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Domenic Carbone



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# An Extraordinary Concept of Ordinary Income? The Significance of FCT v Montgomery on What is Income According to Ordinary Concepts

**Abstract**
FCT v Montgomery is regarded as an authority on whether a specific type of receipt - a lease incentive – is 'income according to ordinary concepts'. However, the case has significance beyond the issue of whether lease incentives are ordinary income. This article analyses the reasoning in Montgomery and discusses the subsequent cases in which it has been considered.

**Keywords**
FCT v Montgomery, ordinary income

# AN EXTRAORDINARY CONCEPT OF ORDINARY INCOME? THE SIGNIFICANCE OF *FCT V MONTGOMERY* ON WHAT IS INCOME ACCORDING TO ORDINARY CONCEPTS

DOMENIC CARBONE*

*FCT v Montgomery* is regarded as an authority on whether a specific type of receipt - a lease incentive – is 'income according to ordinary concepts'. However, the case has significance beyond the issue of whether lease incentives are ordinary income. This article analyses the reasoning in *Montgomery* and discusses the subsequent cases in which *it* has been considered.

A core concept of Australian income tax is that of 'ordinary income' in s 6-5(1) of the *Income Tax Assessment Act 1997* (Cth) (the 1997 Act). That subsection provides that 'assessable income includes income according to ordinary concepts, which is called ordinary income'. However, neither 'income' nor the 'ordinary concepts' of income are defined in the 1997 Act, or in the *Income Tax Assessment Act 1936* (Cth) (the 1936 Act) which continues to operate together with the 1997 Act. Rather, as it did with the 1936 Act, the Parliament has left it to the courts to give meaning to 'income' and 'income according to ordinary concepts'. It is in this respect that the decision of the High Court of Australia in *FCT v Montgomery*[1] has significance, beyond the specific type of receipt involved in that case - an inducement payment received as an incentive for a business taxpayer to enter a lease.

*Montgomery* is mentioned in one leading text book[2] as an authority on that specific type of receipt in the context of business income. In another leading text book,[3] *Montgomery* is again mentioned as an authority on a lease incentive receipt but only in the context of property income. However, neither discusses nor points out the significance of the case beyond the issue of whether lease incentives are ordinary income. This is what this article will endeavour to do. It does this primarily by analysing the reasoning in *Montgomery* and discussing the subsequent cases in which *Montgomery* has been considered. Apart from briefly reviewing the decision of the

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* Lecturer, Business School, University of Adelaide.

1 (1999) 198 CLR 639.

2 *Australian Master Tax Guide 2010* (CCH 46th ed, 2010) 10-116.

3 Deutsch et al, *Australian Tax Handbook 2010*, (Thomson Reuters 2010) [6 150].

Full Court of the Federal Court in *FCT v Cooling*,[4] the article does not discuss all the other so-called 'lease incentive cases' that predated *Montgomery*, about which there has already been much written. *Cooling* is discussed because it is the only lease incentive case referred to by the High Court in *Montgomery*. Before setting out that analysis and discussion, an introductory discussion is provided on ordinary income because it is only by setting out what is considered to be the position before *Montgomery* that the effect of the case can be properly addressed.

## INTRODUCTION – ORDINARY INCOME

In the absence of a statutory definition of 'income', a useful starting point is its dictionary definition such as that which appears in the *Macquarie Dictionary*:

> 1. the returns that come in periodically, esp. annually, from one's work, property, business, etc; revenue; receipts.

What have been accepted as two hallmark characteristics of income are implicit, if not explicit, in this dictionary definition. These are the 'periodicity, regularity and recurrence'[5] of a receipt, and the 'coming in' or realisation[6] of a receipt. However, it may also be noted that the definition has not been adopted in its entirety by the courts, which have not included mere 'receipts' within the meaning of income. In this regard, the courts have drawn a distinction between an income receipt, on the one hand, and a capital receipt, on the other. This may be simply expressed as a rule that income does not include a capital receipt, or a capital receipt is not income.

Beyond this starting point, the courts have consistently declined to adopt a precise or exhaustive meaning of 'income'. Consequently, there is no absolute test for determining in every case what is ordinary income. The courts have instead developed 'principles' to determine that question. This was acknowledged in the Explanatory Memorandum to the *Income Tax Assessment Bill 1996*, which became the 1997 Act, that stated in respect of ordinary income:[7]

> The courts have developed principles for determining what is ordinary income. However there is no complete set of rules for determining that question.

Some of the principles that apply to determining what is ordinary income are of a general nature, and some are more specific to particular types of ordinary income, such as personal exertion, business and property income.

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4 (1990) 22 FCR 42.

5 See, eg, *FCT v Myer Emporium Ltd* (1987) 163 CLR 199, 215, and *FCT v Dixon* (1952) 86 CLR 540, 557 and 567-8.

6 This second hallmark characteristic could also be described as a receipt of money or moneys worth.

7 Explanatory Memorandum at 38.

## *MONTGOMERY'S* CASE AND 'INCOME ACCORDING TO ORDINARY CONCEPTS'

The importation of those principles within the meaning of ordinary income is reflected in the words 'income according to ordinary concepts' in s 6-5(1). This is an express legislative adoption[8] of what Jordan CJ said in *Scott v C of T (NSW)*:[9]

> …what forms of receipts are comprehended within [income], and what principles are to be applied to ascertain how much of those receipts ought to be treated as income, must be determined in accordance with the ordinary concepts and usages of mankind …

It has been noted that such concepts and usages are not constant but changing.[10] It follows that if ordinary concepts and usages change over time, the meaning of income and what receipts are encompassed by the term will also change. Therefore, income cannot be regarded as having a meaning that is forever static or fixed.

**Principles on ordinary income generally**

Prior to *Montgomery* being decided by the High Court, the principles developed by the courts that apply to ordinary income generally (and some observations on them) included the following:

A1 Whether an amount is income depends on the character of the amount in the hands of the recipient.[11] Accordingly, the character of the amount in the hands of the payer or another recipient is irrelevant.[12]

A2 This character is determined by an objective consideration of the facts.[13] Whether the recipient thinks an amount is income or not, or treats an amount as income or not is not decisive.

A3 The character of a receipt is not determined by whether it is expenditure of a capital nature by the payer, or by the nature of expenditure that the recipient is required to make.[14] A taxpayer may expend income to acquire a capital asset or may expend a capital receipt to pay a non-capital or revenue liability.

A4 There is no exact symmetry between the income or capital character of an amount as a receipt, and its character as an expenditure.[15] Consequently, there

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[8] *FCT v Stone* (2005) 222 CLR 289, 294 [8] and 310 [73].
[9] *Scott v C of T (NSW)* (1935) 3 ATD 142, 144.
[10] *FCT v Blake* 84 ATC 4661, 4663.
[11] *Scott v FCT* (1966) 117 CLR 514, 526.
[12] *Federal Coke Co Pty Ltd v FCT* (1977) 34 FLR 375, 388, 399 and 402.
[13] *Hayes v FCT* (1956) 96 CLR 47, 55.
[14] *GP International Pipecoaters Pty Ltd v FCT* (1990) 170 CLR 124, 136.
[15] *FCT v Rowe* (1997) CLR 266, 276-7 and 291.

is no general principle that an amount received as compensation or reimbursement of a deductible expense is income.

A5 The question whether an amount is income depends on a consideration of the whole of the circumstances.[16] The question is therefore one that is ultimately determined as a question of fact.

To determine that question, the courts have identified a number of factors that are relevant and important and which individually or collectively may be decisive. For example, in *GP International Pipecoaters Pty Ltd v FCT*,[17] the High Court said:[18]

> To determine whether a receipt is of an income or of a capital nature, various factors may be relevant. Sometimes, the character of receipts will be revealed most clearly by their periodicity, regularity or recurrence; sometimes, by the character of a right or thing disposed of in exchange for the receipt; sometimes, by the scope of the transaction, venture or business in or by reason of which money is received and by the recipient's purpose in engaging in the transaction, venture or business.

To these factors may be added the connection of a receipt with the provision of services, the performance of employment, the engagement in business or other 'sufficient connection' with any revenue producing activity carried on by the taxpayer.[19]

### Principles on business income

Prior to *Montgomery*, specific principles (and some observations on them) relevant to business income included:

B1 The fact that a business is being carried on does not automatically mean that every receipt or profit of the business will be ordinary income.[20] However, if a receipt or profit is made 'in the course of'[21] carrying on a business that 'in itself is a fact of telling significance' in determining whether it is ordinary income.[22]

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16 *Squatting Investment Co Ltd v FCT* (1953) 86 CLR 570, 627.

17 *GP International Pipecoaters Pty Ltd v FCT* (1990) 170 CLR 124.

18 *GP International Pipecoaters Pty Ltd v FCT* (1990) 170 CLR 124, 138. See also *FCT v Rowe* (1997) CLR 266, 291.

19 *FCT v Rowe* (1997) CLR 266, 291.

20 *FCT v Spedley Securities Ltd* 88 ATC 4126, 4130.

21 Which phrase 'involves a temporal connection': *FCT v Spedley Securities Ltd* 88 ATC 4126, 4130.

22 *FCT v Myer Emporium Ltd* (1987) 163 CLR 199, 215.

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B2 A receipt or profit, which is the proceeds or product of a business, is ordinary income.[23] This principle essentially reflects the dictionary definition of 'income'.

B3 To be regarded as the proceeds or product of a business, there must be a 'sufficient connection' between the receipt or profit and the business carried on. Matters of degree and judgment will be involved in deciding whether a 'sufficient connection' exists in any given case.[24]

B4 In determining whether a 'sufficient connection' exists, crucial matters are defining the scope of the business and examining the relationship of the receipt or profit to the business. This process involves a 'wide and exact scrutiny' of the taxpayer's business activities.[25]

B5 A 'sufficient connection' will exist where a receipt or profit arises from a transaction 'in the **ordinary** course of' of carrying on a business.[26] The ordinary income from such a transaction can be, and usually is, the gross amount or can, perhaps surprisingly, sometimes be the 'profit or gain'[27] from it.

