income;

if the loss had not occurred, and any amount so received for or in respect of any loss or outgoing which is an allowable deduction.

The only "limb" of s 26(j) of possible relevance is the last one, which, in effect, includes in assessable income any amount received by way of insurance or indemnity for or in respect of any loss or outgoing which is an allowable deduction.

The essential issue is whether Rowe received the amount of the ex

¹⁹ 95 ATC 4691 at 4703.

gratia payment "by way of indemnity for or in respect of" his legal expenses.

There have been several cases which have considered the meaning of that expression in the context of s 26(j).²⁰ Representative of the views taken in those cases are the statements of Walters J in *Goldsborough Mort & Co Ltd v FCT* that:²¹

in the interpretation of s 26(j), the word "indemnity" takes its colour from the phrases "by way of" and "in respect of", and that in conjunction with the word "indemnity", those two phrases are merely "descriptive of, or adjectival to", the expression "the amount received" (*Cliffs Robe River Iron Associates v Seamen's Union of Australia* (1974) Industrial Arbitration Service Current Review [V92] at p 201). Moreover, the phrase "by way of" is significantly wider than the word "as", or even the phrase "under a contract of". The words "in respect of" also have a wider import than the word "for" (*Paull v Munday* (1976) 9 ALR 245, per Gibbs J at p 251). It seems to me that the phrases "by way of" and "in respect of" were inserted in the section for the express purpose of giving the word "indemnity" a wide connotation; that those phrases bring within the scope of the section a broader field of receipts than those recovered primarily under a policy of insurance or other contract of indemnity.

In my view, the word "indemnity" in s 26(j) is not so entirely a special word that there can be attributed to it any one particular meaning, or any one comprehensive definition. ... I cannot accept the notion that "the terms of s 26(j) suggest that it is concerned with a contract of insurance or indemnity giving security or protection against contingent hurt". I think it would be wrong to give the words of the section such a narrow interpretation. And if I may respectfully adopt the words of Herron J (as he then was) in *Williamson and Anor v Commr for Railways* (1959) 76 WN (NSW) 648 at p 664 "the word 'indemnity' in s 26(j) is not used as limited to merely contractual indemnity, that is, as limited to receipts which are of the same character as 'insurance'" .

However, notwithstanding the apparent width of the term "indemnity" and the composite expression "by way of indemnity for or in respect of", when one analyses the abovementioned cases in

²⁰ See *FCT v Wade* (1951) 84 CLR 105, per Kitto J at 115-116; *Robert v Collier's Bulk Liquid Transport Pty Ltd* (1959) 33 VLR 280; *Williamson v Commr for Railways* (1959) 76 WN (NSW) 648; *Goldsborough Mort & Co Ltd v FCT* 76 ATC 4343.

²¹ 76 ATC 4343 at 4348-4349.

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which the receipt has been held to be caught by the expression, one finds in each case that the loss for which the recipient was compensated or indemnified gave rise to a legal right (whether pursuant to the common law, statute or a contract) to be so compensated or indemnified.

In *Rowe*, the AAT found as a fact that:²²

the payment was not made subject to it being accepted in settlement of any legal claim or any other entitlement. The payment was made totally on an ex gratia basis.

It is thus submitted that since Rowe had no legal right to be reimbursed or compensated for his legal expenses, the ex gratia payment was not an amount "received by way of insurance or indemnity for or in respect of any loss or outgoing which is an allowable deduction". As such, it is submitted that s 26(j) has no application in the circumstances of *Rowe*.

