HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND HEYDON JJ

COMMISSIONER OF TAXATION APPELLANT

AND

JOANNA STONE RESPONDENT

Commissioner of Taxation v Stone
[2005] HCA 21
26 April 2005
S245/2004

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 27 June 2003 and in their place order that the appeal to that Court is dismissed.*

3. *Special leave to cross-appeal granted.*

4. *Cross-appeal treated as instituted and heard instanter but dismissed.*

5. *Appellant to pay the respondent's costs of the proceedings in this Court.*

On appeal from the Federal Court of Australia

Representation:

G T Pagone QC with S H Steward for the appellant (instructed by Australian Government Solicitor)

D H Bloom QC with T M Thawley for the respondent (instructed by Blake Dawson Waldron)

CATCHWORDS

Commissioner of Taxation v Stone

Income tax – Income – Whether taxpayer turned her athletic talent to account for money – Whether receipt of prize money, government grants, appearance fees and sponsorship payments constitute assessable income – Whether income derived from conduct of a "business" – Whether conduct of business a relevant consideration.

Words and phrases – "assessable income", "business", "professional sport".

Income Tax Assessment Act 1997 (Cth), ss 3-1, 4-1, 4-15, 6-5(1).
Income Tax Assessment Act 1936 (Cth), s 6(1).

1 GLEESON CJ, GUMMOW, HAYNE AND HEYDON JJ. During the year ended 30 June 1999 the respondent ("the taxpayer") was a Senior Constable in the Queensland Police Service. In addition to performing her duties as a police officer, she competed during that year, as she had since before 1995, in women's javelin throwing events at national and international athletics competitions. She was very successful. In 1996 she had been a member of the Australian Olympic team at the XXVI Olympiad at Atlanta and had competed in the women's javelin event at those Games. She won the women's javelin competitions at the 1998 World Cup and at the 1998 Goodwill Games.

2 During the 1999 financial year the taxpayer received sums as prize money, as grants by the Australian Olympic Committee ("the AOC") and Queensland Academy of Sport ("the QAS"), as fees for some appearances she made, and as payments in cash or kind by sponsors. The appellant Commissioner contended that all of these sums formed part of her assessable income and assessed her to taxation accordingly. The taxpayer objected to that assessment; the Commissioner disallowed the objection. Pursuant to s 14ZZ of the *Taxation Administration Act* 1953 (Cth), the taxpayer appealed to the Federal Court of Australia against the disallowance of her objection.

3 At first instance, Hill J allowed[1] the taxpayer's appeal in part and ordered that the taxpayer's objection be allowed in part. The taxpayer conceded[2] at first instance that what she received as sponsorship benefits (in cash or kind) was assessable income. She disputed that the other receipts were assessable income. The primary judge found that some but not all[3] of those other receipts were rewards of or incidental to her carrying on a business and, for that reason, were assessable income.

4 The order made by the primary judge did not identify the particular respects in which the taxpayer's objection was allowed, but allowing the objection in part is consistent only with concluding that one or more of the disputed receipts was not assessable. It is not necessary to resolve any uncertainty about which receipts were held not to be assessable. It is enough to

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1 *Stone v Federal Commissioner of Taxation* (2002) 196 ALR 221.

2 (2002) 196 ALR 221 at 236 [73].

3 (2002) 196 ALR 221 at 238 [86], 239 [90], 244 [117]-[118].

notice that the primary judge concluded[4] that the QAS grant did not "have the character of income".

5 The taxpayer, being dissatisfied with the decision of the primary judge, appealed to the Full Court of the Federal Court. That Court (Heerey, Emmett and Hely JJ) allowed the appeal in part, holding[5] that neither the sums the taxpayer received as prizes nor any of the sums received as grants were assessable income but that the appearance moneys were. (The taxpayer did not seek to depart from her concession that the sponsorship benefits she had received formed part of her assessable income.) Much of the Court's reasons focused upon whether, and to what extent, the taxpayer conducted a business. The Court concluded[6] that the taxpayer "is a career police woman, who has achieved considerable success in an athletic sporting activity for which she has been rewarded [but that she] has not been engaged in a business activity to exploit her sporting prowess or to turn her talent to account in money".