B6 A 'sufficient connection' can also exist where a transaction is undertaken outside the ordinary course of business, but which is nonetheless 'incidental' to, or an ordinary or natural incident of, the ordinary course of business or that business activity.[28] The ordinary income from such a transaction will be the profit from the transaction.[29] This principle is referred to in the following sections of this article as the 'ordinary incident principle'.

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23 *FCT v Cooling* (1990) 22 FCR 42, 50, citing *Squatting Investment Co Ltd v FCT* (1953) 86 CLR 570, 620.

24 *FCT v Consolidated Press Holdings Ltd (No 2)* (1999) 91 FCR 574, 593 [80].

25 *London Australia Investment Co Ltd v FCT* (1977) 138 CLR 106, 116, citing *Western Gold Mines NL v C of T (WA)* (1938) 59 CLR 729, 740.

26 *Californian Copper Syndicate v Harris* (1904) 5 TC 159 and *FCT v Myer Emporium Ltd* (1987) 163 CLR 199.

27 *FCT v Myer Emporium Ltd* (1987) 163 CLR 199, 209. It may also be noted that the High Court there reasoned that because a business is carried on with a view to profit, a 'gain' made in the ordinary course of carrying on the business is invested with the profit-making purpose, thereby stamping the 'profit' with the character of income.

28 *FCT v Reynolds* 81 ATC 4131, 4141-4143; *Westfield Ltd v FCT* (1991) 28 FCR 333, 343-344. In *Westfield* at 342-343, Hill J (Lockhart and Gummow JJ agreeing) said that where a transaction is an ordinary incident of the business activity of the taxpayer, albeit not directly its main business activity, a profit-making purpose can be inferred from the association of the transaction with that business activity.

29 See *FCT v Citibank Ltd* (1993) 44 FCR 434, 446 and the cases mentioned by Hill J (Jenkinson and Einfeld JJ agreeing) where gross income was equated with a net profit amount. His

B7 If a profit or gain arises from an extraordinary transaction in the course of a business, it will be income only if it arises from a commercial transaction entered into with the intention or purpose of making a profit or gain by the very means giving rise to that profit or gain.[30] This is so even if the transaction is an isolated or 'one-off' transaction.[31] A source of this principle is *FCT v Myer Emporium Ltd*[32] and it is referred to in the following sections of this article as the '*Myer* principle'.

B8 However, a profit or gain from an extraordinary transaction is not income merely because a business is carried on with a view to a profit, or it arises in the course of business operations undertaken to produce a profit. The purpose of profit-making must exist in relation to the particular operation in question.[33]

It is acknowledged that referring to the foregoing as 'principles' carries with it the possible criticism and risk of elevating what are essentially factual considerations, that have been given significant weight in decided cases,[34] to statements resembling rules of law, which they are not.[35] This reference has, however, been adopted because the cases are themselves replete with such references to so-called principles.

Also, it must be said that some of the principles are not without their difficulties or controversy. In applying principle B3, for example, reasonable persons can differ on what type of connection is 'sufficient' enough, as opposed to being too remote, for a receipt or profit to be regarded as the proceeds or product of a business. Matters of degree and judgment not only impact on the application of this principle but also principle B4. Again, reasonable persons can differ in how broad or narrow a view they take of the scope of the business, and the relationship of the receipt or profit to the business.[36]

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Honour there noted that what all these cases have in common, and what is indeed a necessary requirement of a net profit being income, is that the gross receipts used in the calculation of the net profit must not themselves be income in ordinary concepts. It would seem the gross receipts in the cases were not income because they did not arise from transactions involving revenue assets but capital assets.

30 *FCT v Myer Emporium Ltd* (1987) 163 CLR 199, 209-10 and *Westfield Ltd v FCT* (1991) 28 FCR 333, 344.

31 *FCT v Myer Emporium Ltd* (1987) 163 CLR 199, 210.

32 (1987) 163 CLR 199.

33 *FCT v Spedley Securities Ltd* 88 ATC 4126, 4130.

34 Which, in the view of the author, is indeed merely what they are.

35 See, eg, in a different context *FCT v Mitchum* (1965) 113 CLR 401, 407. See also *Hallstroms Pty Ltd v FCT* (1946) 72 CLR 634, 646 and *BP Australia Ltd v FCT* (1965) 112 CLR 386, 397.

36 For example, compare *Memorex v FCT* 87 ATC 5034 with *FCT v Cyclone Scaffolding Pty Ltd* (1987) 18 FCR 183 and, in this latter case, compare the majority (Bowen CJ and Beaumont J) with the dissenting judge (Wilcox J).

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Another difficulty inherent in principles B5, B6 and B7 is that of defining with a degree of precision what is 'in the ordinary course of' a business, what is 'incidental to, or an ordinary or natural incident of', a business, and what is an 'extraordinary' transaction in a business. It is submitted, however, that the expression 'in the ordinary course of' business may be said to refer to transactions or activities entered into day to day in the business as the main focus of business activities. The expression 'incidental to, or an ordinary or natural incident of', at least at first glance, may be taken to refer to a transaction, activity or occasion that commonly, regularly or frequently arises in the carrying on of the business, although not as the main focus of day to day business activities.[37] And an 'extraordinary' transaction or activity may be said to be one that is undertaken neither in the ordinary course nor incidental to, or as an ordinary or natural incident of, the transactions or activities in which a taxpayer usually engages in the ordinary course of business.[38]

The application of such definitions to any given business also has its difficulties. A reason for this is that business is usually dynamic and the transactions entered into or activities undertaken in a business can change. What may have been at some time an extraordinary transaction or activity may, at some other time, become incidental or in the ordinary course of the business. Therefore, it can be difficult to delineate the boundaries between the three classes of transactions or activities over the lifetime of a business.

Principles B5, B6 and B7 may also be regarded as controversial as the three classes or categories of business transactions have not all been consistently acknowledged, defined or applied by the courts. It is submitted that that this lack of consistency does not impinge upon the actual existence of the principles, nor that it is completely the cause or fault of the courts.

Rather, it is considered to be more a reflection of the actual arguments put before the courts by counsel and consequently addressed by the courts in the particular cases decided by them.

Finally, to return to principle B5, it is on the face of it surprising that a 'profit or gain' from a transaction in the ordinary course of business can be ordinary income. But that this principle exists and is settled was made clear by the unanimous judgment of the High Court in *Myer*. The Court (Mason ACJ, Wilson, Brennan, Deane and Dawson JJ) said:[39]

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37 This of course begs the question of how common, regular or frequent must a transaction or occasion arise for it to be 'sufficiently connected' to the business so that it is a product of the business and result in ordinary income.

38 *FCT v Myer Emporium Ltd* (1987) 163 CLR 199, 210.

39 *FCT v Myer Emporium Ltd* (1987) 163 CLR 199, 209.

> … it is well settled that a profit or gain made in the ordinary course of carrying on a business constitutes income …

If a profit or gain from such a transaction is treated as ordinary income, it would obviously involve only a net amount being income. However, this would seem to be contrary to the scheme and operation of the Income Tax Assessment Acts, both of which contemplate a role for general deductions[40] in working out taxable income.[41] If a net amount is included in assessable income as ordinary income, this would not leave any room for the operation of the general deduction provision unless it is accepted as having an operation in working out the net amount of profit or gain. For the reasons given by Mason J in *Commercial and General Acceptance Ltd v FCT*,[42] such an operation is unlikely.

Overcoming this difficulty is what prompted Mason J in *Commercial and General Acceptance* to say that in the context of s 25(1) of the *Income Tax Assessment Act 1936*:[43]

> … income is to be ascertained in the first instance by reference to the gross income receipts of the taxpayer, but in my view it also includes a net amount which is income according to the ordinary concepts and usage of mankind, when the net amount alone has that character, not being derived from gross receipts that are revenue receipts.

Although his Honour's view was expressed in regard to s 25(1), which included the expression 'gross income' in its terms, and s 6-5(1) does not incorporate the word 'gross' in its terms, there seems little doubt that a similar view should also be taken of s 6-5(1), which after all was clearly intended to be a plain English rewrite of part of s 25(1) without changing its meaning and effect.[44] But the difficulty with what is said by the High Court in *Myer* still remains, because a profit or gain made in the ordinary course of carrying on a business would be derived from gross receipts or amounts that are revenue receipts and also ordinary income. This character would therefore prevent any net amount of profit or gain from those receipts also being ordinary income.

**Principles on property income**

In regard to property income, the specific principles that apply in determining ordinary income are affected by whether a receipt or profit arises from the use or

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40 *Income Tax Assessment Act 1997* (Cth) s 8-1, *Income Tax Assessment Act 1936* (Cth) s 51(1).

41 *Income Tax Assessment Act 1997* (Cth) s 4-15, *Income Tax Assessment Act 1936* (Cth) s 48.

42 (1977) 137 CLR 373, 382. See also *FCT v Whitfords Beach Pty Ltd* (1982) 150 CLR 355, 371-2 and *FCT v Citibank Ltd* (1993) 44 FCR 434, 446-7.

43 (1977) 137 CLR 373, 382-3.

44 See 1-3 *Income Tax Assessment Act 1997* (Cth).

exploitation of property, or the realisation of property. In regard to the former, principles established before *Montgomery* included:

C1 A receipt or profit, which is a return or product from one's property, is generally ordinary income. This principle essentially reflects the dictionary definition of 'income'.

C2 In this context, property does not bear only its strict legal meaning of a 'right, interest or thing which is legally capable of ownership, and which has value',[45] but also extends to and is used interchangeably with a 'capital asset'.[46]

C3 The ordinary income is usually the gross amount of the return or product from the property, and will be such where the amount also has the character of periodicity.[47]

To these principles may be added that the return or product can arise from the use or exploitation of property, whether active or passive, although there appears to be no case law that explicitly said so.[48]

From principle C3, it can be seen that it was clearly established before *Montgomery* that a periodical receipt from the use or exploitation of property is ordinary income. However, there appears to be no clear authority directly on point that established that an isolated or 'one-off' receipt or profit from the use or exploitation of property resulted, for that reason alone, in ordinary income. Based on the traditional approaches adopted to classifying receipts as income or capital, the tendency would be to conclude that such a receipt was capital because of its isolated and non-recurrent nature and because it is received 'once and for all' in a lump sum.

