

## **COMMISSIONER OF TAXATION v McNEIL (S56/2006)**

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 8 August 2005

Date of grant of special leave: 10 February 2006

At the start of 2001 Mrs McNeil held 5,450 shares in St George Bank Limited ("St George"). On 12 January 2001 St George announced a buy-back of about 5% of its then issued capital, with the buy-back price set at \$16.50 per ordinary share. Shareholders who wanted to exercise or dispose of any of their "Sell Back Rights" were required to return a completed direction form to St George. Those who gave no such direction however were still going to benefit. This is because their "Sell Back Rights" were to be sold to a merchant bank and they were to receive the net proceeds calculated according to a set formula.

Mrs McNeil was one of those shareholders who failed to give St George such a direction. Nevertheless she still had 272 "Sell Back Rights" allocated to her in respect of her shareholding and she duly received \$576.64.

In her 2000/01 tax return Mrs McNeil included \$576.00 by way of receipts. This was comprised of \$514.00 as ordinary income and \$62.00 as a capital gain. (The capital gain represented the difference between the sell price received from the "Sell Back Rights" (\$576.00) and their cost base calculated by reference to their market value (\$514.00)). She was assessed by the Commissioner of Taxation ("the Commissioner") as having received ordinary income. Alternatively Mrs McNeil was assessed as having received a capital gain of \$514.00

Mrs McNeil objected to that assessment, contending that the sum of \$514.00 was not assessable as ordinary income under section 6-5 of the *Income Tax Assessment Act 1997 (Cth)* ("the ITAA 1997"), nor as a capital gain. The Commissioner disallowed her objection. His stated reasons were as follows:

*'Mrs McNeil was granted 272 Sell Back Rights on 19 February 2001. The grant of the "Sell Back Rights" is assessable as ordinary income under section 6-5 of the ITAA 1997. The amount to be included in assessable income for each Right granted is its market value at the time of the grant. The market value of each Right is \$1.89, and accordingly Mrs McNeil is assessable on an amount of \$514.00.*

*Alternatively, the grant of the Rights is a CGT event H2, and a capital gain of \$514.00 arises under subsection 104-155(3) of the ITAA 1997.*

*This decision is in accordance with Class Ruling CR 2001/75.'*

On 14 April 2004 Justice Conti held that neither the entitlement to the "Sell Back Rights", nor the money paid to Mrs McNeil were income. His Honour further held that she had not made a capital gain. On 8 August 2005 the Full Federal Court (French & Dowsett JJ, Emmett J dissenting) dismissed the Commissioner's appeal. The majority, for separate reasons and in separate judgments, concluded that neither the "Sell Back Rights" nor the money paid to Mrs McNeil were income. They also found that she had not made a capital gain. Justice

Emmett however held that the sum of \$576.64 paid to Mrs McNeil was income, but he agreed that she had not made a capital gain.

The grounds of appeal include:

- The Full Federal Court erred in deciding that:
  - a) the value of the "Sell Back Rights", which were granted for the benefit of Mrs McNeil by St George on 19 February 2001, was not income according to ordinary concepts derived by her for the purposes of section 6-5 of the ITAA 1997 in the year of income ending 30 June 2001; alternatively
  - b) that the amount of \$576.64 received by Mrs McNeil on or about 2 April 2001 in connection with the share buy-back scheme established by St George was not income according to ordinary concepts derived by her pursuant to section 6-5 of the ITAA 1997.