

**COMMENTS ON ISSUES RAISED IN GRAEME COOPER'S  
PAPER PRESENTED AT TAX BOARD/ATAX CONFERENCE  
OF 23-24 JULY 2001**

**BY**

**BOARD OF TAXATION'S TVM LEGISLATIVE GROUP**

**STATUS OF THE REJOINDER**

1. This rejoinder reflects the proposed TVM legislation as developed to July 2001. Readers should note that the legislation is still under development.
2. The rejoinder has not been endorsed by the Treasurer or any other Minister, nor does it reflect the official views of the Treasury, the Australian Taxation Office, the Office of the Parliamentary Counsel or the Board of Taxation.
3. Comments on the rejoinder and/or the paper which it addresses are welcome. Comments in writing should be addressed to:

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4. Alternatively, comments can be e-mailed to the Board of Taxation Secretariat at [taxboard@treasury.gov.au](mailto:taxboard@treasury.gov.au).

## 1. Cooper, G.; ‘How well does TVM express the current income tax base?’

### *Overview*

- 1.1 The main thesis of Professor Cooper’s paper seems to be that, although TVM may offer a good way of addressing some of the problems of the present income tax system, the claims made for it have been exaggerated.<sup>1</sup>
- 1.2 The Legislative Group accepts that some of the claims made for TVM in the past may not have been articulated as well as they ideally might have been. In our opinion, however, it would now be more fruitful to move on to judge the actual benefits of TVM itself. To that end the Legislative Group supports Professor Cooper’s idea<sup>2</sup> for a process to more clearly identify and articulate the intent and potential benefits of TVM so that commentators can reach an informed opinion about its actual merits.
- 1.3 That said, the Legislative Group believes that Professor Cooper's paper contains a number of statements that we feel are incorrect. This response will address the most significant of them in the interests of an informed debate.

### *Intent behind TVM*

- 1.4 The paper discusses what TVM is intended to achieve in terms of changes to existing outcomes.<sup>3</sup> The paper says that RBT intended that *nothing* would or should change under TVM (i.e. that the existing outcome would be achieved for every taxpayer in every case).<sup>4</sup> That does not seem to be a fair reflection of the position taken by the designers and developers of TVM.
- 1.5 That position is perhaps best summed up in the explanatory material released by the Board of Taxation before the conference. That material notes that, as a general statement, TVM is not intended to change existing income tax outcomes. However, it then goes on to say:<sup>5</sup>

“2.34 Inevitably though, there will be some differences.

2.35 One case is where the Government makes policy decisions for change. This would be the case, for example, if the Government decided to accept the Ralph policy recommendations dealing with the taxation of financial arrangements.

2.36 Also, inherent in the Tax Value Method is a more consistent treatment of assets and liabilities. This consistent treatment will do these things:

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<sup>1</sup> Professor Graeme Cooper, ‘How well does TVM express the current income tax base?’, p. 39.

<sup>2</sup> Ibid, p. 39.

<sup>3</sup> Ibid, pp. 2-3.

<sup>4</sup> Ibid, p. 3.

<sup>5</sup> See Explanatory Material to Tax Value Method Working Draft (Version 2), p.26. (This version of the working draft is also referred to as TVM Prototype 2 and is available at [www.taxboard.gov.au](http://www.taxboard.gov.au)). We consider these statements to also be a fair reflection of comments made by the RBT in *A Tax System Redesigned* (see, for example, recommendations 4.1 (and discussion following), 4.6, 4.14, 4.15 and 4.18).

- *Standardisation.* The disparate treatment that currently applies to different kinds of assets and liabilities (e.g. depreciating assets as compared to CGT assets) will be standardised. This standardisation in turn may alter tax outcomes in some cases (e.g. consistent timing of recognition regardless of asset type). The comprehensive recognition of liabilities under the Tax Value Method will also standardise the timing of recognition of gains and losses for the provision of services and the disposal of assets.
- *Complete description of the income tax base.* A completely described tax base, rather than a number of separate regimes trying to cover the same ground, will prevent gaps. For example, under the Tax Value Method expenditure black holes will be avoided so that tax relief for all non-private expenses will be given at some time. Similarly, overlaps between regimes that are present in the current law should not arise. To the extent that the current law does not address those overlaps, current cases of double taxing (or double deductions) will disappear under the Tax Value Method.