6 By special leave, the Commissioner now appeals to this Court. The taxpayer seeks special leave to cross-appeal from that part of the judgment of the Full Court by which it was decided that appearance fees paid to the taxpayer were assessable income.

7 The Commissioner's appeal should be allowed, the orders of the Full Court except its order as to costs set aside, and in their place there should be an order dismissing the appeal to that Court. Consistent with the undertakings given at the time of the grant of special leave, the Commissioner should pay the taxpayer's costs in this Court; the costs orders made in the courts below should not be set aside or varied. The taxpayer's application for special leave to cross-appeal should be granted, the cross-appeal treated as instituted and heard instanter but dismissed.

The *Income Tax Assessment Act* 1997 (Cth)

8 Section 3-1 of the *Income Tax Assessment Act* 1997 (Cth) ("the 1997 Act") says that it is an Act that "is mainly about income tax". Section 4-1 provides that "[i]ncome tax is payable by each individual and company, and by

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4 (2002) 196 ALR 221 at 244 [117].

5 *Stone v Commissioner of Taxation* (2003) 130 FCR 299 at 316 [98]-[99].

6 (2003) 130 FCR 299 at 315 [92].

some other entities". Section 4-15 provides (in an imperative style common to the introductory provisions of the 1997 Act):

> "Work out your taxable income for the income year like this:
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> taxable income = assessable income - deductions."

Division 6 contains provisions elucidating the meaning of "assessable income" and "exempt income". Assessable income includes "income according to ordinary concepts"[7]. This reference to "income according to ordinary concepts" is an evident reference to Sir Frederick Jordan's often quoted statement in *Scott v Commissioner of Taxation*[8]:

> "The word 'income' is not a term of art, and what forms of receipts are comprehended within it, and what principles are to be applied to ascertain how much of those receipts ought to be treated as income, must be determined in accordance with the ordinary concepts and usages of mankind, except in so far as the statute states or indicates an intention that receipts which are not income in ordinary parlance are to be treated as income, or that special rules are to be applied for arriving at the taxable amount of such receipts".

9 The various provisions of the 1997 Act to which reference has been made must be understood in the light of its stated relationship with the *Income Tax Assessment Act* 1936 (Cth) ("the 1936 Act"). Section 1-3(1) of the 1997 Act provides that the 1997 Act contains provisions of the 1936 Act "in a rewritten form". Sub-section (2) of that section provides that:

> "If:
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> (a) that Act expressed an idea in a particular form of words; and
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> (b) this Act appears to have expressed the same idea in a different form of words in order to use a clearer or simpler style;
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> the ideas are not to be taken to be different just because different forms of words were used."

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7 Section 6-5(1).

8 (1935) 35 SR (NSW) 215 at 219.

10 It will be necessary to examine in more detail both the facts giving rise to this matter, and some decisions under the 1936 Act about what is income, but it is desirable to begin by noticing some assumptions that the use of particular forms of expression may mask.

"Sport" and "professional sport"

11 "Sport" is usually used to describe forms of (more or less) athletic pastime undertaken for pleasure or recreation. In many contexts, it may be used in contradistinction to "business" or "occupation". It is a word that may carry with it echoes of what once was commonly understood to be the Olympic ideal of the amateur pitting skill and strength against others in the pursuit of excellence. It may convey only the idea of a pursuit which is intended to do no more than provide diversion or amusement to both participants and onlookers.

12 "Professional sport" may be thought to be a phenomenon of the second half of the 20th century. It was during that century that the expression came to be associated with those who made their principal pursuit the playing of sport for reward. During parts of the 20th century, and even before, distinctions were drawn among cricketers between those who were "gentlemen" and those who were "players", between the professional tennis player and the amateur, between the professional boxer and the amateur, between the golf club professional and the club player. What was understood as marking one group apart from the other was sometimes whether the "professional" was employed by an employer (often a club). But that was not the only basis for the distinction. Distinct codes of sport emerged in rugby football and in boxing, where the rules of the game differed according to whether those participating were professionals or amateurs. Then, as professional golf and tennis circuits developed, the distinction might be thought to have turned upon whether the individual sought to make the playing of the sport a full-time occupation and the principal source of income.