## *FCT V COOLING* – A BRIEF REVIEW

The taxpayer was a partner in a firm of solicitors that was established in 1939. Since then the firm had always carried on its practice in leased premises – 4 in all – prior to moving to new premises. The previous leased premises were not entirely satisfactory and its lease was due to expire at the end of February 1986. The firm was approached in January 1985 to relocate to the new premises and subsequently received leasing proposals that included a rent free period or cash payment as an incentive for the

45 See the *Butterworths Concise Australian Legal Dictionary*, citing *Doodeward v Spence* (1908) 6 CLR 406, 411-412, 414-415 and 416; *Cmr of Stamp Duties (Qld) v Donaldson* (1927) 39 CLR 539, 550.

46 See, eg, *Federal Wharf Co Ltd v FCT* (1930) 44 CLR 24.

47 See, eg, *FCT v Citibank Ltd* (1993) 44 FCR 434, 447.

48 See Parsons *Income Taxation in Australia: Principles of Income, Deductibility and Tax Accounting* (1985) 88.

firm to enter into a lease. At the time it was common for landlords of new city buildings to offer incentives to new tenants to induce them to enter leases. The firm agreed to the receipt of a lump sum payment of $162,000 (the incentive receipt) to be made to it as an incentive to procure the firm's service company to accept a lease of the new premises, and to guarantee the company's obligations under the lease. The firm had never previously received a payment of the type in question. The anticipated expenditure to fund the move and fit-out the new premises totalled $205,009.

At first instance in the Federal Court,[49] Spender J held the incentive receipt was not income. In so holding, his Honour relied on the incentive receipt not being received in the ordinary course of business or incidental thereto, not being for any services rendered, not compensating for an abnormally high rent to be paid, and not being periodic, regular or recurrent.[50] This decision was reversed on the Commissioner's appeal to the Full Federal Court where it was held that the incentive receipt was income.[51]

The main judgment of the Full Court was delivered by Hill J (Lockhart and Gummow JJ agreeing), in which it may be said that there were two strands his Honour's reasoning resulting in the incentive receipt being income. The first strand was that the incentive receipt was received by the firm either in the ordinary course of its business or incidental to that business. The second strand of reasoning essentially involved an application of the *Myer* principle.

### First strand of reasoning

In regard to the first strand of Hill J's reasoning, he stated:[52]

> Where a taxpayer operates from leased premises, the move from one premises to another and the leasing of the premises occupied are acts of the taxpayer in the course of its business activity just as much as the trading activities that give rise more directly to the taxpayer's assessable income. Once this is accepted, the evidence established that in Queensland in 1985 it was an ordinary incident of leasing premises in a new city building, at least where the premises were of substantial size, to receive incentive payments of the kind in question. Why then should a profit received during the course of business where the making of such a profit was an ordinary incident of part of the business activity of the firm not be seen to be income in ordinary concepts?

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49 *Cooling v FCT* 87 ATC 4731.

50 *Cooling v FCT* 87 ATC 4731, 4739-40.

51 *FCT v Cooling* (1990) 22 FCR 42.

52 *FCT v Cooling* (1990) 22 FCR 42, 56.

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It must be said that a close reading of this passage reveals that while some propositions and aspects of his Honour's approach are clearly acceptable, there are also some that are open to doubt.

The proposition that where 'a taxpayer operates from leased premises, the move from one premises to another and the leasing of the premises occupied are acts of the taxpayer in the course of its business activity' is clearly acceptable. As his Honour had previously pointed out, the firm did not cease business when it moved from one set of leased premises to another. However, his Honour then continued to make a comparison by saying the act of moving was an act in the course of the firm's business activity 'just as much as the trading activities that give rise more directly to the taxpayer's assessable income.' This comparison could be taken to suggest that moving from one premises to another is an act in the 'ordinary' course of business, because that is how such trading activities would be characterised.

If this is what his Honour meant then, it is submitted, that this is a questionable proposition generally. It is highly doubtful that the act of moving leased premises can be properly regarded as a day to day activity that is the main focus of a firm of solicitors, as would be the act of rendering legal advice and services. And in regard to the particular firm, it is even more questionable because the firm had moved only four times since 1939. Yet the comparison made by his Honour seems to indicate that this circumstance suffices for a move from one leased premises to another being accepted as an act in the 'ordinary' course of business. Perhaps the focus of Hill J's reasoning and what he meant in making the comparison was that the act of occupying leased premises was an act in the day to day operation of the business, in which case the proposition becomes acceptable.

On the basis of the initial part of the passage quoted being accepted, however, Hill J then continued to point out that 'the evidence established that in Queensland in 1985 it was an ordinary incident of leasing premises in a new city building, at least where the premises were of substantial size, to receive incentive payments of the kind in question.' While this may be so, his Honour's consideration of this evidence seems to conflict with the principle A1, previously set out in this article, that whether or not an amount is income depends on the character of the receipt in the hands of the actual recipient. The character of the amount in the hands of another recipient is therefore irrelevant to the question. Yet, his Honour seemed to approach his reasoning by taking into account this irrelevant consideration.[53] It is submitted that, however, that the relevant issue is instead whether the evidence showed that it was an ordinary

[53] Another view is that principle A5 would nonetheless allow consideration to be had to the business environment in which an amount is received in characterising the amount in the hands of the recipient.

incident of the actual taxpayer's business activities to receive lease incentive payments. And the evidence in the case was to the contrary because it showed that the firm had never previously received such a payment of that kind.

Hill J went on to conclude the passage by asking why 'should a profit received during the course of business where the making of such a profit was an ordinary incident of part of the business activity of the firm not be seen to be income'. In view of this, it is apparent that his Honour was relying on the principles B2 to B6, previously set out in this article, that ordinary income arises where a receipt or profit is the proceeds or product of a business, and a 'sufficient connection' will exist between the receipt or profit and the business carried on where, despite a transaction being outside the ordinary course of business, it nonetheless arises from a transaction that is 'incidental' to, or an ordinary or natural incident of, the ordinary course of business or the business activity. However, there is a certain incongruity in saying that an amount received from a transaction that has never previously occurred is an 'ordinary incident' of the business carried on by the taxpayer. While it may be an 'incident' of the business, and the incidents of a business may not be static, it hardly seems to be able to be described as an 'ordinary' incident, especially if it is the first time the taxpayer carrying on the business has received the amount and the receipt of it does not reoccur.

**Second strand of reasoning**

That there was a second strand to Hill J's reasoning is apparent by his Honour immediately continuing on from the quoted passage to say that there was 'another way' of analysing the facts. This other way was to ask whether the transaction giving rise to the incentive receipt could be properly characterised as a 'profit-making scheme'. This second strand of reasoning relied on the following often cited passage from the joint judgment of Mason ACJ, Wilson, Brennan, Deane and Dawson JJ in *Myer*:[54]

> Although it is well settled that a profit or gain made in the ordinary course of carrying on a business constitutes income, it does not follow that a profit or gain made in a transaction entered into otherwise than in the ordinary course of carrying on the taxpayer's business is not income. Because a business is carried on with a view to profit, a gain made in the ordinary course of carrying on the business is invested with the profit-making purpose, thereby stamping the profit with the character of income. But a gain made otherwise than in the ordinary course of carrying on the business which nevertheless arises from a transaction entered into by the taxpayer with the intention or purpose of making a profit or gain may well constitute income. Whether it does depends very much on the

[54] (1987) 163 CLR 199, 209-210.

> circumstances of the case. Generally speaking, however, it may be said that if the circumstances are such as to give rise to the inference that the taxpayer's intention or purpose in entering into the transaction was to make a profit or gain, the profit or gain will be income, notwithstanding that the transaction was extraordinary judged by reference to the ordinary course of the taxpayer's business. Nor does the fact that a profit or gain is made as the result of an isolated venture or a 'one-off' transaction preclude it from being properly characterized as income (*Federal Commissioner of Taxation v Whitfords Beach Pty Ltd* (1982) 150 CLR 355 at pp 366-367, 376). The authorities establish that a profit or gain so made will constitute income if the property generating the profit or gain was acquired in a business operation or commercial transaction for the purpose of profit-making by the means giving rise to the profit.

Hill J explained the requisite profit-making purpose by saying that a transaction may be a profit-making scheme notwithstanding that 'neither the sole nor the dominant purpose' of entering into it was the making of a profit.[55]

His Honour's ensuing analysis of the facts was that it was an integral part of the firm's commitment to moving premises that it receive the incentive receipt, which he said was a 'profit' of the partnership. The incentive receipt was not, however, the sole purpose of the firm moving premises. The previous premises had disadvantages and the securing of premises in a prestige building was also a clear purpose of the firm. Hill J was therefore able to conclude that the transaction entered into by the firm was a commercial transaction; it formed part of the business activity of the firm; and a 'not insignificant purpose' of it was the obtaining of a commercial profit by way of the incentive receipt.[56] It was these factors that resulted in the incentive receipt being income under *Myer*, although his Honour did not expressly say so. The second strand of reasoning is what may be termed an 'orthodox' application of the *Myer* principle and is clearly less objectionable than the first strand of Hill J's reasoning.

This analysis based on two strands of reasoning also supports, it is submitted, that Hill J applied two principles – the ordinary incident principle and the *Myer* principle – as alternative grounds for deciding that the incentive receipt was income. What is, however, lacking in his Honour's judgment is an explanation of why the amount of the incentive receipt constituted a 'profit or gain' for the purpose of either principle. A profit or gain in these contexts would ordinarily contemplate a gross amount less associated expenses to arrive at a net amount, or an excess of an amount received over an amount outlaid.[57] In this regard, the judgment also lacked an explanation of

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55 (1990) 22 FCR 42, 56.

56 (1990) 22 FCR 42, 56-7.