Part IIIA

To fall for inclusion in assessable income as a result of Part IIIA, Rowe would need to have disposed of an asset in circumstances within the Act. It is difficult to discern an "asset", as defined in s 160A, which Rowe had acquired and disposed of. Prior to the State Government's promise to provide an ex gratia payment to Rowe, he had no rights against that government which could be an "asset" for the purposes of s 160A. Even after the government made the promise to pay an ex gratia payment, it seems very doubtful whether Rowe acquired any "right" (for the purposes of s 160A) to insist upon the honouring of that gratuitous promise which *may* be said to be disposed of by the fulfilment of that promise. Firstly, whilst it is true that the failure to honour a gratuitous promise may, in limited circumstances, give rise to a "right" or "equity" in the promisee to claim that the promisor be estopped from reneging on that promise (see *The Commonwealth v Verwayen* (1990) 170 CLR 394), there was no such failure in *Rowe* which could possibly give rise to the acquisition by Rowe of such a right. Secondly, even if such a right could be said to have been acquired by Rowe upon the making of the promise, it would seem that the better view is that it is not correct to view the fulfilment of that promise as a disposal of that right.²³

²² 94 ATC 400 at 410.

²³ See *FCT v Unilever Australia Securities Ltd* (1995) 30 ATR 134 per Beaumont J at 156, and at first instance (1994) 28 ATR 422 per Spender J at 434; but for the contrary view see *ICI Australia Ltd v FCT* (1994-1995)

We have also considered the applicability of s 160M(6) and s 160M(7). Although there are lengthy considerations involved in that analysis, essentially, those subsections are not applicable in the circumstances of *Rowe* because of the lack of any relevant "asset" as mentioned above.

Tax asymmetry

If one leaves aside the legal niceties, Rowe received a tax deduction for an outlay which at the end of the day he did not make. Whatever lawyers and accountants might think about this, we consider that the reasonable person, riding as she does on the Rivercat between Parramatta and Circular Quay, may well consider that result incongruous. Indeed, we consider that, as a matter of tax policy, the result is incongruous, ignoring as it does any notion of symmetry between the deductibility of the expenses and the assessability of their reimbursement, and the notion of simple fairness.²⁴

Although there is presently no general principle that compensation for, or reimbursement of, a previously allowed deduction is to be included in assessable income, there are several statutory provisions that produce that result in relation to specific types of proceeds. Section 26(j), which has already been mentioned, is a good example of such a provision. Other examples include:

- s 26(k) which, in effect, includes in assessable income any amount recovered in respect of a loss allowable under s 71 (losses through embezzlement);
- s 63(3) which, in effect, includes in assessable income any amount recovered in respect of a debt which had previously been written off as bad; and
- s 72(2) which, in effect, includes in assessable income the amount of any refund of rates or taxes which had been an allowable deduction.

It thus seems that the Commonwealth Parliament does consider

29 ATR 233 per Ryan J at 260.

²⁴ For similar sentiments in relation to the assessability of a reimbursement of a previously deductible expense see Waincymer J, *Australian Income Tax: Principles and Policy* (2nd ed 1993 Butterworths) at 105 and 228.

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symmetry to be a worthwhile objective (at least in a piecemeal fashion). How are the issues arising out of *Rowe* dealt with in other jurisdictions?

The approach in other jurisdictions

For the purposes of this article we have examined how *Rowe* would be decided in the United Kingdom (UK) and South Africa (SA). We conclude that the receipt would probably escape taxation in the UK, but would quite clearly be taxed in SA.

The United Kingdom

Under the UK rules, an amount is subject to income tax only if it is so defined by the Schedules and Cases of the Taxes Acts. Those which may have application in this instance are Schedule E, relating to offices and employment; Schedule D Cases I or II which apply to recipients engaged in a trade, profession or vocation; or Schedule D Case VI, the residual case which taxes profits not falling under Schedules A, C, E or any other case of Schedule D. For the reasons which follow, it is submitted that the Schedules and Cases would have no application in a case such as *Rowe's*.

It is submitted that *Rowe's* circumstances, as he is not in a "trade profession or vocation" as contemplated by Schedule D Cases I and II (which essentially mean persons in business), fall outside those Cases. It is further submitted that, as the receipt in question lacks repetitiveness, Schedule D Case VI would not apply. The lack of repetitiveness means that the receipt would not fall within the definition of "annual" profits or gains which Case VI requires.