2.37 It will be necessary, in due course, to identify and obtain an estimate of the revenue impact of these changes. This will enable their impact to be fully considered in developing the legislation, by the Tax Board and, ultimately, by the Government.”

- 1.6 The analysis of the cases at paragraphs 1.10 to 1.41 demonstrates the different outcomes that will be achieved in some cases.

***‘Writing income’: comparison between income under current law and under TVM***

- 1.7 As noted in the paper, the conference version of the paper implied that TVM must “capture (almost) all of, and little or no more than, what we currently understand to be within ‘income according to ordinary concepts’”.<sup>6</sup> The version now published acknowledges that taxable income is in fact made up of ordinary income and statutory income. However, despite the change, the paper still gives a disproportionate emphasis to the role of ordinary income and general deductions in the income tax base. In particular, the paper does not mention that the introduction of capital gains tax in 1985 fundamentally changed the nature of the income tax base, and that an implementation of key RBT recommendations, like recommendation 4.14 (tax relief for ‘blackhole’ expenditure), would take that further.<sup>7</sup>
- 1.8 So it is clear that TVM must capture the multitude of things the current law describes as *statutory income*. For example, it must also capture gains which are currently taxed under the capital gains tax (CGT) rules, gains on redemption of liabilities, balancing charges, recoupments and the miscellany of items listed in Division 10 of the 1997 Act.

***‘How robust is the “private or domestic” tag?’***

- 1.9 The paper raises a number of issues relating to the exclusion of private or domestic things in working out taxable income under TVM. The private or domestic legislation is still

<sup>6</sup> Cooper, op cit, pp. 3 (footnote 7) and 7.

<sup>7</sup> Footnote 7 of the paper suggests that the RBT may have intended TVM to express ordinary income minus general deductions and that, in the conference discussions, it was suggested that TVM expresses taxable income. We note that the RBT said that TVM would in fact calculate taxable income and that “Capital gains and losses are brought into taxable income/loss as part of net income” (*A Tax System Redesigned: Explanatory Notes*, p. 44). We also note that Chapter 2 of the explanatory material released on the Tax Board’s website in April 2001 explained the changing nature of Australia’s income tax base in some detail and that existing provisions dealing with ‘statutory income’, in one way or another, express many of the concepts found in TVM.

under development, so it is not yet appropriate to comment on the issues raised in the paper.

### *Cases considered in the paper*

- 1.10 The paper mentions a number of previously decided cases to suggest that TVM will not solve many of the difficult questions that arise in tax law. To allow readers to make their own judgement, an analysis of these cases and how TVM, combined with RBT policy recommendations on black holes, rights and financial arrangements, would apply is set out below. In our view, these cases demonstrate one of the key benefits of TVM; that it provides a common framework for assessing the income tax implications of transactions.
- 1.11 The paper says that this analysis of the cases shows that outcomes will change under TVM.<sup>8</sup> That is true when TVM is combined with the RBT policy recommendations dealing with financial arrangements, the treatment of rights and black hole expenditure.<sup>9</sup> Most of these cases are illustrative of changes in those areas. But we note that this cannot reasonably be extrapolated to suggest that TVM will change most outcomes.<sup>10</sup>

