HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, KIRBY AND HAYNE JJ

COMMISSIONER OF TAXATION
OF THE COMMONWEALTH OF AUSTRALIA APPELLANT

AND

ANDREW PAYNE RESPONDENT

Commissioner of Taxation v Payne
[2001] HCA 3
8 February 2001
S252/1999

ORDER

1. *Appeal allowed.*

2. *Set aside orders 1 and 2 of the orders of the Full Court of the Federal Court of Australia made on 30 March 1999 and in lieu thereof order:*

   (a) Appeal allowed.

   (b) Set aside orders 1 and 2 of the orders made by Foster J on 2 July 1998 and in lieu thereof order:

      (i) that the matter be remitted to the Administrative Appeals Tribunal for consideration of the questions:

      first, whether the taxpayer should have leave in respect of any of the years of income ended 30 June 1991, 1992, 1993 or 1994 to rely on an additional ground of objection to the effect that the Commissioner was bound in respect of Taxation Ruling TR 95/19 to assess the tax payable by the taxpayer in accordance with that ruling; and

second, if leave is granted, whether and to what extent the Commissioner was so bound.

(ii) otherwise, appeal dismissed.

On appeal from the Federal Court of Australia

Representation:

D H Bloom QC with S W Gibb SC for the appellant (instructed by Australian Government Solicitor)

D F Jackson QC with D B McGovern and A J O'Brien for the respondent (instructed by Locke Harris McHugh)

CATCHWORDS

Commissioner of Taxation v Payne

Income tax – Allowable deductions – Travel expenses incurred in travelling between unrelated places of work and business – Whether expenses incurred "in gaining or producing the assessable income".

Words and phrases – "in gaining or producing the assessable income".

Income Tax Assessment Act 1936 (Cth), s 51(1).

1 GLEESON CJ, KIRBY AND HAYNE JJ. The central issue in this appeal is whether expenses incurred by the respondent taxpayer in travelling between two unrelated places of work were allowable deductions under s 51(1) of the *Income Tax Assessment Act* 1936 (Cth) ("the Act"). The issue arises in respect of the 1991, 1992, 1993 and 1994 years of income. A subsidiary question about a taxation ruling issued by the appellant ("the Commissioner") was also agitated.

The facts

2 During the relevant years the taxpayer lived with his family on a rural property near Tamworth, where he carried on the business of deer farming. In the original proceedings that gave rise to the present appeal, the Administrative Appeals Tribunal found that the "farming operation [was] a considerable undertaking, carefully structured, conscientiously managed, deriving substantial gross income, and requiring the dedication of much time, skill, and experience". In addition to operating his deer farm, the taxpayer was employed by an international airline as a pilot. Because of the way in which the airline organised flying duties for its pilots, the taxpayer was usually able, in less than 25 days, to perform all of the work that his employer required of him over a 56 day period. As a result, he usually had more than 30 of every 56 days to devote to the farming business. When he had to report to Sydney airport for flying duties, the taxpayer travelled from the farm by car, bus and train. Once, when he had to travel to Sydney quickly, he flew to the airport by chartered aircraft. It was the expenses incurred in making these journeys which the taxpayer claimed as allowable deductions.

3 In December 1995, the Commissioner issued notices of amended assessment to the taxpayer in respect of each of the 1991 to 1994 years of income. Those amended assessments disallowed the deductions for travelling expenses and imposed penalties and interest. The taxpayer objected to those amended assessments. The Commissioner allowed the objections in part and, in March 1996, issued further notices of amended assessment. The taxpayer applied to the Administrative Appeals Tribunal for review of the Commissioner's decisions about the objections. The Tribunal decided that all the penalties imposed by the Commissioner should be remitted in full, but otherwise affirmed the Commissioner's decisions.

4 Pursuant to s 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth), the taxpayer appealed to the Federal Court of Australia. The question of law which was said to enliven the jurisdiction of the Federal Court was whether, on the facts found by the Tribunal, the Tribunal had erred in law in failing to determine that the taxpayer was entitled to the deductions he claimed.

5 At first instance in the Federal Court, Foster J allowed the appeal and ordered that the matter be remitted to the Tribunal for reconsideration[1]. From this decision the Commissioner appealed to the Full Court of the Federal Court. That Court dismissed the Commissioner's appeal[2]. The majority of the Full Court (Sackville and Hely JJ) held that "expenses of travel by a taxpayer between a place of business and another place of employment are capable of constituting allowable deductions"[3] pursuant to s 51(1) of the Act. The fact that the travel was between "two places of unrelated income derivation"[4] did not necessarily mean that the expenses were not allowable deductions. The other member of the Court (Hill J) dissented, concluding that the expenditure in question in this matter had "no connection with either income producing activity which the taxpayer [carried] on and [was] not a working expense of either activity"[5]. Accordingly, Hill J considered that the decision of the Tribunal revealed no error of law. By special leave the Commissioner now appeals to this Court.