57 *Steinberg v FCT* (1975) 134 CLR 640, 696-7 per Gibbs J.

why the expenditure, anticipated at $205,009,[58] that would have been incurred in funding the move and fit-out was not a cost that could be taken into account in arriving at that profit or gain.[59] Indeed, his Honour repeatedly refers interchangeably to the profit arising from the incentive receipt, and to the gross amount of the incentive receipt, as if they were one and the same without giving any explanation of why this is so.[60]

## *FCT v MONTGOMERY* – AN ANALYSIS

The taxpayer was a partner in a large firm of solicitors. From 1977 to 1991, the firm carried on its practice from leased premises in two buildings, including BHP House. In 1987 and 1988, the firm refurbished the BHP House premises and expected to occupy them at least until the expiry of its leases of the premises in March 1993 and February 1994.

In September 1988, the owner of BHP House informed the firm that all levels of the building were to be gutted and cleared of asbestos. In March 1989, the owner further informed the firm that a proposed refurbishment would start in August 1989 and extend over three or more years. Although work on the floors occupied by the firm was not to begin until 1991, when it did the firm would not be able to remain in occupation of those floors. In view of this, the owner offered financial assistance to the firm to relocate it on other floors of the building during the refurbishment.

As well as considering the relocation to other floors within BHP House, the firm investigated leasing other premises as alternatives. In August 1989, it was offered an opportunity to lease new premises in another building. At the time, it was common practice for landlords to offer incentives to potential tenants to enter into leases of new buildings. The firm considered that it was of a size which made it a particularly attractive tenancy target, and that it should receive from a prospective landlord a good inducement to lease new premises.

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58 (1990) 22 FCR 42, 47.

59 In the author's view, the cost of the fit out would have been a non-revenue and capital expense and therefore not able to be immediately expensed against revenue in arriving at a profit amount, but rather would need to be capitalised and depreciated over time. This is on the basis that the fit out cost would be expected to provide an economic benefit in future periods. However, it is likely that some if not all of the moving expenses were non-capital and revenue expenses that could be immediately expensed against revenue in arriving at a profit amount. This is on the basis that some or all of the moving expenses would not provide an economic benefit in future periods.

60 A brief explanation is, however, set out by Hill J in his later judgment in *Lees & Leech v FCT* (1997) 73 FCR 136, 151.

The owner of the new premises would not negotiate on the amount of rent sought for a lease of the premises. However, the owner offered to pay an amount to induce the firm to enter the lease. This offer was an occurrence independent of any action of the firm. It had no choice but to accept such an inducement amount and to try and influence the amount offered by negotiation. It did not have available to it the alternative of negotiating a lower rent for the new premises.

The firm subsequently entered into two agreements relating to the lease of the new premises. One agreement provided for the payment of 'inducement amount' as an inducement for entry into a lease agreement (the inducement agreement), and the other agreement was for the lease of the premises. The amount paid under the inducement agreement totalled $29.3 million and was paid over the three income years from 30 June 1990 to 1992. The lease of and move to the new premises involved substantial costs to the firm in excess of $18 million,[61] as well as early termination costs of its leases of the BHP House premises that totalled $6.2 million.[62]

The Commissioner of Taxation assessed the taxpayer, first, by including in the taxpayer's assessable income an interest in the net income of the firm, which included the total inducement amount received by the firm under inducement agreement, and secondly, by disallowing deductions relating to the firm's relocation, new lease and fit-out costs, and early termination costs of its BHP House leases. The taxpayer's objections were disallowed and he appealed to the Federal Court.

**Federal Court**

At first instance[63] on the ordinary income issue, Jenkinson J held that the total inducement amount received was income within the operation of the principles expounded in *Cooling*. While not easily expressed as a profit, the receipt was a gain and one purpose of the taxpayer and his partners in entering into the transaction was to secure that gain.[64] It is considered that the more important findings relied on by his Honour were that the taxpayer and his partners did not think themselves devoid of choice between staying in BHP House and leaving it, but were set upon making a choice between the alternatives open to them. Also, one substantial purpose of their

61 Although the precise amount of those costs was not made clear by the evidence, it appears that they included lease stamp duty of approximately $788,000, moving expenses in excess of $630,000, new fit-out of approximately $12.9 million and loss of more than $3.7 million for the costs of the refurbishment of the BHP House premises: *FCT v Montgomery* (1999) 198 CLR 639, 647.

62 This total is set out in the Full Federal Court judgment of Heerey J: *Montgomery v FCT* 98 ATC 4120, 4123.

63 *Montgomery v FCT* 97 ATC 4287.

64 Ibid 4296 [19].

making the decision to lease the new premises chosen was to obtain the incentive payment under the inducement agreement, which that choice could secure.[65] Also of significance to Jenkinson J was the uncontradicted evidence that in 1988 and 1989 it was an 'ordinary incident' of renting premises in a new city building to receive incentive payments of the kind in question.[66] During those years when a move from BHP House was under consideration such incentive payments were common in respect of large new buildings in the city centre.[67]

**Full Federal Court**

The taxpayer's appeal to the Full Federal Court was upheld.[68] The Court (Heerey, Davies and Lockhart JJ) delivered separate judgments in which they were unanimous in holding that the inducement amount received under the inducement agreement was not income but a capital receipt. Their Honours all approached the issue of the application of what were referred to by Jenkinson J as the principles in *Cooling* as, in turn, simply being an application of the 'profit-making scheme or transaction' principle in *Myer*.[69] They each concluded that this *Myer* principle did not apply because there was no profit-making scheme entered into by the taxpayer.[70]

In summary, Heerey J's conclusion was influenced by the receipt of the inducement amount being 'inextricably tied up' with the acquisition of an income earning asset – the premises in the practice would be carried on – and that it was 'only' as a result of market conditions that the firm was receiving such an amount.[71] Davies J was influenced by the firm having to move from their existing premises, and by them not being given the opportunity of taking a lower rent at a lesser or no incentive in respect of the premises to which they moved. The rent for the new premises was fixed and it was the lessor who was prepared to grant the incentive.[72]

Lockhart J's conclusion that the *Myer* principle did not apply was based on the view that the firm's purpose in entering into the new lease was to secure 'at the lowest possible cost' the occupation of prestigious premises in which it could conduct its practice, and not to obtain a profit or gain for its members. His Honour specifically pointed out that the firm naturally wished the inducement payment to be as large as possible, but it did not follow from this that the receipt of the incentive payment was

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65 *Montgomery v FCT* 97 ATC 4287, 4297 [19].
66 *Montgomery v FCT* 97 ATC 4287, 4291 [7].
67 *Montgomery v FCT* 97 ATC 4287, 4297 [19].
68 *Montgomery v FCT* 98 ATC 4120.
69 *Montgomery v FCT* 98 ATC 4120, 4125, 4128 and 4141.
70 *Montgomery v FCT* 98 ATC 4120, 4123-4, 4128 and 4141.
71 *Montgomery v FCT* 98 ATC 4120, 4125.
72 *Montgomery v FCT* 98 ATC 4120, 4128.

the object of the transaction.[73] His Honour was also influenced by the fact that remaining in BHP House was not an alternative that was practically feasible.[74]

It can therefore been seen from this summary of their Honours' reasoning that a common thread to the approaches of all three judges was that the firm's purpose in entering into the transaction was to secure new premises from which to conduct its practice, and that it was not a significant purpose to make a gain from the transaction. For this reason, the purpose requirement of the *Myer* principle was not satisfied.

Heerey and Davies JJ also separately held that another reason for the *Myer* principle not applying was because the taxpayer had not made a profit or gain in the circumstances. In this regard, their Honours took into account the costs of meeting obligations under the firm's existing lease, the fit-out, the move and the rental obligations under the new lease.[75] Interestingly, the total cost of the rent at the new premises was included rather than just the increased cost over the rent of the old premises.

In the Full Federal Court appeal, the parties also made submissions on the issue of whether the inducement amount was ordinary income as a result of it being an 'ordinary incident' of the firm's business activity.[76] The taxpayer submitted that it was not an ordinary incident of the firm's business to receive lease inducements or incentives, as the firm had never previously received them. The Commissioner's responding submissions were that it was an ordinary incident of the conduct of the firm's legal practice to move into the new premises, and it was an ordinary incident of leasing premises in the city in 1989 for a lessee to receive an incentive payment.[77] Despite these submissions having been made, only Lockhart J directly addressed them and only in the summary way by expressing the view that it was incorrect to say that if a profit or gain was made by the taxpayer, it was itself an ordinary incident of the practice of the firm.[78]

Although it does not appear to have been raised in the parties' submissions to the Full Federal Court, the issue of whether the inducement amount arose from the exploitation of an asset owned by the firm was dealt with, but only by Davies J. His Honour's conclusion on this issue was simply that the inducement amount did not

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[73] *Montgomery v FCT* 98 ATC 4120, 4141.

[74] *Montgomery v FCT* 98 ATC 4120, 4140.

[75] *Montgomery v FCT* 98 ATC 4120, 4122-3 and 4128.

[76] A summary of each party's submissions are helpfully set out by Lockhart J in his judgment: *Montgomery v FCT* 98 ATC 4120, 4138.

[77] *Montgomery v FCT* 98 ATC 4120, 4138.

[78] *Montgomery v FCT* 98 ATC 4120, 4141.

arise from the exploitation of any asset of the firm. Rather, it arose from the undertaking of a new lease that was a capital transaction.[79]

### High Court

On the Commissioner's appeal to the High Court, two of the three contentions put by the Commissioner[80] were that the inducement amount received under the inducement agreement was income because:

1 It was received as an incident of a transaction that occurred in the course of the business activity of the taxpayer, even though it was not in the ordinary course of that business, and the receipt was an ordinary incident of a transaction of that kind (or, in other words, the ordinary incident principle).

2 The receipt was a gain from a profit-making undertaking or scheme where a significant purpose of the taxpayer in entering the transaction was the derivation of a gain (or, in other words, the *Myer* principle).