13 The plaintiff in *Tolley v J S Fry & Sons Ltd*[9] was a well known amateur golfer. The House of Lords upheld the award by a jury of damages for libel of the plaintiff by reason of the publication in 1928 of an advertisement for the defendants' chocolate in which there appeared a caricature of the plaintiff. The innuendo pleaded by the plaintiff had been that[10]:

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9 [1931] AC 333.

10 [1931] AC 333 at 337.

> "[the] defendants meant, and were understood to mean, that the plaintiff had agreed or permitted his portrait to be exhibited for the purpose of the advertisement of the defendants' chocolate; that he had done so for gain and reward; that he had prostituted his reputation as an amateur golf player for advertising purposes, that he was seeking notoriety and gain by the means aforesaid; and that he had been guilty of conduct unworthy of his status as an amateur golfer".

14 However, the distinctions upon which the pleading in *Tolley* turned 75 years ago[11] were never tidy. They never accommodated what probably always was, but certainly emerged as being, the wide variety of circumstances in which some of those participating in sport have received sums of money for, or as a result of, their endeavours on a playing arena. They are distinctions that do not take account of the changing role played by those who have organised sporting competitions. No longer is the organisation of such competitions the preserve, as it once may have been, of the voluntary association or members' club. Now many competitions are conducted for the profit of those who organise them.

15 Athletic contests for prizes are very old. Classifying a participant in such a contest as "professional" does no more than present the question: What is meant by "professional"? That is why asking no more than whether this taxpayer was a "professional" athlete either restates the relevant question, about whether the receipts in question were "income", in words that distract attention from the content of that relevant question, or it seeks to inject presuppositions into the debate that should not be made. Likewise, when considering whether a person who receives sums for, or in connection with, sport is conducting a business, or exploiting that person's skills or abilities for reward, care must be taken lest presuppositions that should not be made are injected into the debate.

"Business" and "income"

16 There is no doubt that receipts from carrying on a business are often to be identified as income according to ordinary concepts. Often, perhaps very often, the conclusion that receipts are ordinary income will proceed from, or at least carry with it, a conclusion that the recipient was conducting a business. Asking whether a person was carrying on a business may therefore be useful and necessary. But the inquiry about "business" must not be permitted to distract attention from the question presented by both the 1936 Act and the 1997 Act.

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11 See *Hopman v Mirror Newspapers Ltd* (1960) 78 WN (NSW) 192.

That question seeks to identify whether a receipt is, or receipts are, "income". As s 6-5 of the 1997 Act makes plain, that requires consideration of whether the receipt in question is income in accordance with "the ordinary concepts and usages of mankind".

17 The proceeds on revenue account of any business carried on by a taxpayer is one form of income. Receipts of that kind fall within the understanding of income according to ordinary concepts and usages. If there were any lingering doubts about that being so, those doubts are put to rest by the 1936 Act and the 1997 Act. Because the 1997 Act contains provisions of the 1936 Act in a rewritten form, construing the word "income" in the 1997 Act requires reference to the definition in s 6(1) of the 1936 Act of "income from personal exertion" as, among other things, "income consisting of ... the proceeds of any business carried on by the taxpayer either alone or as a partner with any other person". "Business" income is one species of income.

18 There is, however, a fundamental difficulty that lurks behind questions like whether the taxpayer was conducting a business. The question may be thought to assume that activities associated with the receipt of sums can always be divided into separate categories. As was pointed out, however, in the majority reasons in *Federal Commissioner of Taxation v Montgomery*[12], general propositions in this field of discourse often require some qualification:

> "[I]ncome is often (but not always) a product of exploitation of capital; income is often (but not always) recurrent or periodical; receipts from carrying on a business are mostly (but not always) income."[13]

Sporting activities may often (but will not always) be distinct from business activities. A taxpayer's sport is often (but not always) distinct from that taxpayer's career or business.