The applicable legislation

6 Section 51(1) of the Act provides that:

> "All losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income, or are necessarily incurred in carrying on a business for the purpose of gaining or producing such income, shall be allowable deductions except to the extent to which they are losses or outgoings of capital, or of a capital, private or domestic nature, or are incurred in relation to the gaining or production of exempt income."

7 As the majority of the Full Court pointed out[6], the general principles governing the construction (and we would add the application) of s 51(1) are familiar. Under the first limb of s 51(1), outgoings incurred in gaining or producing the assessable income of the taxpayer are deductible. The sub-section

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1 *Payne v Commissioner of Taxation* (1998) 39 ATR 356; 98 ATC 4703.

2 *Commissioner of Taxation v Payne* (1999) 90 FCR 435.

3 (1999) 90 FCR 435 at 451 [65].

4 (1999) 90 FCR 435 at 447 [50].

5 (1999) 90 FCR 435 at 437 [10].

6 (1999) 90 FCR 435 at 441 [26].

requires the identification of a loss or outgoing, an understanding of what is meant by "the assessable income", and the identification of a particular connection between the two.

8 The expression "the assessable income" is not to be given a narrow meaning. In particular, it has been said that[7]:

> "[it] is not to be read as confined to assessable income actually derived in the particular tax year. It is to be construed as an abstract phrase which refers not only to assessable income derived in that or in some other tax year but also to assessable income which the relevant outgoing 'would be expected to produce'."

9 The connection which must be demonstrated between an outgoing and the assessable income, in order to fall within the first limb of s 51(1), is that the outgoing is "incurred in gaining or producing" that income. The sub-section does not speak of outgoings incurred "in connection with" the derivation of assessable income or outgoings incurred "for the purpose of" deriving assessable income. It has long been established that "incurred in gaining or producing" is to be understood as meaning incurred "in the course of" gaining or producing[8]. What is meant by being incurred "in the course of" gaining or producing income was amplified in *Ronpibon Tin NL and Tongkah Compound NL v Federal Commissioner of Taxation*[9] where it was said that[10]:

> "to come within the initial part of [s 51(1)] it is both sufficient and necessary that the occasion of the loss or outgoing should be found in whatever is productive of the assessable income or, if none be produced, would be expected to produce assessable income".

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7 *Fletcher v Federal Commissioner of Taxation* (1991) 173 CLR 1 at 16.

8 *Amalgamated Zinc (De Bavay's) Ltd v Federal Commissioner of Taxation* (1935) 54 CLR 295 at 303 per Latham CJ, 309 per Dixon J; *Ronpibon Tin NL and Tongkah Compound NL v Federal Commissioner of Taxation* (1949) 78 CLR 47 at 56-57; *Charles Moore & Co (WA) Pty Ltd v Federal Commissioner of Taxation* (1956) 95 CLR 344 at 350.

9 (1949) 78 CLR 47. See also, for example, *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 426; *Fletcher* (1991) 173 CLR 1 at 17; *Steele v Deputy Commissioner of Taxation* (1999) 197 CLR 459 at 467 [22].

10 (1949) 78 CLR 47 at 57.

It is against these principles that the Tribunal had to consider the applications for review of the Commissioner's decisions. On appeal to the Federal Court, the question was whether the Tribunal had failed to apply these principles correctly.

10 The majority in the Full Court, and the primary judge, held that the Tribunal made an error of law in "concluding that the travel expenses were not incurred in gaining or producing assessable income by reason only of the fact that the travel was between two places of unrelated income derivation"[11]. The majority differed from the primary judge about what, if any, degree of connection a taxpayer would have to demonstrate existed between the two income-earning activities for the expenses of travelling between them to be deductible. Expressions like "organisational connection", "synergy", "interrelationship", "agglutination", and "integration" were mentioned by the majority in the Full Court in describing the connection which the taxpayer asserted existed in this case[12]. Their Honours concluded that such a connection was neither necessary nor sufficient to characterise the costs of travel between the two places as being incurred in the course of gaining or producing assessable income, although such a connection was not "necessarily irrelevant"[13]. Whether travelling expenses were incurred in the course of gaining or producing assessable income was, their Honours said[14], essentially a factual question. Especially was that so where, as was the case here, the taxpayer happened to live at one of the two places of income derivation. The question in such a case was said to be one which may depend upon whether the predominant character of one of those places is as a place of business or a home, and upon the purpose underlying the journeys in question[15].

11 Accepting, as one must, that "the assessable income" referred to in s 51(1) is a broad concept, it may well follow, as the majority of the Full Court said, that "[t]he relevance of the expenditure should be determined having regard to the overall income producing activities of the taxpayer, and not by reference to individual sources of income"[16]. That is not to say, however, that the kind of

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11 (1999) 90 FCR 435 at 447 [50].

12 (1999) 90 FCR 435 at 447 [51].

13 (1999) 90 FCR 435 at 447 [51].

14 (1999) 90 FCR 435 at 451 [67].

15 (1999) 90 FCR 435 at 451 [66].