These two contentions were essentially accepted by a majority comprising Gaudron, Gummow, Kirby and Hayne JJ,[81] who held that the inducement amount was income.

### *Majority*

In essentially accepting both contentions, the majority strangely did not address them separately in their judgment. Their Honours instead noted that the contentions placed great emphasis on the decisions in *Myer* and *Cooling*. In regard to *Myer*, the majority reasoned that references in that case (and other cases referred to in their judgment) to a 'profit' or 'gain' being income are not to be read as denying that a singular transaction may give rise to a gross receipt properly classed as a revenue receipt.[82] In particular, their Honours stated:[83]

> It may be that the distinction drawn by Mason J in *Commercial and General Acceptance Ltd v Federal Commissioner of Taxation* is not absolute. That is, there

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79 *Montgomery v FCT* 98 ATC 4120, 4127 and 4128.

80 *FCT v Montgomery* (1999) 198 CLR 639, 659. The third contention was that the inducement amount was income because it was received in business as an incentive to pay greater rental payments than the taxpayer would otherwise have been prepared to pay and in circumstances where the rental payments are a deductible expense and the incentive was bargained and negotiated for in the natural course of carrying on the taxpayer's business. This contention was unanimously rejected by the Court essentially on the ground that it lacked a factual basis: (1999) 198 CLR 639, 653 [34-35] & 667-669 [83-89].

81 Gleeson CJ, McHugh and Callinan JJ dissenting.

82 *FCT v Montgomery* (1999) 198 CLR 639, 676 [112].

83 *FCT v Montgomery* (1999) 198 CLR 639, 675 [111]

> may be cases where it would be possible to characterise the same set of transactions of receipt and outgoings as either gross receipts that are revenue receipts (against which the outgoings are to be allowed as deductions) or as giving a net amount that alone is to be characterised as income.

While not citing any authority for this and not giving an example of such a transaction, the majority continued to state the position as being that if a singular transaction or adventure is 'in the nature of trade or business' and is undertaken 'in the course of a wider business', the gross receipt, as opposed to the net profit from the transaction or adventure, is properly characterised as a 'revenue receipt'.[84]

Assuming that the reference to a revenue receipt is simply synonymous with income, it is submitted that the position adopted by the majority is at odds with case law authority[85] that indicates the income from such a singular transaction is a net amount of profit or gain and not a gross amount. If the position is correct, however, it would result in an overruling of that authority without this even being acknowledged by the majority. The majority went further to say that:[86]

> *Myer* demonstrates [that] a singular transaction, in business, even if unusual or extraordinary …, can generate a revenue receipt. And that is why, in *Commissioner of Taxation v Cooling*, the Full Court of the Federal Court rightly emphasised the fact that, in that case, the receipt was an ordinary incident of part (albeit an extraordinary and unusual part) of the firm's business activity.

But this passage omits acknowledging that in *Myer* the Court did not simply decide that it was the gross receipt that was income. Rather the amount of the receipt was itself a profit because, based on the historical cost method, for an outlay of $80 million in the overall transaction the taxpayer acquired a debt of $80 million owed by a subsidiary and $45.37 million from the unrelated financier.[87] So the receipt was actually the profit component as a result of the taxpayer outlaying a sum in return for a greater sum.

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84 *FCT v Montgomery* (1999) 198 CLR 639, 676 [111].

85 For example, *Moana Sand Pty Ltd v FCT* 88 ATC 4897 where it was held that the Commissioner was correct in including in the taxpayer's assessable income under s 25(1) an amount representing the 'surplus' on the sale of land in a transaction that was single and in a sense isolated, (although it is acknowledged that there could be considered to be an ambiguity in the Full Federal Court's reference at 4903 to the 'amount received'). See also *FCT v Whitfords Beach Pty Ltd* (1981) 150 CLR 355 which was cited by the majority, and indeed *Californian Copper Syndicate v Harris* (1904) 5 TC 159, 165-6 where the reference was to 'enhanced values' being a profit assessable to tax.

86 *FCT v Montgomery* (1999) 198 CLR 639, 676 [113].

87 *FCT v Myer Emporium Ltd* (1987) 163 CLR 199, 220.

Returning to the two different ways in which the Commissioner put his case (a receipt being an ordinary incident of transaction in course of business – the ordinary incident principle, and a gain arising from profit-making undertaking or scheme – the *Myer* principle), the majority said they could be seen to have 'intersected or overlapped'. Their Honours continued:

> The 'gain' alleged was the gross amount of the receipts under the inducement agreement. The 'profit-making undertaking or scheme' was the entry into these agreements as a step in the conduct of the taxpayer's business. The receipt was, so the argument went on, a receipt from carrying on the business (albeit by means of an unusual transaction). The receipt was an ordinary incident of transactions of this kind. Its receipt was, then, neither an unexpected nor unintended by-product of the transaction; its receipt was a purpose of entering the transaction.

Although it is not entirely clear that this passage is expressing the majority's final conclusion on the Commissioner's contentions,[88] as opposed to further explaining the contentions, the former seems to be the more likely because there is no further mention of the contentions in the majority's judgment after that passage. It is also, it is submitted, not entirely clear what the majority meant by saying the two different ways the Commissioner put his case 'intersected or overlapped'. On one view, it could be taken as meaning the majority were of the opinion that the contentions did not cover separate grounds or principles of ordinary income. Another view that seems more likely is that the contentions, although relying on different grounds or principles, still arrived at the same result, that is that the inducement amount was ordinary income.

It is considered that this latter view is more likely what the majority intended because they expressly mentioned the ordinary incident principle in the passage, and indeed gave it the meaning of a receipt from a transaction where the 'receipt [is] … neither an unexpected nor unintended by-product of the transaction; its receipt was a purpose of entering the transaction'. This could be restated as a receipt that is an ordinary incident of a business transaction is one that is an expected and intended product of the transaction, where its receipt is a (and not necessarily significant) purpose of entering the transaction. This degree of purpose could distinguish the ordinary incident principle's area of operation from that of the *Myer* principle, which requires a 'not insignificant' purpose of making a profit.

The evidential basis to support the majority's conclusion had been indicated earlier on in its judgment as being the findings of Jenkinson J at first instance, the more important of which have been noted previously in this article. Further, to the extent that Lockhart J in the Full Federal Court had arrived at conclusions that stated

88 Because of the references to 'gain alleged' and 'so the argument went on'.

different findings from those of Jenkinson J, the majority was of the view that there was no sufficient basis for the Full Court of the Federal Court to substitute its own findings on the issue.[89]

The majority did not, however, just rely on the application of *Myer* and *Cooling* in support of their decision that the inducement amount was income. The majority also further held that that the inducement amount was income on another ground that does not appear to be related to the Commissioner's contentions in the case before the High Court. This other ground was that the firm used or exploited its 'capital' in the course of carrying on its business, albeit in a transaction properly regarded as singular or extraordinary, to obtain the inducement amount which was received not as some growth or increment of value in its profit-yielding structure, but rather came in or were derived for the separate use, benefit and disposal of the firm and its members as they saw fit.[90] In adopting this reasoning, the majority was implicitly, if not explicitly, disagreeing with Davies J's conclusion on the issue when he alone dealt with in it the Full Federal Court.

This reasoning of the majority relied on[91] what was accepted by Pitney J in *Eisner v Macomber*[92] as the 'essential matter' of the meaning of 'income' in the context of a 'gain derived from capital'. His Honour there said that the essential matter is that the gain be:

> *not* a gain *accruing to* capital, not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in*, being '*derived*,' that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal;–*that* is income derived from property.[93]

The majority was of the view that the passage quoted from *Eisner* indicates that income is often the product of exploitation of capital. However, they were explicit in their qualification of this by adding: 'But, of course, that is not always so.'[94]

Expressed in this way, it is evident that the proposition set out by Pitney J in *Eisner* was regarded by the majority as only a general and not absolute proposition. This qualification of the proposition is to be expected, as to adopt the proposition in an

89 *FCT v Montgomery* (1999) 198 CLR 639, 665 [75]. This was because Jenkinson J's findings depended in part on his assessment of the oral evidence given at trial and no proper basis to depart from that assessment had been established.

90 *FCT v Montgomery* (1999) 198 CLR 639, 677-8 [117-118].

91 *FCT v Montgomery* (1999) 198 CLR 639, 661-2 [65].

92 (1920) 252 US 189, 207.

93 The emphasis is in the original passage.

94 *FCT v Montgomery* (1999) 198 CLR 639, 663 [67-8].

unqualified form would have resulted in capital receipts being included in the concept of ordinary income. This result would have been contrary to the accepted distinction between income and capital and long standing established case law supporting the distinction, and in any case was not a result argued for by any of the parties. Although the majority did not explicitly say so much in their judgment, their Honours did state:[95]

> Most receipts from carrying on a business are income. But some receipts, such as amounts paid on disposing of capital assets of the business, are properly classified as receipts on capital account.

This therefore was an acknowledgment of the continued existence of the distinction between income and capital receipts.

The majority's application of the general proposition to facts is set out in the following critical passage:[96]

> … the firm used or exploited its capital (whether its capital is treated for this purpose as being the agreement to take premises or its goodwill) to obtain the inducement amounts. As the articles presented to the firm in August 1989 said, the firm was then 'of a size which makes it a particularly attractive tenancy target'. And it was because it was a particularly attractive tenancy target that it was suggested in those articles that the firm should receive a good inducement offer to take premises. The firm used or exploited its capital in the course of carrying on its business, albeit in a transaction properly regarded as singular or extraordinary. And the sums it received from the transaction were not as some growth or increment of value in its profit-yielding structure – the receipts came in or were derived for the separate use, benefit and disposal of the firm and its members as they saw fit. (That the firm decided to retain the sums received rather than distribute them to partners – other than to the extent necessary to meet the amounts of taxation payable by partners on account of their receipt – is of no consequence. The very fact that the firm chose to dispose of the sums in this way demonstrates that they were receipts at the disposal of the firm.)