### *Myer Emporium*

- 1.12 The Legislative Group does not agree with the paper's proposition that 'gain vs flow' theory will be relevant to the TVM analysis of *FC of T v Myer Emporium Ltd* (1987) 163 CLR 199; (1987) ATR 693; 87 ATC 4363.<sup>11</sup> 'Gain vs flow' theory is not relevant for TVM; in essence, all transactions are analysed by examining asset and liability movements.
- 1.13 The paper implies that the outcome of *Myer* was unsatisfactory, because the taxpayer was not able to recognise a cost against which to offset the assignment proceeds. The paper is probably right - but consider what would be the result if the *Myer* case had happened in a TVM context.
- 1.14 In that case, Myer Emporium Ltd lent \$80 million to its subsidiary, Myer Finance Ltd, at commercial rates of interest. Three days later, Myer Emporium assigned its right to the interest (but not to the principal) to Citicorp Canberra Pty Ltd for a lump sum in the order of \$45 million.
- 1.15 Under TVM, Myer Emporium would have a payment of \$80 million, coupled with a single asset (the right to repayment of principal and interest), having a cost of \$80 million.<sup>12</sup> Under subsection 6-40(1), item 7,<sup>13</sup> the asset would have a tax value worked out under Division 45.
- 1.16 When Myer Emporium assigned the right to interest to Citicorp for \$45 million, it would split its asset into a right to repayment of the principal and a right to payments of interest. The \$80 million tax value of the original asset would be apportioned between these two

<sup>8</sup> Cooper, op cit, p.1 (third paragraph of first footnote).

<sup>9</sup> See recommendation 4.14 and sections 9 and 10 of *A Tax System Redesigned*.

<sup>10</sup> We note that the paper does not suggest otherwise.

<sup>11</sup> Ibid, pp. 12 and 13.

<sup>12</sup> Subsection 7A-20(1) of TVM Prototype 2.

<sup>13</sup> TVM Prototype 2.

rights. Myer Emporium would have a receipt of \$45 million, but a corresponding reduction in the tax value of its assets (the right to interest).

- 1.17 Over the following years, the tax value of the right to repayment of the principal would rise to \$80 million under the Division 45 rules.<sup>14</sup> In effect, this would bring the \$45 million gain to account over the period of the loan.<sup>15</sup>
- 1.18 This result reflects the fact that the actual outcome of Myer was economically unsatisfactory.<sup>16</sup> Myer Emporium did not actually make the full profit at the time of the assignment. The full gain emerged to Myer Emporium over the future years and the loss to Myer Finance emerged over the same period. At the time of the case, there was no mechanism in the legislation to achieve that result. TVM is a mechanism that would bring Myer Emporium's gain to account, and allow Myer Finance's loss, over the years of the loan without the need for special rules.<sup>17</sup>

### *Montgomery*

- 1.19 *FC of T v Montgomery* (1999) 42 ATR 475 is an example of a case dealing with the income tax consequences of lease incentive payments. The treatment of lease incentives under TVM depends on whether the incentive gives rise:
- to an *ongoing* obligation (e.g. to commit to the lease for a period); or
  - only to an *immediate* obligation (e.g. where the lease incentive is merely an inducement to enter the lease).
- 1.20 If the obligation is ongoing, the liability that arises would result in the lease incentive being recognised as income over the life of the liability (via the rules in Division 40 dealing with depreciating liabilities). If the obligation is only immediate, the lease incentive would be assessed immediately because there is no ongoing liability.
- 1.21 The paper's argument is that TVM gives rise to the same uncertainty as the current law. But there is an important distinction between the analysis required under TVM and that required under the current law. Characterising the transaction for the purpose of TVM is a matter of establishing the link between the receipt and any liabilities the taxpayer has. This is basically a *question of fact*, which requires analysis of what the parties have agreed to. Under the current law, the taxpayer must still undertake that factual analysis but must also undertake the complex *legal* analysis inherent in applying the income/capital dichotomy.

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<sup>14</sup> Assuming that item 2 of the table in section 45-15 of TVM Prototype 2 is applicable to the asset.

<sup>15</sup> This analysis is based on the assumption that Myer Emporium had no ongoing liability to Citicorp. If the arrangement was instead that Myer Emporium received the interest from Myer Finance and was obliged to pass it on to Citicorp, there would be no split of the asset. Rather, Myer Emporium would have a liability (with an initial tax value of \$45 million) which would decline in value as the interest was passed-on. The effect of that would also be to tax Myer Emporium on the \$45 million over the life of the loan.

<sup>16</sup> See Spry ICF 'The Implications of the *Myer Emporium* Case' (1987) *Aust. Tax Review* (September) 152.