16 (1999) 90 FCR 435 at 445 [42].

connection which s 51(1) requires between outgoing and income is other than the connection described as "incurred in gaining or producing the assessable income". The question is whether the outgoing was incurred *in the course of* gaining or producing actual or expected income. That is, is the occasion of the outgoing found in whatever is productive of actual or expected income?

Established authority on travelling expenses

12 The application of s 51(1) to expenses incurred in travelling between a taxpayer's place of residence and a place where income is derived has long been regarded as settled. Such expenses are not deductible. In the leading decision on that question in this Court, *Lunney v Commissioner of Taxation*[17], Dixon CJ said[18] that the question had then "been accepted as settled for the last two generations". Having referred to two earlier decisions which were said to have settled the question[19], Dixon CJ said[20]:

> "To escape from the course of reasoning on which the decisions proceed requires the taking of refined and rather insubstantial distinctions. I confess for myself, however, that if the matter were to be worked out all over again on bare reason, I should have misgivings about the conclusion. But this is just what I think the Court ought not to do. It is a question of how an undisputed principle applies. Its application was settled by old authority long accepted and always acted upon. If the whole subject is to be ripped up now it is for the legislature and not the Court to do it."

13 Three other members of the Court, Williams, Kitto and Taylor JJ, reached the same conclusion as Dixon CJ. In their joint reasons, their Honours made more extensive reference to the decisions of the Court in *Ronpibon*[21] and *Charles Moore & Co (WA) Pty Ltd v Federal Commissioner of Taxation*[22]. Particular consideration was given to what is meant by "in gaining or producing the assessable income" and "incurred in carrying on a business for the purpose of

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17 (1958) 100 CLR 478.

18 (1958) 100 CLR 478 at 485.

19 *Re Adair* (1898) 4 ALR (CN) 42; *Re Income Tax Acts* (1903) 29 VLR 298.

20 (1958) 100 CLR 478 at 486.

21 (1949) 78 CLR 47.

22 (1956) 95 CLR 344.

gaining or producing such income" and to how those expressions apply to expenditures on travel between home and work[23]. Their Honours concluded[24] that "to say that expenditure on fares is a prerequisite to the earning of a taxpayer's income is not to say that such expenditure is incurred in or in the course of gaining or producing his income". That is, the majority in *Lunney* held that a taxpayer does not demonstrate that the first limb of s 51(1) is satisfied by demonstrating only that there is some causal connection between the expenditure and derivation of the income. What must be shown is a closer and more immediate connection. The expenditure must be incurred "in the course of" gaining or producing the assessable income.

Application of authority

14 When, as here, the travel is between two places of unrelated income derivation, the expense cannot be said to be incurred "in the course of" deriving income from either activity. As the majority of the Full Court recognised in this case[25]:

> "The expenditure was incurred before [the taxpayer] began to perform his duties as a pilot, or after he had fulfilled those duties. Similarly, in relation to the deer farming business."

The expenditure was, as the majority of the Full Court rightly said, "not incurred in the course of his employment as a pilot, nor in the course of his deer farming business"[26]. The taxpayer's travel occurred in the intervals between the two income-producing activities. The travel did not occur while the taxpayer was engaged in either activity. To adopt and adapt the language used in *Ronpibon*, neither the taxpayer's employment as a pilot nor the conduct of his business farming deer occasioned the outgoings for travel expenses. These outgoings were occasioned by the need to be in a position where the taxpayer could set about the tasks by which assessable income would be derived. In this respect they were no different from expenses incurred in travelling from home to work.

15 This is not to deny that s 51 recognises that there may be cases where only part of an outgoing can be said to have been incurred in (that is, in the course of)

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23 (1958) 100 CLR 478 at 496.

24 (1958) 100 CLR 478 at 499.

25 (1999) 90 FCR 435 at 445 [41].

26 (1999) 90 FCR 435 at 445 [41].

gaining or producing the assessable income. This, however, is not such a case. The conclusion that the travel occurred in the intervals between the two income-producing activities, when the taxpayer was not engaged in either of them, denies the requisite connection between any part of the outgoing and the gaining or producing of assessable income.

16 The reference by Dixon CJ in *Lunney* to his misgivings "if the matter were to be worked out all over again"[27] was taken, in the argument of the present matter, as suggesting that the rule established in that case could not be supported logically. We do not accept that this is so, and it is not what we understand Dixon CJ to have said. As Dixon CJ pointed out, the question in *Lunney* was how an undisputed principle was to be applied. The principle which had to be applied in that case, and must be applied in this, is one which limits the allowance of a deduction for outgoings to those outgoings that are incurred in the course of deriving assessable income. It is a principle which excludes outgoings which, although incurred *for the purpose of* deriving assessable income, are not incurred *in the course of* doing so. Distinguishing between those two kinds of outgoing may well invite some criticism, but if it does, the criticism is directed at the legislation, not at the way in which the legislation has been interpreted.