It can be seen in this passage that the majority identified two possible items as the relevant 'capital' that was used or exploited to obtain the inducement amount. These were either the agreement to take or lease the new premises, or the firm's goodwill. However, their Honours' reference to the evidence of the firm's 'size' making it a particularly attractive tenancy target, so that it should receive a good inducement offer to take premises, appears to indicate that the majority favoured the second alternative as the relevant capital asset.

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95 *FCT v Montgomery* (1999) 198 CLR 639, 663 [67].

96 *FCT v Montgomery* (1999) 198 CLR 639, 678 [118].

It is considered that this application to the facts of the 'exploitation of capital' proposition is not entirely convincing. While it can be accepted that the terms 'capital' and 'property' may be used interchangeably for the purposes of the proposition,[97] it is still a requirement that there be capital or property, and that a gain, profit or something of exchangeable value 'proceed from' that capital or property. In this respect, the first alternative item relied on by the majority as being used or exploited was the agreement to take or lease the new premises. The apparent difficulty with this approach is that the inducement payment must logically be regarded as naturally coming before the lease agreement was entered into – it was after all an inducement or incentive to enter into that lease agreement. No doubt without the inducement amount being available, the lease agreement would not have been entered into.

This then leaves the firm's goodwill as the relevant item being used or exploited to obtain the inducement amount. However 'goodwill' is defined,[98] this approach suffers from the difficulty of accepting that it actually was in fact goodwill that was used or exploited to obtain the inducement amount. Rather, the more realistic view is that the inducement amount was obtained by the firm exploiting its size and resultant bargaining power, which would not normally be understood as comprising goodwill. So much seems to be acknowledged in the majority's reference to evidence of the firm's 'size' making it a particularly attractive tenancy target so that it should receive a good inducement offer to take premises. However, it can be expected that all business taxpayers would endeavour to exploit their size and resultant bargaining power in entering into any commercial transaction involving the receipt of a sum of money. If this is accepted, then the obviously incorrect conclusion could follow that the 'exploitation of capital' proposition would always apply to result in the receipt being ordinary income. This in turn goes very close to making an absolute proposition, which the majority had said clearly it was not.

Another criticism is that the majority's application of the proposition to the facts did not address the effect of the factual finding at first instance that the offer of the inducement amount was an occurrence independent of any action of the firm.[99] It seems that either this finding was overlooked by the majority or was not accepted as impacting on their conclusion that the firm used or exploited its 'capital' to obtain the

97 In other words, it can be accepted that 'property' does not have its technical legal meaning of 'any type of right, interest or thing which is legally capable of ownership, and which has value': *Butterworths Concise Australian Legal Dictionary*.

98 Whether it be the technical legal meaning of 'the attractive force that brings in custom and adds value to a business', or the more general meaning of 'the excess of intangible assets of a business over its tangible assets': *Butterworths Concise Australian Legal Dictionary*.

99 *Montgomery v FCT* 97 ATC 4287, 4296 [18].

inducement amount. If it was the latter, the matter at least warranted an explanation to clarify why the finding did not impact or was not relevant to the conclusion.

A final point to be noted about the majority's reasoning in the passage set out is that it appears relevant to their conclusion, that the inducement amount was income from the use or exploitation of the firm's capital, that the use or exploitation occurred in the course of carrying on its business. It is not therefore entirely clear whether the same conclusion would follow if an amount arises from the use or exploitation of capital or property that is not in the course of carrying on a business or, in other words where a taxpayer is not carrying on a business. The passage quoted from *Eisner* would, however, suggest that the same conclusion would follow.

### *Minority*

In writing their minority judgment, Gleeson CJ, McHugh and Callinan JJ were aware of the majority's application of the 'exploitation of capital' proposition, and while they did not expressly approve or disapprove of the proposition, they were unable to accept its application by the majority. In the minority's view, the inducement amount was not properly characterised as proceeding from the use or exploitation by the firm of its capital, whether the relevant capital was taken to be the agreement to lease the new premises or the goodwill of the firm. The minority gave four reasons for this, each of which are very convincing even if it may be said that they rely on a legalistic (but not merely formal) approach being taken.

The first reason was that such a characterisation involved disregarding the entire transaction and directing attention to only part of it, which the minority said is opposite to the approach taken in *Myer* to the characterisation of a transaction involving more than one agreement. Secondly, at the time of the agreement for the inducement payment, the lease agreement was not an asset of the firm capable of exploitation. The minority's view here was that the receipt of the inducement payment 'accompanied, and was occasioned by' the lease agreement, but it did not constitute an exploitation of the lease agreement. Thirdly, it was incorrect to regard any part of the inducement payment as the 'fruit' of exploitation of the firm's goodwill. The asset of the firm which was its 'goodwill' had to be identified accurately, and was something different from the firm's 'size'. The firm's size was not part of its 'capital' that could be exploited. Fourthly, there was a measure of inconsistency between the argument that the receipt of the inducement payment was an ordinary incident of taking up a lease of a substantial portion of a new city building, and the argument that the payment resulted from the exploitation of the firm's goodwill.

As for the two contentions actually put by the Commissioner, in contrast with the majority, the minority did separately address the contentions. In regard to the first contention relying on the ordinary incident principle, the minority was of the view that it was not right to regard the course or incidents of a developer landlord's business as being the same as those of a firm of solicitors carrying on a legal practice in leased premises.[100] Further, the fact that an inducement payment was an ordinary incident of agreeing to take a lease in the circumstances did not make receipt of the payment an incident of the ordinary course of the firm's business. As a matter going to principle, these views are obviously narrower than those of the majority. However, it is submitted that the views are to be preferred as they are consistent with the principle A1 of ordinary income set out previously in this article, viz whether or not an amount is income depends on the character of the receipt in the hands of the actual recipient, and its character in the hands of the payer or another recipient is therefore irrelevant.

The minority therefore concluded that receipt of the inducement amount was not an incident of the ordinary course of the firm's business, and in doing so further relied on the transaction being a singular one, as well as it not being part of the regular means by which the firm derived income. The majority made the point that while *Myer* decided that singularity was not conclusive, the High Court did not decide that it was irrelevant.[101]

On the Commissioner's second contention relying on the *Myer* principle, the minority reasoned that if there were a scheme or venture entered into for the purpose of making a profit or gain, then the costs associated with the scheme or venture would have to be taken into account in deciding whether there was a profit or gain made. Their Honours noted that the inducement amount was brought to tax on the basis that it represented, in whole, a profit or gain. They further noted that there were substantial costs associated with the firm's move. The minority therefore concluded that it was incorrect to treat the gross receipt as profit or gain. To treat the gross receipt as profit or gain represented an inversion of what was decided in *Myer*. The Honours pointed out that in *Myer* the Court rejected the argument that attention should be confined to one aspect of a larger transaction in determining whether a profit or gain had been made and held that the entire transaction had to be considered.[102] On this point, the minority was clearly opposed both as a matter of law and fact to the approach taken by the majority.

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[100] *FCT v Montgomery* (1999) 198 CLR 639, 653 [31].

[101] *FCT v Montgomery* (1999) 198 CLR 639, 656 [43].

[102] *FCT v Montgomery* (1999) 198 CLR 639, 655-6 [41].

In any case, the minority were of the further opinion that there was no scheme or venture entered into by the firm for the purpose of making a profit or gain. Their Honours pointed out that *Myer*:[103]

> … also decided that, in identifying a trading purpose of making a profit or gain, the whole transaction, and not merely part of it, is to be considered.

On the minority's view of the facts, the firm's change of premises did not have the (or even a) purpose of obtaining the inducement payment. The payment of the inducement was but one aspect of a wider transaction that was activated by practical necessity.[104] On this aspect, the minority's dissent was not based on any difference with the majority on the interpretation or content of the *Myer* principle. Rather, the dissent was simply based on a different view of the facts to that taken by the majority.

## THE APPLICATION OF MONTGOMERY

The High Court's decision in *Montgomery* has so far been considered in three court cases: *O'Connell v FCT*,[105] *FCT v Stone*[106] and *FCT v McNeil*.[107] *O'Connell* is a decision of the Federal Court that involved another lease inducement receipt. Both *Stone* and *McNeil* are decisions of the High Court but did not involve lease inducement receipts. *Stone* involved the assessability as ordinary income from a business of an athlete's prize money, government grants, appearance fees and sponsorship payments. *McNeil* basically involved the assessability as ordinary income from property of the proceeds from the sale of share 'sell-back' rights. Of the three cases, *O'Connell* and *McNeil* dealt in greater detail with the *Montgomery* decision.

### *O'Connell*

In this case, the taxpayer was a partner in a firm of accountants that carried on its practice in leased premises. By 1986, the firm needed more office space for its growing practice. It therefore engaged property consultants to assist in the search for suitable new premises. The consultants advised the firm that, because of its size and desirability as a tenant, it had the potential to make a substantial profit by making a long term lease commitment. In October 1987, the firm merged with another firm and therefore the need for more office space, in which to carry on the merged practice in one place, became more critical.

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[103] *FCT v Montgomery* (1999) 198 CLR 639, 656 [43].

[104] *FCT v Montgomery* (1999) 198 CLR 639, 656 [43].

[105] (2002) 121 FCR 562.

[106] (2005) 222 CLR 289.

[107] (2007) 229 CLR 656.

*MONTGOMERY'S* CASE AND 'INCOME ACCORDING TO ORDINARY CONCEPTS'

In November 1988, the firm entered into an agreement under which it was paid just over $8 million as an inducement (the inducement amount) to lease substantial space in a new building to be developed in the city centre. At that time, the firm also entered an agreement to lease the building, as a result of which the inducement amount was paid by the building owner to the firm and the firm distributed it to its partners. The building owner had also agreed to contribute a further $20 million to meet the cost of the firm's fit-out of the building.