<sup>17</sup> Note that the appropriate treatment of financial arrangements is being examined by the project on the taxation of financial arrangements.

*Dickenson*

- 1.22 In *Dickenson v FC of T* (1958) 98 CLR 460, the owner of a garage and service station business entered into exclusive trade-tie arrangements with Shell Oil Company. Under two deeds, the owner promised:
- to sell only Shell Oil products (for 10 years); and
  - not to establish any new garage or service station within 5 miles of the existing garage (for 5 years).
- 1.23 Further, the owner entered into a 10-year sale and lease-back arrangement with Shell in relation to its garage, in order to bind successors to the owner's business to the arrangement. In return, the taxpayer received 2 amounts of £2,000. The Full High Court found that the receipts were of a capital nature, and therefore not assessable. The two payments were received as an inducement to enter into the trade-tie arrangement, which constituted a substantial change to the capital structure of the taxpayer's business.
- 1.24 If the case were decided now, the £4,000 Dickenson received would be assessable income under the CGT rules (see CGT event D1, section 104-35 of the 1997 Act).
- 1.25 The TVM treatment of this case seems clear. The owner would have a receipt of £4,000, coupled with liabilities to Shell with proceeds of assumption of £4,000.<sup>18</sup> The result is:
- $$\text{Net income}_{\text{Dickenson}} = [4,000 - 0] + [0 - 0] - [4,000 - 0] = \text{£}0$$
- 1.26 The liabilities would then be written-off over time under Division 40. The liability not to sell products other than Shell products would decline over 10 years. The liability not to set up a service station within 5 miles of the existing one would decline over 5 years. As the liabilities decline, the taxpayer would be assessed on the £4,000 as a natural consequence of the net income calculation in section 5-55.<sup>19</sup>
- 1.27 A response to this analysis might be that Mr Dickenson had actually carved out a piece of his goodwill by entering the tie, and the transaction should therefore affect his assets rather than his liabilities. But this reasoning cannot stand, since goodwill is indivisible property that cannot be dealt with separately from the business with which it is associated: *FC of T v Murry* 98 ATC 4585.
- 1.28 Equally, Dickenson would not be recognised by TVM as having disposed of assets, being 'freedoms of trade' by entering into the agreement. Such freedoms might be assets but they are never *held* and so are irrelevant.<sup>20</sup>

*BP Australia*

- 1.29 In *BP Australia Ltd v FC of T* [1966] AC 224 a petrol distributor sought to combat competition from a rival by establishing a cooperative arrangement with 3 other petrol companies. Initially, the companies tried to induce service station owners to deal solely

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<sup>18</sup> Section 7A-75 of TVM Prototype 2.

<sup>19</sup> TVM Prototype 2.

<sup>20</sup> See Section 6-20 of TVM Prototype 2.

with them by undertaking to paint their service stations in distinctive colours. Later, the taxpayer expended £270,569 securing promises from certain petrol station owners that they would stock and sell only the taxpayer's products. The trade 'ties' were for periods ranging from 3 to 15 years. The payments made were in the form of lump sum 'developmental allowances' and were based loosely on the quantity of petrol sold (£100 per 1,000 gallons per month).

- 1.30 The treatment of all of these transactions under TVM seems clear. When BP offered to paint service stations in return for exclusive dealing rights, there would be non-cash transactions involving the exchange of services (and incidental goods, such as paint) for rights against the service station owners.<sup>21</sup> These rights would have a cost equal to their market value,<sup>22</sup> and would depreciate over the duration of the station owner's promise under Division 40. The cost to BP of providing the painting services would be offset against the tax value of its rights. The net effect would be to spread the costs of BP's service over the period that its right is providing benefits; i.e. a natural 'matching' occurs.
- 1.31 When the developmental allowances arise, there would be a non-cash transaction under which BP gives the participant a right to receive money in certain circumstances, and the participant gives BP the right to have only BP's products sold.<sup>23</sup> These rights and liabilities are likely to be 'routine',<sup>24</sup> but would otherwise be written off over time under Division 40. Each time 1,000 gallons was sold, BP's liability to pay £100 would become non-contingent.<sup>25</sup> Effectively, BP would be able to 'deduct' the payments as a natural consequence of the net income formula in section 5-55.<sup>26</sup>