17 Moreover, the distinction has long been made and it is now too late for the Court to "rip it up" and treat the section as allowing any and all deductions having some causal connection with the derivation of assessable income. As cases like *Amalgamated Zinc (De Bavay's) Ltd v Federal Commissioner of Taxation*[28], *Ronpibon*[29], and *Fletcher v Federal Commissioner of Taxation*[30] show, the distinction between outgoings incurred in the course of deriving income and other outgoings is a distinction which applies generally, not just in relation to travel expenses[31]. Once the distinction is recognised, it follows that the expenditure which was in issue in this case could not be held to be an allowable deduction.

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27 (1958) 100 CLR 478 at 486.

28 (1935) 54 CLR 295.

29 (1949) 78 CLR 47.

30 (1991) 173 CLR 1.

31 *Fletcher* (1991) 173 CLR 1 at 17.

Reliance on a public tax ruling

18 When this appeal came on for oral argument, the taxpayer sought leave to give a notice of contention that the decision of the Full Court should be affirmed on a ground not relied on by the Full Court. The contention was that the taxpayer was entitled to the deduction "in reliance upon the Public Ruling TR95/19". That ruling was issued in June 1995. It was said to apply to the years commencing both before and after its date of issue. It dealt with "airline industry employees – allowances, reimbursements and work-related deductions". It said that "to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the Taxation Administration Act 1953, [it] is a public ruling for the purposes of that Part".

19 Under the heading "Travel between two places of employment or between a place of employment and a place of business" the ruling said:

> "148. A deduction is allowable for the cost of travelling directly between two places of employment or between a place of employment and a place of business. This is provided that the travel is undertaken for the purpose of engaging in income-producing activities.
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> 149. If the airline employee lives at one of the places of employment or business, a deduction may not be allowable as the travel is between home and work. It is necessary to establish whether the income-producing activity carried on at the person's home qualifies the home as a place of employment or business. The fact that a room in the airline employee's home is used in association with employment or business conducted elsewhere will not be sufficient to establish entitlement to a deduction for travel between two places of work (Taxation Ruling IT 2199)."

20 After oral argument had concluded, the parties, by leave, made further submissions about the matters raised by the notice of contention. Counsel for the Commissioner informed the Court that, if the Court were to allow the appeal, the Commissioner would agree to orders the effect of which would be to remit the matter to the Tribunal for consideration of two questions: whether the taxpayer should have leave in respect of any year of income to rely upon an additional ground of objection to the effect that the Commissioner was bound in respect of the ruling to assess tax in accordance with it and, if that leave were granted, whether and to what extent the Commissioner was so bound. The taxpayer submitted that the question of leave to rely on an additional ground should not be remitted, only the question whether the Commissioner was bound to assess tax in accordance with the ruling.

21 Before the Tribunal, the taxpayer had contended that he had acted in accordance with an earlier ruling which the Commissioner had issued: Ruling IT 2199 issued on 27 September 1985. Although Ruling TR 95/19 was mentioned in the course of proceedings before the Tribunal, little if any argument was directed to its operation. The earlier ruling (Ruling IT 2199) was relied on in the taxpayer's notice of appeal to the Federal Court and in his notice of contention in the Full Court of that Court. Although no mention was made in those documents of the ruling upon which it is now sought to rely (Ruling TR 95/19), it is clear that there was reference to it in the course of argument of the appeal to that Court.

22 In these circumstances we would give leave to the taxpayer to rely on his notice of contention but on terms that, the appeal to this Court being allowed, the order for remitter to the Tribunal should take the form proposed by the Commissioner.

Orders

23 In accordance with the terms on which special leave to appeal was granted, there should be no order as to costs in this Court and the orders for costs below should not be disturbed. We would make orders:

1. Appeal allowed. No order as to costs.

2. Set aside orders 1 and 2 of the orders of the Full Court of the Federal Court of Australia made on 30 March 1999 and in lieu thereof order:

   (a) Appeal allowed.

   (b) Set aside orders 1 and 2 of the orders made by Foster J on 2 July 1998 and in lieu thereof order:

      (i) that the matter be remitted to the Tribunal for consideration of the questions:

      first, whether the taxpayer should have leave in respect of any of the years of income ended 30 June 1991, 1992, 1993 or 1994 to rely on an additional ground of objection to the effect that the Commissioner was bound in respect of Taxation Ruling TR 95/19 to assess the tax payable by the taxpayer in accordance with that ruling; and

      second, if leave is granted, whether and to what extent the Commissioner was so bound.

(ii) otherwise, appeal dismissed.

24 GAUDRON AND GUMMOW JJ. Observations by Mason J, one in general terms and the other more specific, but both concerned with s 51(1) of the *Income Tax Assessment Act* 1936 (Cth) ("the Act"), are apposite to this appeal. In *Handley v Federal Commissioner of Taxation*, his Honour said[32]:

> "The application of the provisions of s 51(1) gives rise to difficulty in some cases. That is because there is an infinite variety of factual situations to which it may apply. It is not always easy to distinguish one case from another when, in order to apply the section, it is necessary to take a number of factors into account."

The temptation, or at least the tendency, to which this difficulty gives rise is the derivation of a "principle" from similar facts in various cases. The "principle" then is taken to govern the administration of the statute with respect to later cases said to fall within this artificially constructed category.