19 To conclude, as the Full Court did[14], that the taxpayer "is a career police woman ... [who] has not been engaged in a business activity to exploit her sporting prowess or to turn her talent to account in money" may assume that "career" and "sport" not only lie at opposite ends of a relevant spectrum of activities, but that their location on that spectrum dictates the answer to the

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12 (1999) 198 CLR 639 at 663 [67]-[68].

13 (1999) 198 CLR 639 at 663 [68].

14 (2003) 130 FCR 299 at 315 [92].

question which is presented. Those assumptions, if made, can mislead. To decide whether receipts of a taxpayer form part of that taxpayer's assessable income there must be undertaken[15] "a wide survey and an exact scrutiny of the taxpayer's activities". To that end, it is necessary to say more about the facts.

1987-1994 – the taxpayer becomes a national competitor

20 The taxpayer first became interested in javelin throwing in about 1987. She was then about 14 years old and she competed in junior competitions for the next few years. In 1991, the taxpayer joined the Queensland Police Service.

21 In 1994, she began to compete in the series of Grand Prix meetings conducted by Athletics Australia (the governing body of track and field athletics competitions in Australia). The Grand Prix meetings culminated in the Australian Track and Field Championships. In that year, those who sought selection in Australian teams, or received funding from bodies like Athletics Australia, the Australian Institute of Sport[16], the AOC or the Australian Commonwealth Games Association, were required to compete at a number of the eight Grand Prix meetings that were to be held. Some monetary prizes were offered to those who competed. The taxpayer did not win any prize money.

22 In July 1994, the QAS selected the taxpayer for its "Athlete's Squad Program". The taxpayer and the State of Queensland ("acting through" the QAS) made a written agreement recording the terms governing her membership of the program. The QAS agreed to provide certain benefits to the taxpayer, including training and coaching, meeting some costs of entry and travel to some competitions, providing some sports science and sports medicine support, and providing some equipment. The funding for this was provided by the Queensland Government and the Australian Institute of Sport. The level of benefits provided varied according to the standard an athlete reached. The taxpayer participated in this program up to the 1999-2000 year at the highest level of participation and benefits.

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15 *Federal Commissioner of Taxation v Montgomery* (1999) 198 CLR 639 at 663 [69] citing *Western Gold Mines NL v Commissioner of Taxation (WA)* (1938) 59 CLR 729 at 740 per Dixon and Evatt JJ.

16 The name by which the Australian Sports Commission, established by the *Australian Sports Commission Act* 1989 (Cth), operated in performing various of its functions.

23 In late 1994, the taxpayer suffered some serious injuries from javelin throwing. She underwent surgery in September 1994 and again in December 1994.

1995-1996 – national and international competitions

24 In 1995, the taxpayer again competed in local and State athletics meetings. Again she entered at least one Grand Prix meeting and came first in the women's javelin event. She won $250. In March 1995, Athletics Australia told the taxpayer that, being in the top 25 in her sport in the world, she would be paid $5,196 (by monthly instalments of $433) under what was called the "Olympic Athlete Programme". The taxpayer had not sought this payment. It was a payment administered by the Australian Sports Commission but the evidence does not reveal the source of the particular fund that was being administered by the Commission in this way. The evident objective of payments under the Programme was to encourage those who were not yet in the world's top eight or 16 competitors in their discipline to strive to reach that standard. It was said that those who reached that standard would be able "to plan for twelve months of funding leading into the Olympics" in 1996 at Atlanta.

25 During 1995-1996, the taxpayer competed at both national and international athletics meetings. She was successful in some of those competitions and she won some monetary prizes. She received a share of the gate receipts at one of the meetings at which she competed.

1996 – Olympic selection

26 At the 1996 Australian National Championships the taxpayer won the women's javelin event and was subsequently selected for the Australian Olympic team. To become a member of the team the taxpayer had first to sign and then observe the AOC Team Agreement, the AOC Doping Policy and the AOC Selection Guidelines.

27 It is not necessary to describe all of the provisions of those documents. For present purposes, what is important is that the AOC Team Agreement ("the 1996 Team Agreement") stipulated the terms on which an athlete (here, the taxpayer) was selected as a member of the Australian Olympic team. The agreement stated that it was not an employment agreement and that the taxpayer was not required to provide services to the AOC. Yet it is clear from the agreement's content, and its terms, that it was intended to be, and was, an agreement providing for legally enforceable obligations.