Furthermore, as *Rowe's* receipt was not an "emolument" derived from his "office" or "employment" as is required under Schedule E, that part of the UK legislation would not have application. Nor is the receipt a perquisite, or profit, or a payment of expenses by reason of his employment. The UK view, not unlike the Australian approach in such cases, is illustrated by the case of *Hochstrasser v Mayes*²⁵ which establishes that there is an important distinction between a payment arising from employment (eg, a reward for past or future services rendered) and a payment made for other reasons but which would not have been made if the employment relationship had not existed (eg, a birthday gift for an employee). The latter is not taxable, the former is. On this basis, the amount received by *Rowe*

²⁵ 38 TC 673 (HL); [1958] 3 All ER 285.

would not be taxable in the UK because it was not paid for services rendered or to be rendered and it was not paid because of an ongoing employer/employee relationship. The award was made because the initial employment by the council triggered the inquiry which gave rise to the legal expenses.

This view is reached despite consideration of s 148 of the Income and Corporation Taxes Act 1988, which caters for taxation of "any payment ... in connection with the termination of the holding of an office or employment...". It is submitted that Rowe's receipt was not in the nature of a "golden handshake" or other consideration for his loss of office, but was clearly a reimbursement of expenditure he incurred in defending himself from loss of office. This might bring the amount within the ambit of the section, if it could be said that the amount constituted payment of damages for loss of profits from his employment, along the lines of such cases as *London & Thames Haven Oil Wharves Ltd v Attwooll*.²⁶ It is accepted that the payment was not a conventional one arising from an employment dispute such as the damages for breach of contract or damages in tort for financial loss, in that they were not paid by the employer who caused the loss. On the other hand, Rowe's receipt was evidently based on the costs he had incurred and was intended to reimburse him for his out-of-pocket expenses in the form of those costs. As the dispute was whether or not Rowe should be dismissed, it may be said that the payment was "in connection with the termination of the holding of an office or employment", a phrase which is very wide indeed.

Because the payment was "ex gratia" it may be said that it is not sufficiently closely linked to the termination of Rowe's employment. Damages cases are frequently settled, however, by agreement between the parties and are said to be made "ex gratia" without admission of fault or liability on behalf of the defendant. Rowe's receipt is not materially different from such amounts; the important point being that, if he had not been in the employment which he lost, the amount would not have been paid. Thus, depending on what view is taken of the nature of the settlement, Rowe's tax position in the UK might have been different, although it is the writers' view that it would not have been, because of the peculiar nature of his particular receipt and the complete lack of obligation on behalf of the State Government to pay it.

None of this discussion leads us any closer to establishing whether

²⁶ 43 TC 491; [1967] 2 All ER 124.

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there is a principle in the UK law which would generally include in assessable income amounts reimbursed to taxpayers who have previously claimed such amounts as deductions. That is because there does not appear to be one. The status of a receipt in the United Kingdom is, as has already been said, dependent on the application of the specific taxing Schedules and Cases to the receipt in question. If the taxing Acts do not cover the receipt, it is free of tax.

The South African approach

The South African approach is to include in assessable income virtually any amount previously allowed as a deduction. According to the definition in s 1 of the South African Income Tax Act 1962,²⁷ "gross income" includes:

- (n) any amount which in terms of any other provision of this Act is specifically required to be included in the taxpayer's income and for the purposes of this paragraph all amounts which in terms of subsection (4) of section *eight* [sic] are required to be included in the taxpayer's income shall be deemed to have been received by or to have accrued to the taxpayer from a source within the Republic notwithstanding that such amounts may have been recovered or recouped outside the Republic.