25 Earlier, in *Lodge v Federal Commissioner of Taxation*, Mason J had said[33]:

> "The rejection in *Lunney's Case*[34] of the claim that the expenses of travelling between home and work was an allowable deduction was based on the proposition that it is not enough to show that the expenditure was an essential prerequisite to the derivation of assessable income. The decision denied the notion that an expense was incidental and relevant to the derivation of income merely because it was necessary in that sense. The decision turned rather upon a view of the character of the expenditure incurred.
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> This approach to s 51(1) is founded largely on the presence of the word 'in' in the principal parts of the subsection."

Long before *Lodge*, the preposition "in" was said in this Court here to have the force of "in the course of" and to look to the relevance of the expenditure to the operations or activities in question rather than to purpose in itself[35].

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32 (1981) 148 CLR 182 at 195.

33 (1972) 128 CLR 171 at 175.

34 *Lunney v Commissioner of Taxation* (1958) 100 CLR 478.

35 *Amalgamated Zinc (De Bavay's) Ltd v Federal Commissioner of Taxation* (1935) 54 CLR 295 at 309.

26 The respondent to this appeal, the taxpayer, claims that his expenses of travelling between two places at which there occur distinct income-producing activities are deductible pursuant to s 51(1). The taxpayer asserts that the outcome is not dictated by the result in *Lunney*, the claim there being one of the expenses of travel between the taxpayer's residence and place of work. The Commissioner contends that *Lunney* established or affirmed a "principle" which applied here; once it was established that the expenses were not incurred "in the course of" the taxpayer's activities whence he derived income, the expenses necessarily could not attract deductions under s 51(1).

27 The Administrative Appeals Tribunal ("the AAT") upheld the disallowance by the Commissioner of the taxpayer's objections to the disallowance of his claims to deductions in four years of income. The amounts were $2,092 (1991), $2,988 (1992), $5,337 (1993) and $5,093 (1994).

28 The "appeal" from the AAT to the Federal Court was, by reason of s 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth) ("the AAT Act"), restricted to questions of law. The particular question of law for the Federal Court was whether, on the facts as found, the AAT had erred in law in determining that the taxpayer *could not* be entitled to deductions in accordance with s 51(1) of the Act for his expenses of travel between the airport and the farm. The issue for the Federal Court was not whether the taxpayer *was* entitled to the deductions.

29 In the Federal Court, Foster J upheld the taxpayer's appeal and ordered that the matter be remitted to the AAT for reconsideration in accordance with his reasons. An appeal by the Commissioner to the Full Court was dismissed (Sackville and Hely JJ; Hill J dissenting)[36]. The matter was remitted by the Full Court to the AAT for reconsideration in accordance with law.

30 The facts are in fairly short compass and may be summarised as follows. In the relevant years of income, the taxpayer resided with his family on a grazing and farming property near Tamworth in New South Wales. The taxpayer conducted activities there associated with the farming of deer. He would not have lived at the farm had he not carried on the business there. The taxpayer also was a pilot employed by Qantas and based in Sydney at Mascot Airport. He had a number of years experience with Qantas and had achieved the rank of captain. For many years, he had commanded the control of international flights. The taxpayer's farming operation was a considerable undertaking which required the dedication of much time, skill and experience. The earnings of the taxpayer as a pilot were necessary for the financing of the farming activities. The taxpayer usually was able to organise his flying activities under the route allocation

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36 *Commissioner of Taxation v Payne* (1999) 90 FCR 435.

system employed by Qantas so that he was absent from the farm for about three days each week and present there for the remainder of the week.

31 The taxpayer's routine generally was constant and he travelled from the property to the airport approximately 40 to 50 times during each of the relevant years of income. When placed by the airline on stand-by duty, the taxpayer usually minimised the risk of his being called from the property on short notice by travelling to and staying in the vicinity of the airport for the duration of the stand-by period.

32 Before turning to consider the submissions to this Court, several points should be made respecting the nature and scope of the "matter" in respect of which the Federal Court exercised jurisdiction. First, the taxpayer did not seek to rely on the second limb of s 51(1), namely that the travel expenses were "necessarily incurred in carrying on a business for the purpose of gaining or producing [the assessable] income". Rather, he relied on the first limb of s 51(1), "losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income".

33 Secondly, as the majority in the Full Court emphasised[37], the AAT had divided its consideration of the first limb into two subsidiary questions. The first subsidiary question was whether the travel expenses were incurred in gaining or producing the assessable income; the second, if the first was answered in the affirmative, was the bearing, if any, upon the matter of the taxpayer's residence at the farm. Because the AAT answered the first question in the negative, it did not find it necessary to answer the second. The negative answer was sufficient to defeat the taxpayer's claims. The majority of the Full Court reached the opposite conclusion to the AAT on the first question, but that was insufficient to dictate the result that the taxpayer's claims to deductions should have been allowed.

34 The majority expressed its conclusion by saying that neither the AAT nor the Federal Court was precluded by authority from concluding that travel between two unrelated places of business or employment may be deductible pursuant to s 51(1). Their Honours emphasised that the sub-section does not require that the assessable income which the relevant outgoing would be expected to produce is "confined to income from a particular job or a particular business"[38]. They also differed from the reasoning of Foster J, saying[39]:

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37 (1999) 90 FCR 435 at 439.