- Liability increase (contingent liability becomes non-contingent): -£100
- Payment: -£100
- Liability decrease: +£100
- Effect on net income: -£100

### *Regent Oil*

- 1.32 In *Regent Oil v Strick* [1966] AC 295, the taxpayer (an oil dealer) entered into arrangements with the owners of filling stations under which it would only sell the oil supplied by the dealer. One of the tie arrangements involved the filling station owner leasing the station to the dealer for a number of years in return for a nominal rent and a lump sum premium and, secondly, with the dealer sub-letting the station back to the owner for the same number of years less three days at the same nominal rent, the sub-lease containing a covenant by the owner to purchase the dealer's oil only.
- 1.33 The premium was calculated by reference to the estimated gallonage to be supplied by the dealer to the owner for the duration of the letting; but the dealer would make additional payments if the estimate was exceeded. The owner undertook not to assign his tenancy except to a person undertaking to enter into a similar covenant with the dealer.

<sup>21</sup> Sections 8-25 and 8-27 of TVM Prototype 2.

<sup>22</sup> Sections 8-29 and 7A-20 of TVM Prototype 2.

<sup>23</sup> Sections 8-25 and 8-27 of Prototype 2.

<sup>24</sup> Subsection 6-45(3) of Prototype 2.

<sup>25</sup> Subsections 7-22(2) and (3) of Prototype 2.

<sup>26</sup> TVM Prototype 2.

The House of Lords held that the premiums paid by the dealer were capital payments and not deductible for income tax purposes.

- 1.34 The treatment for TVM purposes again seems clear; it also removes the ‘black hole’ that was revealed by the court’s decision in the case. The dealer would have:
- *Under the primary lease* - rights with a cost equal to the market value of the future rental stream plus the lump sum premium.<sup>27</sup> These rights would be matched with a payment and a small liability (i.e. to pay the nominal rent) in the year of entering the arrangement. The tax value of this right and the liability would decline over time under Division 40, leading to an overall ‘deduction’; and
  - *Under the sub-lease* - rights, including the trade tie rights, with a cost equal to their market value. The dealer would also have a liability under the sublease with the same value. The rights and liabilities would probably both be routine.<sup>28</sup> Thus, the dealer would be assessed on the nominal rent when received.
- 1.35 The dealer would also have a contingent liability to make additional payments. When the volume of sales exceeded a certain level, the liability would become non-contingent and would be recognised.<sup>29</sup> The additional payment would therefore be ‘deductible’ in the year that the liability to make a payment ceased to be contingent.

### *Hallstroms*

- 1.36 In *Hallstroms Pty Ltd v FC of T* (1946) 72 CLR 634, a refrigerator manufacturer incurred legal costs in successfully opposing a competitor’s application for a patent extension. By majority, the High Court allowed the taxpayer a deduction under subsection 51(1) of the 1936 Act for these expenses, on the basis that the costs were not incurred in order to acquire an asset or add to the profit-yielding structure of the taxpayer’s business. Maintaining an existing position was not the gaining of an enduring advantage, and a right enjoyed in common with everyone to manufacture fridges was not a capital asset.
- 1.37 The treatment of this expenditure under TVM is clear. Hallstroms would have payments for legal expenses. The ability to manufacture fridges using a competitor’s design might be an asset, but it isn’t held (it is a freedom shared with *everyone*, not a legal or equitable right).<sup>30</sup> So, if the expenses were \$10,000, and all of the legal services were provided within the year:<sup>31</sup>

$$\text{Net income}_{\text{Hallstroms}} = [0 - 10,000] + [0 - 0] - [0 - 0] = -\$10,000$$

- 1.38 Note how comparatively simple the analysis is here. There is no need to consider the effect of the payment upon the taxpayer’s ‘profit yielding structure’; it is simply a matter of observing that the taxpayer’s payment is not matched by any held asset.

