

Assessable Income

Ordinary Income (under s6-5)

Factors to consider

1. Cash or Cash Convertible

Can the Gain be converted into cash?

2. Real Gain

Has there been a real gain or just compensation for loss?

Example of Employer Reimbursement

3. Regular or Periodic?

If payment is made fortnightly or monthly, more likely to be OI

Not always though – lump sum can still be OI; regular payment can still be capital

4. Fruit & Tree

OI more likely to flow from a source

Property (Tree) – Rental Income (Fruit)

Business (Tree) – Profits (Fruit)

But selling the Tree will be a capital gain

5. Relied on, expected, and depended on?

If taxpayer relies on or expects the gain then it is more likely to be OI.

Compensation

If replacing OI – will be OI

If replacing SI – will be SI

If you receive **lump sum** where it is **not clear** what is OI and what is capital (SI) – the **entire amount will be capital** (SI)

Constructive Receipt

If you perform work and are entitled to receive OI, but **choose to direct it to someone else**, you will be assessed on it as OI

Immoral/Illegal receipts are taxable:

Whether a receipt is legal or illegal **does not affect** its assessability;

Drug dealer – declares income to ATO, is assessable on receipts ([La Rosa \(2003\)](#)) (and gets deductions).

Mutuality Principle:

Applies to Recreational clubs/associations/owners' corporations (manage blocks of units/apartments)

Basically the principle is that since the organisation "belongs" to its owners **most transactions between the organisation and owners are tax free**

eg - Sports club collects \$50 ea from members to organise sports/games for members - not AI for club;

A sports club collects \$2,000 fees from members, spent \$500 on sporting games, winds up and refunds the remaining \$1500 to its members. The \$1500 is not AI to its members.

Will not apply to situations involving external income (transactions with non-members);

eg Sports club collects \$2,000 from members, puts in bank & earns \$100 interest. This interest is AI – not covered by mutuality principle as it involves an external party;

Principle discussed in the case of [RACV v FCT](#)

Income from personal exertion ('reward for services')

A receipt will be OI due to being income from personal exertion if the receipt is a product/reward of an income earning activity ([Hayes v FCT 1956](#));

1. Contractually entitled to be paid for services performed:

Where employer has to pay you for your services, is clearly OI.

Eg) **Salary** (eg paid \$900/week for working for bank);

Lump sum paid to independent contractor (eg Deakin Univ. pays you \$1,000 to clean up the campus after Orientation week. This is a 'once-off' payment);

2. Gifts/Voluntary Payments

A gift will be **OI if the gift has a sufficient nexus with services** you performed, whether or not once-off or regular

Ex) Get Christmas bonus from employer;

This is a gift, they don't have to give it to you;

Is clearly OI. Why?

It is a reward for your services - your only association with them is through employment. Or if bonus is for great idea you had at work, clearly OI (reward for services);

If gift is a **personal gift = not OI** (also referred to as a "mere gift" by some case law).

Ex) Get birthday present from boss, who is **also** your mother

Clearly **not** OI. A personal gift, not a reward for services.

[Laidler v Perry](#): An employer gave a Christmas bonus in the form of a voucher to all previous & present employees → Income, reward for their employment

(*******) [Scott v FCT \(1966\)](#): gifted \$10,000 in addition to the normal fees, have friendship relation → **Not OI, personal gift, focus on subjective motive.**

Other considered elements

- Gifts that are a **common incident** to employment → OI
- **Exceptional gift** → less likely to be income
- Unexpected gift from work done → less likely to be OI ([Scott](#))

[Brown v FCT \(2002\)](#): govt. minister, sped up process of approval, received a villa as gift → **OI, reward for services, was not otherwise paid for his services.**

[Hayes v FCT \(1996\)](#): TP helped improve bus. , developed close friendship, received shares of the company → **Not Income, personal gift, not connected to work done, personal friendship, was already remunerated for work.**

FCT v Harris (1980): ex-employment, received **once-off gift** to top-up high inflation pension → **Not OI, insufficient nexus, already remunerated, not reward for work.**

FCT v Blake (1984): same facts as Harris but regular not once-off → **OI, reward for services, not personal gift.**

Unclear nexus: Once-off → Not OI

Regular → OI

3rd parties' gift: (customer vs waiter or taxi driver)

If a reward for services → OI

Penn v Piers & Pond 1908;

Calvert v Wainwright 1947

3. Prizes

OI if prize is a reward for an income earning activity

Prizes due to **luck/chance** eg the lottery, are **not OI** – not a reward for income earning services.

Most **gambling activities** will **not be 'OI for personal services'** because they are due to luck/chance rather than skill-based services on the part of the gambler.

On the other hand, **prizes that are a reward for "income earning activities"** such as a **professional sports player** winning a **"best player" prize** are a reward for income earning services and often **will be OI**

Kelly v FCT (1985): professional sports player winning a "best player" prize

NOTE that it was **unexpected and not regular**. Despite this was **still OI** - because clearly a reward for services.

Prizes from a TP's **non-professional/non-employment activities** are much **less likely to be considered OI** than prizes from professional/employment activities.

Most **prizes from appearing on TV shows** etc will **not be considered OI** if the appearance is casual (non-regular).

However, if the **appearance on radio/TV programs are regular** then any payments/prizes **more likely to be OI** – someone who appears on many quiz shows and wins on many occasions, might be OI;

If the prize is **incidental** (ngẫu nhiên) to the TP's **income producing activities** then it **will be OI**.

4. Distinction Between Payment for Services and Giving up a Capital Right

Compensation for giving up OI = OI;

Compensation for giving up capital = capital

Jarrold v Boustead (1963): *amateur* rugby player who was paid a fee to **give up** his amateur status and turn professional → **Not OI, capital payment for relinquishing (tu bo) amateur status, not remuneration for future services, giving up his amateur status.**

If a **sign-on fee** is an ordinary/normal practice in industry – sport or other employment – is likely to be OI (a reward for services) (Taxation Ruling TR 1999/17)

This is especially so if **not giving up anything of capital**

Brent v FCT (1971): vo toi pham, ngoi ke chuyen, khong truc tiep viet sach → claimed for giving up copyright → **OI, not Capital, TP was in fact being paid for services – can't claim capital.**

Payment for Giving up a Capital Right

Bennett (1947): TP exchanged (for money) his original work contract for another that had shorter term and fewer powers → **Capital, giving up some of the privileges (dac quyen) under old K**

Restraint of Trade

Where you are paid not to perform certain types of work/business activities.

Higgs v Olivier (1952): TP received £15,000 for agreeing not to act in any films for 18 months. Was the payment OI? → Not Ai, was a **capital** sum paid to TP for **giving up his right** to earn income as an actor, **not** a fee for acting services

Case of restraint of trade will be OI

FCT v Woite (1982):

- TP a professional footballer playing in a team in the SA league (ie they only played against other SA teams);
- Entered into a restraint of trade with a Vic league team (Nth Melb). Vic teams only played other Vic teams;
- The 'restraint of trade' payment (\$10,000) was for Woite to not join any other club in Vic league than Nth Melb;

ie Woite was under no obligation to actually play with a Vic club, but if he did it had to be Nth Melb.

HELD: Restraint of trade payment ie payment to play for no Vic team other than Nth Melb, **was capital.** Why?

TP giving up capital right to play for other Vic. teams;

BUT Court also stated **if Woite had joined Nth Melb then restraint of trade would be OI;**