38 (1999) 90 FCR 435 at 445.

39 (1999) 90 FCR 435 at 447.

> "[I]nsofar as the judgment of the primary judge suggests that entitlement to a deduction is dependent upon the taxpayer establishing a 'close organisational connection between his flying duties and his earning activities at the deer farm', or upon some 'synergy' between the two operations, we are, with respect, unable to agree. It was contended by the taxpayer that the time spent and hours worked in each activity were in fact regulated by the requirement that the taxpayer be available at certain times for one or other of the activities. There was thus an interrelationship or 'agglutination' between the two income earning activities. The AAT did not make any express findings on this issue, but the primary judge referred to aspects of the evidence indicative of an integration of the two income earning activities. We do not doubt that some tailoring of the two activities was necessary if the taxpayer was to be able to pursue each of them. However, in our opinion, it is neither necessary nor sufficient that this be so before the costs of travel can be characterised as being in the course of gaining or producing assessable income. That is not to say that factors such as these are necessarily irrelevant to a consideration of the second question identified by the AAT."

35 A number of matters (in addition to that identified above) remained for consideration and determination by the AAT before the taxpayer could enjoy ultimate success in respect of the whole of the deductions he claimed.

36 It would be necessary, as the majority in the Full Court pointed out[40], to determine whether the particular travelling expenses claimed by the taxpayer in fact were incurred in the course of gaining or producing the assessable income to which s 51(1) refers. In this connection, Sackville and Hely JJ observed[41]:

> "In the present case, whether the expenses are deductible may depend, for example, upon whether the predominant character of the farm is as a place of business or a home, and upon the purpose underlying the journeys in question. If a particular journey was undertaken simply so that the taxpayer could return home for the weekend, the fact that home was used as a place of business on some days of the week would not make the expenditure on travel deductible."

37 Their Honours also pointed out that there were two essentially factual questions involved, the first being the application of the "positive limb" in the terms just mentioned, and the second any exclusion from the operation of s 51(1)

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40 (1999) 90 FCR 435 at 451.

41 (1999) 90 FCR 435 at 451.

by the "negative limb" concerned with the disallowance of losses and outgoings to the extent to which they are of a "capital, private or domestic nature". Their Honours expressed the view that there was no legal compulsion to conclude that the negative limb applied to travel expenses between two places of work, at one of which the taxpayer also resided. It would be necessary for the AAT to address the matter.

38 In addition to these considerations, it will be recalled that s 51(1) adopts the principle that allows for the apportionment of losses and outgoings; the sub-section does so by providing for the deduction of losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income[42]. In *Handley*, Mason J observed[43]:

> "Plainly enough, the language of s 51(1) permits apportionment in those cases in which the expenditure in part relates to an outgoing of a capital, private or domestic nature and in part to a revenue earning item, where the expenditure is severable or capable of being apportioned."

A question may arise in a case such as the present whether an apportionment is inappropriate if a separate outgoing could not have been made to achieve the end which gives the expense the necessary relevance. There also is the risk that to apportion is to evince uncertainty about the sufficiency of connection between the outgoing and income derivation and to avoid a hard decision as to the nature of the whole of the outgoing.

39 Nevertheless, it is significant that, in *Federal Commissioner of Taxation v Green*[44], the taxpayer was successful in his claim for a deduction of what was a fair proportion of travelling expenses in visiting Townsville and Cairns from his residence in Brisbane to attend both to his interests in shop premises at those places and to church and masonic matters there. Several of the United Kingdom and Canadian decisions upon which the Commissioner relied, in particular *Ricketts v Colquhoun*[45] and *Mahaffy v The Minister of National Revenue*[46], turned upon statutory provisions the terms of which denied apportionment in circumstances where it might have been demanded by the terms of s 51(1). At all events, no question of apportionment has yet been considered by the AAT.

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42 *Ronpibon Tin NL v Federal Commissioner of Taxation* (1949) 78 CLR 47 at 55.

43 (1981) 148 CLR 182 at 194.

44 (1950) 81 CLR 313 at 314, 318-319.

45 [1926] AC 1.

46 [1946] SCR 450.

40 The result reached by the Full Court in this litigation resembled that reached by this Court in *Steele v Deputy Commissioner of Taxation*[47]. There, the order was that the matter be remitted to the AAT for rehearing of the appellant's appeal against the disallowance of her objection with or without the hearing of further evidence as the AAT might determine[48]. This situation may be compared with that in *Lunney*[49]. There, the High Court was exercising original jurisdiction and was not limited to the ascertainment of an error of law upon facts found by the Board of Review, the predecessor of the AAT. Rather, the taxpayers in *Lunney* bypassed the Board of Review and "appealed" directly to this Court (apparently under s 187 of the Act) against the disallowance of the deductions they had claimed. The result of this procedure was that the issues in dispute in *Lunney* were not before the Court in a piecemeal fashion. The question in *Lunney* was whether the sums in question were "deductible either wholly or in part"[50]. As has been indicated earlier in these reasons, that was not the question before the Federal Court in the present litigation, and it is not the question before this Court.