<sup>27</sup> Section 7A-20 of Prototype 2.

<sup>28</sup> Subsection 6-45(3) of TVM Prototype 2.

<sup>29</sup> Subsections 7-22(2) and (3) of TVM Prototype 2.

<sup>30</sup> See section 6-20 of TVM Prototype 2, item 1 of the table.

<sup>31</sup> Another argument might be that the legal expenses add to Hallstroms’ goodwill. However, even if this were the case, it would not affect the result as the goodwill would have a tax value of zero (see subsection 6-40(1), item 8 of the table).



### *Cyclone Scaffolding*

- 1.39 The paper says that TVM will require nexus tests to be used in some circumstances and refers for illustration to *FC of T v Cyclone Scaffolding Pty Ltd* (1987) 19 ATR 674.<sup>32</sup> In that case, the issue was whether scaffolding held for both lease and sale was trading stock or plant. In other words, the tax treatment of the profit on the sale of the scaffolding was determined by what category of asset it fell into.
- 1.40 The point is, however, that the case was pre-CGT, so that there was an incentive for the asset to be treated as depreciable plant rather than as trading stock (i.e. only any depreciation previously deducted would be recaptured, not the full profit on disposal of the asset). Since 1999, however, nothing would be achieved by arguing whether the scaffolding is depreciable or trading stock because the same profit would be taxed in both cases. This would also be true under TVM.<sup>33</sup>

### *Federal Coke*

- 1.41 The paper's analysis<sup>34</sup> of *FC of T v Federal Coke Company Pty Ltd* (1977) 7 ATR 519 correctly notes that no double taxation would arise in that case under TVM but suggests that there is an issue about whether the correct taxpayer was assessed on the receipt. Had the facts occurred in a TVM context only Federal Coke Co Pty Ltd would have been assessable.
- 1.42 In that case, Bellambi Coal Co Ltd arranged for a \$1 million receipt due to it to be paid instead to another company in its group (Federal Coke Co Pty Ltd). Under TVM, as the paper notes, Federal Coke would be taxed on this amount but Bellambi would not; Bellambi would have a constructive receipt of \$1 million and a matching constructive payment to Federal Coke of \$1 million.
- 1.43 In the usual case, this is the correct outcome. Suppose Federal Coke had provided services to Bellambi for which it charged \$1 million, but instead of directly paying Federal Coke, Bellambi redirected the \$1 million due to it to Federal Coke to satisfy the debt. It would be appropriate in that case for Federal Coke to be assessed on the receipt and for Bellambi to be given a 'deduction' for its \$1 million constructive payment. It is only if there is something unusual happening in the case (e.g. non-arm's length dealing or income injection) that the approach is inappropriate, and this would necessarily involve the application of rules addressing those problems.

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<sup>32</sup> Cooper, op cit, at p. 34.

<sup>33</sup> Under TVM, as under the current law, it will be necessary to decide whether an asset is a depreciating asset or trading stock in order to determine its tax value (nothing short of a fundamental policy shift will remove the need for this). But this was not the relevant issue in the *Cyclone Scaffolding* case.

<sup>34</sup> Cooper, op cit, at p. 35.

***Minor issues raised in the paper****‘Cash receipts that are also assets’*

- 1.44 The paper’s analysis about ‘cash receipts that are also assets’<sup>35</sup> does not reflect the nature of the net income calculation in section 5-55.<sup>36</sup> It uses an example of a painter receiving \$15,000 for a job to suggest that there is a double counting problem with TVM. However, applying the facts of the example to the TVM legislation shows that there is no double counting and, further, that such double counting is systemically impossible under TVM.<sup>37</sup>

*‘Non-cash receipts that are also assets’*

- 1.45 The paper’s explanation of the role of the non-cash transaction rules<sup>38</sup> does not reflect their true function. The principal purpose of the deemed receipts and payments arising under Division 8 is to feed into the cost and proceeds rules in Division 7A.<sup>39</sup>
- 1.46 We do not agree with the paper’s comment that TVM takes 4 steps to do what the existing law does in 2 to assign a cost to an asset received in a non-cash transaction.<sup>40</sup> The steps under the current law and TVM are the same – valuing the non-cash benefits and assigning those values to work out the proceeds for the services and the cost of the asset. But Division 8 of the working draft goes further than the current law by solving the double-counting problems that currently exist.<sup>41</sup>