Relying on the application of the *Myer* principle, Goldberg J in the Federal Court held that the inducement amount was income.[108] His Honour found that the inducement amount was a 'profit' because it was paid and received after the fit-out cost had been provided for, and it was not to be diminished by any offsetting costs.[109] Also, the receipt of the money was more than just a factor in the transaction entered into; it was one of the significant purposes of the transaction.[110] This was so even though an objective of the firm was to obtain appropriate new premises and to minimise the cost of doing so.[111] The inducement agreement was a commercial transaction and it was entered into with a purpose of making a profit or gain. Obtaining the profit or gain was a significant purpose of the transaction and negotiations resulting in the agreement.[112]

Goldberg J also held that the ordinary incident principle in *Cooling* applied to 'confirm' that the receipt of the inducement amount was income. His Honour found that around the time that the inducement agreement was entered into the offer and receipt of cash incentives was an ordinary or normal incident of leasing commercial and business premises in the city CBD. It was relevant to this finding that the firm was also aware at the time of the paying and receiving of such incentives.[113] As the firm's move to new leased premises and the leasing of the new premises were acts in the course of its business activity, and as it was an ordinary incident of leasing premises in a city building of substantial size to receive incentive payments, the inducement amount was, consistently with the reasoning in *Cooling*, income according to ordinary concepts.[114]

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[108] (2002) 121 FCR 562, 594 [139].

[109] (2002) 121 FCR 562, 591 [130].

[110] (2002) 121 FCR 562, 589 [118]. At [98], his Honour reasoned that one should not confuse a purpose of a transaction with factors that are taken into account in deciding whether to enter into the transaction and, if so, on what terms.

[111] (2002) 121 FCR 562, 590 [121].

[112] (2002) 121 FCR 562, 592 [134].

[113] (2002) 121 FCR 562, 580 [78] and 592 [136].

[114] (2002) 121 FCR 562, 595 [144].

Not surprisingly, Goldberg J was of the view that *Montgomery* was a case directly in point, no doubt because of the obvious factual similarities with that case.[115] His Honour noted that the majority in *Montgomery* (as well as the Full Federal Court in *Cooling*) accepted that the receipt of the incentive was an ordinary incident of the business, 'albeit from an unusual transaction'. Significantly, his Honour drew attention that it followed from this that a profit-making purpose would be found without further evidence.[116] This aspect of his Honour's reasoning is, however, surprising as the making of such an inference was not mentioned in either of those cases. But, this does not mean that his Honour was without authority on the point, as he later[117] referred to *Westfield v FCT*[118] where Hill J (Lockhart and Gummow JJ agreeing) said:[119]

> In a case where the transaction which gives rise to the profit is itself a part of the ordinary business (eg a profit on the sale of shares made by a share trader), the identification of the business activity itself will stamp the transaction as one having a profit-making purpose. *Similarly, where the transaction is an ordinary incident of the business activity of the taxpayer, albeit not directly its main business activity, the same can be said.* The profit-making purpose can be inferred from the association of the transaction of purchase and sale with that business activity. (emphasis added)

More significantly, Goldberg J also considered the other ground relied on by the majority in *Montgomery*, viz that the firm used or exploited their capital in the course of carrying on their business, albeit in a singular or extraordinary transaction, to obtain the inducement amount which was received for their separate benefit and an increment of value to their profit-yielding structure. Relevant to this, it would have seemed, his Honour made various findings that the firm had sought to and did exploit its reputation, goodwill, tenancy needs, lease purchasing power and 'capital asset' to obtain their new tenancy on financially advantageous terms.[120]

It is then unexpected that Goldberg J went on to reject the exploitation of capital ground as providing a 'separate head of identifying a taxable situation'. More specifically, his Honour said:[121]

> The point made by the majority in *Montgomery* about the exploitation of capital is an aspect of identifying a profit-making scheme or purpose. It is not a separate

115 (2002) 121 FCR 562, 597 [152].
116 (2002) 121 FCR 562, 599 [157].
117 (2002) 121 FCR 562, 601 [167].
118 (1991) 28 FCR 333.
119 (1991) 28 FCR 333, 342-3.
120 (2002) 121 FCR 562, 591 [126-128].
121 Ibid 599 [159].

> head of identifying a taxable situation but rather an exposition based on *Myer* principles. The point about exploitation of capital is no part of the application of the *Cooling* principle that was endorsed by the majority of the High Court in *Montgomery* at 676 …

It may be readily accepted that exploitation of capital is no part of the *Cooling* application of the ordinary incident principle that was endorsed by the majority in *Montgomery*. But it cannot be so readily accepted that the exploitation of capital point of the majority in *Montgomery* was simply an aspect of identifying a profit-making scheme or purpose and an exposition based on *Myer* principles. Had it been so, one would have expected the majority to have expressly said so, but they did not. Indeed, there is no mention of any actual or inferred purpose at all in any of the passages of the majority where they relied on the exploitation of capital point.[122]

It is further submitted that Goldberg J's view that exploitation of capital is not a separate ground for identifying ordinary income and a taxable situation as a result is, with respect, plainly inconsistent with not only the majority in *Montgomery*, but also with the minority who, in being unable to accept that the ground was satisfied on the facts of that case, still nonetheless implicitly accepted the ground as being relevant to identifying income. The view is also inconsistent with the judgment of Davies J in the Full Federal Court in that case where he referred to the exploitation of an asset or capital as a consideration in the 'traditional approach' to the question of whether a receipt is income or capital.[123]

### *Stone*

This case involved very different facts. The taxpayer was an athlete who because of her athletic talent obtained money receipts in the form of prize money, government grants, appearance fees and sponsorship. The High Court unanimously held that the taxpayer was carrying on a business of turning her athletic activities to account for money and so the receipts were ordinary income.

In a joint judgment, Gleeson CJ, Gummow, Hayne and Heydon JJ briefly mentioned the majority in *Montgomery* as authority that indicates general propositions in the field of discourse involving whether receipts are ordinary income from a business often require qualification. The mention came in the form of their Honours repeating the following statement from the majority reasons in *Montgomery*:[124]

> [I]ncome is often (but not always) a product of exploitation of capital…

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122 Particularly at (1999) 198 CLR 639, 677-8 [117-18].

123 *Montgomery v FCT* 98 ATC 4120, 4127.

124 (2005) 222 CLR 289, 297 [18].

Although, not otherwise further discussed or applied in the reasoning in *Stone*, the adoption of this statement is an explicit recognition and approval of the principle, separate in itself, that the exploitation of capital will generally produce ordinary income. It also casts further serious doubt on Goldberg J's view on the matter in *O'Connell*.

***McNeil***

Of greater and more direct significance is the High Court case of *McNeil*. This was a 'test case' in which the taxpayer was a shareholder who had acquired shares for the dominant purpose of long term retention to derive dividend income in her retirement, and not as part of carrying on any business. The shareholding included shares in a company that was listed on the stock exchange and that had decided to reduce its share capital. The company did this by effecting a buy back scheme under a 'deeds poll'. This provided that for every 20 shares held by a shareholder, the company issued one sell-back right or put option that obliged the company to buy back one share for $16.50, which was higher than the market value of the share. The sell-back rights issued were also listed on the stock exchange at their then market value of $1.89.

Under the deeds poll, the sell-back rights were granted to a trustee for the absolute benefit of shareholders, who could elect to either obtain legal title to the sell-back rights and sell their shares back to the company, or sell the sell-back rights on the stock exchange. For shareholders who did make an election, the sell-back rights were traded or exercised on their behalf by a merchant bank, which accounted for the proceeds to the trustee.

The taxpayer held 5,450 ordinary shares in the company on the record date and this resulted in the grant of 272 sell-back rights. She did not make any election and so the sell-back rights were sold and she received $576.64 as the proceeds of the sale. Of that amount, $62.64 represented the increase in the realisable value of the sell-back rights since their issue date and this was conceded by the taxpayer to be assessable as a capital gain under the capital gains tax provisions in the 1997 Act. The balance of $514.00 represented the market value of the sell-back rights at their date of issue. The Commissioner included that balance in the taxpayer's assessable income, either as ordinary income or as a capital gain.

The High Court[125] by a majority (Gummow ACJ, Hayne, Heydon and Crennan JJ)[126] held that the value of the grant of the sell-back rights was ordinary income. In deciding this, the majority accepted the primary submission made by the

[125] (2007) 229 CLR 656.

[126] Callinan J dissenting.

Commissioner[127] who relied on *Montgomery* and *Eisner* to submit that the taxpayer's receipt of the sell-back rights under the buy-back scheme was ordinary income because it was money's worth and a product of her shareholding. The rights received were severed from her shares, which throughout remained intact and unchanged. The Commissioner further submitted that the rights were not received by the taxpayer in consideration for, or as an incident of the disposal or alteration of, any capital asset she held. And the receipt of the sell-back rights did not represent a distribution of capital or a reframing or modification of the shareholder's capital interest in the company held through her shareholding.[128]

In accepting these submissions, the majority set out as general proposition that:[129]

> again derived from property has the character of income and this includes a gain to an owner who has waited passively for that return from property.[130]

The majority then added that the question in the case became whether the sell-back rights enjoyed by the taxpayer 'arose and were severed from, and were a product of, her shareholding', which she retained. In this regard, their Honours noted[131] that *Montgomery* had accepted the passage from Pitney J in *Eisner*, reproduced earlier in this article, as identifying the core meaning of 'income' where the character of a gain from property is at issue, and their Honours adopted it as a central part of their reasoning in the present case. In doing so, the majority removed the doubt left over from *Montgomery* that the passage could also apply where a taxpayer is not carrying on a business.

In applying the reasoning in that passage from *Eisner* to the facts, the majority pointed out that the taxpayer was not in a position like that of a party who received a payment to give up part of a profit-yielding structure, or on the sale of new rights in the nature of a profit à prendre that were carved out of that structure. Rather, the taxpayer's shareholding remained 'untouched'.[132] Further, the sell-back rights that were turned to account on her behalf did not represent any portion of her rights as a shareholder under the company's constitution, and were not provided in satisfaction of any of those rights. The sell-back rights were 'generated' by the execution, and subsequent performance, of covenants in the deeds poll, which gave 'life' to the share

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127 (2007) 229 CLR 656, 663 [18].

128 (2007) 229 CLR 656, 657

129 (2007) 229 CLR 656, 663 [21].