41 We turn to consider whether the majority in the Full Court was wrong in discerning an error of law in the dismissal by the AAT of the taxpayer's challenge to the disallowance of his claimed deductions. In our view, Sackville and Hely JJ were correct in the view they took and in the orders which were made requiring further consideration of the matter by the AAT.

42 The preposition "in" has been given much work to do by the decisions construing the phrase in s 51(1) "[a]ll losses and outgoings … incurred *in* gaining or producing the assessable income". What is required is a connection between the incurring of the losses or outgoings and the gaining or producing of the assessable income. As Professor Parsons put it[51]:

> "[A]ll the decisions are concerned with fixing the point where connection with a process of income derivation is sufficient to make an outgoing relevant."

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47 (1999) 197 CLR 459.

48 (1999) 197 CLR 459 at 498-499.

49 (1958) 100 CLR 478.

50 (1958) 100 CLR 478 at 480, 481.

51 *Income Taxation in Australia: Principles of Income, Deductibility and Tax Accounting*, (1985), par 8.9.

A decision fixing that point in a given case will involve considerations of some indeterminacy, with leeways for judicial choice indicated by the subject-matter, scope and apparent purpose of s 51(1).

43 The requisite connection may be temporal. Here, the need for a certain flexibility has been accepted in the decisions. Thus, in his influential judgment in *Amalgamated Zinc (De Bavay's) Ltd v Federal Commissioner of Taxation*, Dixon J said[52]:

> "It is not the practice to institute an inquiry into the exact time at which it is hoped that expenditure made within the accounting period will have an effect upon the production of assessable income and to refuse to allow it as a deduction if that time is found to lie beyond the period."

Again, it is settled that the reference in s 51(1) to "*the* assessable income" is not confined to assessable income actually derived in the particular tax year of the loss or outgoing and is to be construed as extending to assessable income which the relevant outgoing would be expected to produce[53].

44 However, where the issue is concerned with the deduction of expenses met by taxpayers in travel between home and work, as in *Lunney*, other practical considerations have intruded; they confirm, as Hill J indicated in his judgment in the present case[54], an apprehension as to the cost to the Revenue of, in essence, subsidising that expenditure by taxpayers.

45 The reasoning that has been employed has fixed upon a connection which requires the taxpayer to establish that the expense was "an essential prerequisite" to the derivation of income. Those words, of course, are not in s 51(1) and are a gloss upon the term "in" as to the criterion of connection.

46 In their joint judgment in *Lunney*, Williams, Kitto and Taylor JJ said[55]:

> "It is, of course, beyond question that unless an employee attends at his place of employment he will not derive assessable income and, in one sense, he makes the journey to his place of employment in order that he

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52 (1935) 54 CLR 295 at 309.

53 *Fletcher v Federal Commissioner of Taxation* (1991) 173 CLR 1 at 16-17; *Steele v Deputy Commissioner of Taxation* (1999) 197 CLR 459 at 467 [22], 481-482 [68].

54 (1999) 90 FCR 435 at 436.

55 (1958) 100 CLR 478 at 498-499.

> may earn his income. But to say that expenditure on fares is a prerequisite to the earning of a taxpayer's income is not to say that such expenditure is incurred in or in the course of gaining or producing his income. Whether or not it should be so characterised depends upon considerations which are concerned more with the essential character of the expenditure itself than with the fact that unless it is incurred an employee or a person pursuing a professional practice will not even begin to engage in those activities from which their respective incomes are derived."

47 That analysis presents as logically inevitable an outcome which may not necessarily be dictated by the terms of the statute. In various fields of the law the actual process of decision is obscured rather than displayed by reference to the criterion of essential characteristics. So it was with the now outmoded learning in this Court which treated s 92 of the Constitution as engaged only where the restriction or burden in question was imposed in virtue of, or in reference to, one of "the essential qualities" which were said to be connoted by the description "trade, commerce, and intercourse among the States"[56]. What in *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)*[57] Dixon and Evatt JJ referred to as "the time-honoured distinction between essential and accidental characteristics" requires some care in its application[58].

48 Of the above passage from the joint judgment in *Lunney*, Professor Parsons wrote[59]:

> "It appears that the determination of 'essential character' makes possible a conclusion on relevance. The determination of essential character involves the adoption of a description of the expense which affords an answer to the question of relevance. The description in effect asserts the relevance or want of relevance of the expense. The analysis tends rather to cloak than to reveal the process of decision. No analysis can deny the evaluation that must be made in concluding that an expense is relevant or irrelevant."

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56 See *O Gilpin Ltd v Commissioner for Road Transport and Tramways (NSW)* (1935) 52 CLR 189 at 206.

57 (1940) 63 CLR 209 at 226-227.

58 See *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 at 318 [115].

59 *Income Taxation in Australia: Principles of Income, Deductibility and Tax Accounting*, (1985), par 8.62.