*‘Assets and liabilities that were not purchased’*

- 1.47 The paper suggests that TVM will tax the value of assets that are not purchased and cites the example of a taxpayer becoming the object of a discretionary trust.<sup>42</sup> However, there is a note after section 8-57<sup>43</sup> which says that untraded contingent assets and liabilities will be excluded from the operation of the non-cash transaction rules. This in turn will mean that there will be no tax consequences in the circumstances described in the note.

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<sup>35</sup> Cooper, op cit, pp. 13-15.

<sup>36</sup> TVM Prototype 2.

<sup>37</sup> To illustrate, if the bank account referred to in the paper is *not* a money account, the following things happen to the painter’s net income:

|   |                  |
|---|------------------|
| • Constructive receipt (subsection 5-65(1))       | +\$15,000        |
| • Less: constructive payment (subsection 5-65(2)) | -\$15,000        |
| • Add: financial asset (account balance):         | <u>+\$15,000</u> |
| • RESULT:   | \$15,000         |

If the account *is* a money account, section 5-60 applies:

|                             |                  |
|-----------------------------|------------------|
| • Deemed receipt (account): | <u>+\$15,000</u> |
| • RESULT:                   | \$15,000         |

<sup>38</sup> Cooper, op cit, p. 16.

<sup>39</sup> TVM Prototype 2.

<sup>40</sup> Cooper, op cit, at p. 7.

<sup>41</sup> See paragraphs 11.27, 11.28 and 11.83 to 11.90 of the explanatory material to TVM Prototype 2.

<sup>42</sup> Cooper, op cit, p. 19.

<sup>43</sup> TVM Prototype 2.

*'Characterisation per se'*

- 1.48 The paper's analysis<sup>44</sup> of how TVM might apply to the facts of *Arthur Murray (NSW) Pty Ltd v FC of T* (1965) 114 CLR 314 or *Country Magazine Pty Ltd v FC of T* (1968) 117 CLR 162 raises an essentially trivial point. Like any tax law (or, indeed, any *statute*) TVM takes the general law as it finds it. In the world of commerce, economic relations are effected by means of contract. Contracts intrinsically create rights and liabilities.<sup>45</sup>
- 1.49 It is trite law that a mere promise is good consideration under a contract. As a matter of contract law, there is no difference between 'selling services teaching dancing'<sup>46</sup> and 'receiving money for undertaking a liability to provide those services'.<sup>47</sup>
- 1.50 The paper's distinction between receiving money for future services and receiving money for undertaking a liability to provide such services is not important. For, while it remains executory on one or more sides, what else can a contract be about, except rights and liabilities?
- 1.51 Perhaps what the paper means to say is that the *ultimate intention* of *Arthur Murray* evidenced in its dancing contracts is the earning of money through selling dancing lessons, rather than selling liabilities to give such lessons. But this is irrelevant, since TVM characterises transactions by progressively recognising, categorising and measuring rights and liabilities, not by looking to ultimate intent.<sup>48</sup>

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<sup>44</sup> Cooper, *op cit*, at p. 37.

<sup>45</sup> Indeed, this is inherent in the notion that bilateral agreements must be supported by a two-way flow of consideration between the parties.

<sup>46</sup> Cooper, *op cit*, at p. 37.

<sup>47</sup> As above.

<sup>48</sup> This approach can be contrasted with that adopted in the current law, as illustrated by the cases cited in the last paragraph on page 23 of the paper. The paper's point seems to be that it will be necessary in some specific provisions to identify the character of certain kinds of income so that a special rule can be applied (e.g. in the provisions dealing with alienation of personal services income it is necessary to determine what is 'personal services income'). However, this would seem to involve no more than consequential amendments to the affected provisions.