130 Parsons, *Income Taxation in Australia: Principles of Income, Deductibility and Tax Accounting*, (1985) 87-9.

131 (2007) 229 CLR 656, 663-4 [21].

132 (2007) 229 CLR 656, 664 [22].

buy back scheme.[133] However, it was at this point that the reasoning of the majority on the question effectively concluded, albeit with the later statement that the Commissioner's submissions should be accepted.[134]

It must be noted that those submissions included that the receipt of the sell-back rights under the buy-back scheme was ordinary income because, in addition to being a receipt of moneys worth, it was a product of the taxpayer's shareholding that was severed from her shares which remained intact and unchanged. Further, the majority framed the relevant question at issue as whether the sell-back rights enjoyed by the taxpayer 'arose and were severed from, and were a product of, her shareholding'. Therefore, there can be no doubt that the majority's decision that the value of the grant of the sell-back rights was ordinary income was based on those sell-back rights being a product of the taxpayer's shareholding that was severed from the shares held.[135]

As previously indicated, the majority had found that the taxpayer was not in the position of having given up any part of a profit-yielding structure, and nor had she sold any rights that had been carved out of any such structure. Rather, the majority found that the sell-back rights were generated by the deeds poll that gave life to the share buy back scheme and, it might be said, in turn 'gave birth' to the sell-back rights. Indeed, the majority had also found that the sell-back rights were 'more readily seen to have been separate and detached from the shares in respect of which they had been granted'.[136] In view of these findings, it is difficult to see a clear consistent ground in the reasons as to why the sell-back rights were a product of the taxpayer's shareholding, rather than a product of the deeds poll that generated and created the rights.

Underlying the majority's reasoning is an extremely broad approach that accepts that the grant of a benefit will arise 'from' and be 'a product of' property if the benefit is granted 'in respect of' that property. Moreover, the grant of a benefit can be 'in respect of' an item of property even if the benefit is more directly connected to

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133 (2007) 229 CLR 656, 664 [23] and 668 [37].

134 (2007) 229 CLR 656, 671 [51].

135 By approaching their reasoning in this way, the majority seem to have overlooked that the general proposition stated by them included as a central requirement that there be a 'gain' from property. Their Honours' reasoning did not address this aspect of the proposition, nor the issue of whether, all other things being equal, it could be accepted that there was no gain because it could be expected that the value of the taxpayer's shareholding would have reduced to reflect the reduction in the company's capital as a result of the share buy back. Instead, the majority's reasoning simply preceded on the footing that the value of sell-back rights was a gain that was a product from property without addressing the issue.

136 (2007) 229 CLR 656, 661 [12].

something else, such as a deeds poll. Perhaps what this confirms is simply that even for receipts from property, there must be a 'sufficient connection' between the receipt and the property for the receipt to be income, and such a connection will exist where the receipt is 'in respect of' that property. The caveat must however still be expressed that matters of degree and judgment will necessarily arise in deciding whether a 'sufficient connection' exists in any given case.

## CONCLUSION

*Montgomery*, at least in its majority, is authority that if a singular transaction or adventure is 'in the nature of trade or business' and is undertaken 'in the course of a wider business' (albeit maybe not in the ordinary course of the business), the gross receipt, as opposed to the net profit from the transaction or adventure, is properly characterised as a 'revenue receipt' and income from a business. The gross amount will therefore be included in assessable income under s 6-5(1) of the 1997 Act in working out taxable income under s 4-15(1), and from it can be subtracted any deductions allowable. Those deductions will include both general deductions under s 8-1 and specific deductions that another provision of the 1997 Act or 1936 Act allows to be deducted.[137]

This is clearly a change from past authorities that have indicated that the amount of income from a singular transaction or adventure in the nature of trade or business that is undertaken in the course of a business is only the amount of profit or gain from the transaction.[138] This profit or gain is a gross amount less expenses associated with the transaction. Although those authorities have not always been very precise in identifying how those associated expenses are to be worked out, Hill J (with Jenkinson and Einfeld JJ agreeing) in the Full Federal Court decision in *FCT v Citibank*[139] indicated that for a business taxpayer a profit figure will need to be calculated in accordance with accounting standards.

The change resulting from *Montgomery*, if adopted in subsequent cases, will therefore be reflected in any difference in amount between the total general and specific deductions allowable, and the total associated expenses under accounting standards. The change is therefore one that does seem to simplify the law on the point and make it more certain by confining the calculation to tax law components only. However, given that the change is at odds with what could be regarded as more overwhelming authority on the point, certainly from the point of view of the number of cases, and

[137] *Income Tax Assessment Act 1997* (Cth) s 8-5; definition of 'this Act' in s 995-1(1).

[138] See *FCT v Citibank Ltd* (1993) 44 FCR 434, 446 and the cases mentioned by Hill J (Jenkinson and Einfeld JJ agreeing) where gross income was equated with a net profit amount.

[139] (1993) 44 FCR 434, 446.

given that there was a strong dissent on the point in *Montgomery*, there must be some doubt as to whether the change can be regarded as being the final say on the matter.

In regard to the ordinary incident principle, if it is accepted that the majority in *Montgomery* did uphold its application, then it would seem, at first glance, that the principle has been given greater certainty as well as clarity in its meaning. From what the majority said, it can be concluded that a receipt is an ordinary incident of business if it is an expected and intended product of a transaction, where the receipt is a (and not necessarily significant) purpose of entering the transaction. Stated in this way, however, the principle is given a very broad scope that could embrace receipts from a mere realisation of a capital asset, which receipts must be regarded as expected, intended from, and a purpose of, the realisation. This would have the effect of bringing within the scope of the principle capital receipts, which the majority clearly did not intend. It is therefore considered that a necessary factor of the ordinary incident principle should still be the commonness, regularity or frequency of the business transaction entered into.

More certain in the majority in *Montgomery* is the expression of what could be referred to as a 'new' principle on ordinary income generally. This is that there is no exact congruence between the character of an amount when received or paid by one taxpayer, and its character when received or paid by another taxpayer.[140] A simple restatement of this principle in the context of income would be that just because an amount received is income to one taxpayer, does not mean it will necessarily be income to another taxpayer. This new principle is really a corollary or consequence of principle A1 previously stated in this article, viz that whether or not an amount is income depends on the character of the receipt in the hands of the actual recipient and not someone else.

The statement of the new principle by the majority in *Montgomery* gives rise to an irony in that case when one considers the majority's application of the ordinary incident principle. This is the majority's reliance on the evidence that at the time it was an ordinary incident of leasing premises in a new city building for tenants to receive incentive payments. The new principle would seem to make that evidence even more irrelevant than has previously been suggested in this article.

More definite is the conclusion that *Montgomery* has brought to the fore what may be termed the 'use or exploitation of property or capital' proposition or principle in determining ordinary income. Although not a new principle of ordinary income, *Montgomery* has clearly proven to be an 'awakening' of the principle as it has since been readily acknowledged and approved (although not applied) by the High Court in *Stone*, and acknowledged, approved and applied by High Court in *McNeil*.

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140 *FCT v Montgomery* (1999) 198 CLR 630, 671 [99].

*MONTGOMERY'S* CASE AND 'INCOME ACCORDING TO ORDINARY CONCEPTS'

This awakening in *Montgomery* presents another irony in the case. This is because it does not appear to have resulted from the Commissioner's contentions and submissions, for he did not raise or rely on the use or exploitation of property or capital principle (and so it was not argued against by the taxpayer) at any level in the litigation. Rather, it appears that it was the majority of the High Court who invoked the principle and applied it, in a sense, for itself.[141] The irony here is that this is a course that one would not expect of the courts,[142] especially when the issue of procedural fairness is considered. It can only be speculated, if the courts in *Montgomery* had the benefit of counsels' analysis of the principle and its application, whether judicial opinion would have been so divided on the issues of what is the relevant 'property or capital', and the circumstances in which it may be said that a gain 'proceeds from' and is 'severed from' it.

The use or exploitation of property or capital principle is only a general one and not an absolute one. It is not the case that all receipts, gains or profits from the use or exploitation of property will be income. Some such receipts, gains or profits may still be of a capital nature and not income. It is equally clear that the distinction between income and capital remains, 'however unscientific that distinction may be, and however difficult it may be to apply it to some particular cases'.[143] But despite the use or exploitation of property or capital principle being only general and therefore having exceptions to it that can be expected to be identified in future cases, the broad scope of the principle was confirmed in *McNeil* where its application was held to give rise to income in circumstances where no business was carried on, and the property or capital owner was entirely passive in the production of the gain.

But there is no doubt that *Montgomery* was the springboard for such a broad application of the use or exploitation of property or capital principle. This is especially so if one accepts that it was not the goodwill of the firm in that case that was used or exploited to obtain the receipt, but rather its size and resultant bargaining power. If this is correct, and a receipt is income as a result of that use or exploitation, then it would lead to what may be described as an 'extraordinary' extension of the concept of ordinary income, as all business taxpayers, if not all taxpayers generally, can be said to be exploiting their size and resultant bargaining power in entering into any commercial transaction that involves the receipt of a sum of money.

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141 Even if this was as a result of the prompting of Davies J below.

142 In a similar vein, see, eg, Kirby J in *FCT v Stone* (2005) 222 CLR 289, 316 [92], who even more ironically was a member of the majority in *Montgomery*.

143 *FCT v Montgomery* (1999) 198 CLR 630, 653 [32].

A final point is what may be a lesson learned from *Montgomery*. This is that in approaching the characterisation of an amount one should ensure that principle A5 is complied with and consider the 'whole of the circumstances'. One should not be blinkered in using an approach to that characterisation that is confined by any of the recognised categories of income – personal exertion, business or property – in undertaking that consideration. Those categories are not mutually exclusive in the sense of the circumstances or principles to be considered in deciding if a receipt is ordinary income. And it should always be recognised that a single receipt can come within one or more categories of income. Then, one would not be confronted with what could be regarded as an unexpected approach or line of reasoning, whether by the courts or the Commissioner, to deciding that an amount is ordinary income.