49 In *Lunney*, the question of income tax law which Dixon CJ took as settled, and was not prepared to disturb, was that[60]:

> "the fares paid by ordinary people to enable them to go day by day to their regular place of employment or business and back to their homes are [not] deductible expenses allowable against the assessable income earned by the employment or business".

The rationale offered in the United Kingdom for that result did not turn upon any asserted logic or inevitability of result dictated by notions of "essential character" of the expenditure. Rather, as explained by Denning LJ[61], the result was a consequence of the spread of suburban housing which divorced place of residence from place of work and supported a distinction between living expenses and business expenses.

50 Further, to say that expenses which are no more than the costs of the movement of the taxpayer between a sole place of work and the place of residence are insufficiently connected with income derivation leaves unanswered the question of sufficiency of connection in other circumstances. For example, it already had been determined before *Lunney*, in *Green*[62], that the taxpayer had properly claimed as a deduction a proportion of the train fares from his home in Brisbane to North Queensland to inspect and supervise his shop properties there as an expense incurred in relation to the management of his income-producing enterprises. The management of the properties involved their inspection and supervision; while travelling north on the long haul from Brisbane, however, the taxpayer was not managing, inspecting or supervising the properties, and was not "travelling on work".

51 The "principle" to be derived from the holding in *Lunney* may be stated as being that expenses which are no more than the costs of the movement of the taxpayer between a sole place of work and the place of residence are insufficiently connected with income derivation to attract a deduction under the first limb of s 51(1). That outcome must be accepted, as Stephen J put it in *Handley*[63], not so much as a matter of logic but as "a question of adherence to well settled authority". But it is not determinative of the question of sufficiency of connection where what is involved is the expenses of movement between two

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60 (1958) 100 CLR 478 at 485.

61 *Newsom v Robertson (Inspector of Taxes)* [1953] Ch 7 at 15-16.

62 (1950) 81 CLR 313.

63 (1981) 148 CLR 182 at 193.

or more places of work or business activity. Nor does it dictate the result where the taxpayer also resides at one of those places.

52 The Commissioner supports the division into two parts of the field upon which the governing legal principles are to be put in play. The classification then predetermines the outcome. The first field is identified as "travel on work" and the second as "travel to work". All then turns upon the reach of these propositions when applied to the facts. An expense in respect of the first category may have a sufficient connection with income derivation; an expense in respect of the second cannot be sufficiently connected with income derivation.

53 The criteria by which the facts are evaluated so as to assign the taxpayer's activities to one category rather than the other are assumed rather than articulated. The search for an "essential", in the sense of exclusive, character does not sit well with the statutory text. The text presupposes that losses and outgoings to some extent only may be incurred in the course of gaining or producing the assessable income, yet be sufficiently connected with them.

54 The expenses involved here may be described as having been incurred by the taxpayer for his travel between two places of income derivation so that he might derive assessable income at each. If the terminology of "essential character" is to be of continued use here, then it is an apt description of the conclusion just expressed. The AAT erred in finding that it was precluded by the holding in *Lunney* from concluding that the taxpayer's expenses here were incurred in gaining the taxpayer's assessable income.

55 In this regard, we adopt what was said by Sackville and Hely JJ in the following passage[64]:

> "It may be objected: what business is the taxpayer engaged on when travelling between Tamworth and Sydney? But to put the matter in that way is to distort the language of the statute. As earlier indicated, the question is: is expenditure to that end in the course of gaining or producing assessable income? Where travel is between places from which income is derived, for the purpose of deriving income from activities conducted at those sources, there is the contemporaneity between expenditure and income earning activity which is implicit in the notion of 'in the course of' gaining or producing the assessable income. Moreover, the expenditure has a substantial business character. If the purpose of the travel is exclusively to go from one income producing activity to another,

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64 (1999) 90 FCR 435 at 446-447.

it is difficult to see how the essential character of the expenditure is other than a business or working expense."

56 That conclusion makes this appeal an inconvenient occasion to determine whether the decision of the Full Court should be affirmed but on a ground other than that relied upon by the majority. The further ground is said to be that the AAT committed an error of law in failing to determine whether the Commissioner was obliged to issue an assessment which allowed a deduction to the taxpayer in reliance upon a public ruling, TR95/19. There is a dispute between the parties as to the extent to which the application of this public ruling was ever raised for determination by the AAT. The Notice of Appeal to the Federal Court asserted an error of law by the AAT by its alleged failure to determine whether the facts as found fell within the terms of a "non-binding" ruling, IT 2199. No error of law was asserted respecting TR95/19. Not surprisingly, Foster J did not consider TR95/19. The point was apparently agitated in the Full Court but was not determined by it. The taxpayer seeks to raise the matter in this Court by a proposed Notice of Contention. Given the lapse of time since the filing and service of the Notice of Appeal in December 1999, leave to the filing of the Notice of Contention is required by O 70 r 6(5) of the High Court Rules. Leave is opposed and in the circumstances it should be refused.

57 The appeal should be dismissed with costs.