This paragraph, then, opens the way to any other provision in the Act which provides for the inclusion of other amounts in the definition of gross income. It must be accepted that the legislation becomes cumbersome as a result, and it is therefore impossible to determine exhaustively, at a glance over the definition of "gross income" in s 1, what it does and does not include. This method of drafting, however, makes it easy for the legislator to tinker with the desired inclusions in gross income as policy may require from time to time.

With regard to the specifics of *Rowe*, in South Africa refunds of deductions claimed in previous years are included in gross income by means of s 8(4)(a) which provides that:

There shall be included in the taxpayer's income all amounts allowed to be deducted or set off under the provisions of ... [a list of provisions follows, including s 11, under which a deduction such as *Rowe's* would have been made] ... or under the corresponding provisions of any previous Income Tax Act, whether in the current

²⁷ Act No 58 of 1962.

or any previous year of assessment, which have been recovered or recouped during the current year of assessment.

There is no doubt in the South African law that the amount in question would have been "recovered or recouped". Thus the dispute in *Rowe* could not have arisen under the South African legislation, for whether the general principle alleged by the Australian Commissioner applied or not, there would have been clear statutory authority for the Commissioner's view.

Where to go from here?

If the Commonwealth Parliament does consider tax symmetry to be a worthwhile objective, we offer the following suggestions as to how it could be achieved legislatively in relation to the recoupment of an amount previously deducted:

- (1) Insert a provision which expressly includes in assessable income in the year of derivation any amount derived by way of reimbursement of, or compensation for, or recovery or recoupment of, etc, an amount allowed as a deduction;
- (2) Insert a provision similar to the South African model which includes in assessable income in the year of derivation any amount derived by way of recoupment of, etc, an amount allowed as a deduction under one of a list of provisions; or
- (3) Insert a provision enabling the Commissioner to amend the assessment in respect of the year in which an amount was allowed as a deduction to include in assessable income in that year any amount derived by way of recoupment of, etc, the amount allowed as a deduction.

Any such provision would obviously need to be carefully drafted so that an intention to cover all methods of recoupment of an allowable deduction was clearly conveyed.

Which option do we recommend?

Balancing equity, efficiency and simplicity, we consider our first suggestion to be the best. Although the third suggestion avoids any inequities that could arise as a result of tax rate changes or change of taxpayer circumstances between the year in which the expense is deducted and the year of derivation of the recoupment receipt, the inclusion of an exception to the present assessment amendment regime

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to overcome this specific anomaly would appear not to be warranted in the overall circumstances. Further, the likelihood of increased compliance obligations on taxpayers (particularly in relation to record keeping) as a result of the adoption of the third suggestion also weighs against its introduction. Although there is little between the first and second suggestions, we favour the first suggestion because it is slightly more simple and efficient than the second, which would require reconsideration and alteration of the list of deduction provisions each time a deduction provision is enacted, altered or repealed.

Concluding remarks

The High Court has now granted the ATO special leave to appeal the Full Federal Court's decision in *Rowe*. As one of us stated previously:²⁸

It is submitted that there is only one issue raised by the Full Federal Court's decision which the High Court is likely to view as being of sufficient significance to warrant special leave - whether there is a general principle that a payment made by way of reimbursement of, or compensation for, a deductible expense is assessable income. It is submitted that precedent is against the ATO in that regard.

On the other hand, perhaps a policy-minded High Court will make our discussion of legislative intervention irrelevant.²⁹ Perhaps our reports of the maladies of tax symmetry are much exaggerated.

²⁸ Schabe DM, "Reimbursed deductible expenditure as a windfall gain: A hard *Rowe* to hoe?" [1995] Butterworths Weekly Tax Bulletin (No 54) 869 at 870.

²⁹ Although one may ponder the likelihood of that happening given the High Court's apparent lack of enthusiasm, in *Mount Isa Mines Ltd v FCT* 92 ATC 4755 at 4760, to consider a submission concerning symmetry between income and deductions. Indeed, the High Court stated in that case (also at 4760) that "considerations of abstract logic are of but limited assistance in the interpretation of the Act".