28 The taxpayer acknowledged in the agreement that she was bound to comply with the Olympic Charter, the constituent document of the Olympic Movement prepared and adopted by the International Olympic Committee ("the IOC"). The Olympic Charter (with which the taxpayer and other team members were bound to comply) spoke of Olympism as a "philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind". But the pursuit of such ideals was understood as entailing commercial consequences for both the IOC and the athletes who competed at the Olympic Games. The Olympic Charter, and the 1996 Team Agreement, both recorded[17] that:

> "[T]he Olympic Games are the exclusive property of the IOC which owns all rights relating thereto including, without limitation, the rights to their organisation, exploitation, broadcasting and reproduction by any means whatsoever."

29 This was not the only reference in the 1996 Team Agreement to commercial objectives. It regulated the subject of sponsorship. The purposes of those provisions of the agreement were said to be to "ensure the continued financial support of the AOC to enable it to fulfil its obligations to assist athletes to prepare for and participate in the Olympic Games" and also to "advise and assist athletes to effect the best projections of *their* reputations and personalities to enhance *their* activities as Olympians and potential Olympians in a manner compatible with established AOC raising of funds" (emphasis added). The taxpayer agreed to "assist and co-operate with the AOC and the Team Sponsors to enable the Team Sponsors to maximise the promotional benefits from their sponsorship of or supply to the AOC and the Team".

30 The 1996 Team Agreement referred to what was called the "Olympic Dream Medal Reward Scheme". On being entitled to participate in this scheme, the taxpayer agreed to certain inhibitions on her permitting her "likeness, name or performance at the Games to be used for any advertising, promotion or marketing purposes". It is not necessary to examine this particular scheme further. The taxpayer finished 16th at the Atlanta Olympic Games and did not participate in the Medal Reward Scheme.

31 It is, however, necessary to notice some other aspects of Olympic Athlete Programmes under which the taxpayer did receive sums of money, both before and during 1998-1999, the year of income now in issue.

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17 There were some minor textual differences between the two provisions, but they need not be identified.

32 In May 1996, before the Atlanta Olympic Games, Athletics Australia told the taxpayer that she would receive an annual amount of $10,020 by monthly instalments of $833. These, like the payments made to the taxpayer in 1995, were payments under an Olympic Athlete Programme. (They were described in 1996 as "AIS/OAP Direct Funding to Athlete"). The letter which Athletics Australia sent to the taxpayer recorded that she was then receiving funding at the rate of $15,000 per annum (or $1,250 per month) "to assist [her] to prepare for the Atlanta Olympics" but that payment at this higher rate would stop in July 1996. Again, as in 1995, the taxpayer did not ask Athletics Australia to make these payments.

The Medal Incentive Scheme

33 During 1996, the AOC published what it called its "2000 Gold Medal Plan – Funding Guidelines". These guidelines were later amended more than once, but nothing turns on the particular details of those changes. Three features of the plan are, however, important.

34 First, there was the sheer size of the plan. The Olympic Athlete Programme was to cost up to $20 million for the 1996-1997 year and then up to $25 million for each of the three years 1997-1998, 1998-1999 and 1999-2000. These sums were to come from the Australian Sports Commission "complemented by assistance from State Institutes and Academies of Sport".

35 Secondly, funding under the plan was said to be conditional upon athletes, coaches and other officials first entering into an appropriate agreement for likely 2000 Olympic Team members that would be similar to the 1996 Team Agreement. There was no evidence that the taxpayer signed any new agreement but there would be little difficulty in concluding that an agreement was reached. The terms of that agreement were, no doubt, to be found in relevant parts of the 1996 Team Agreement and the correspondence on the subject that was sent to the taxpayer by the AOC.

36 Thirdly, provision was made for a Medal Incentive Scheme. Athletes winning medals at the 1996 Olympic Games or in a World Championship or some other major international event of a standard comparable to the Olympics (and their coaches) were to be eligible, in the following year, for participation in the scheme. A sliding scale of payments was fixed for athletes winning gold, silver or bronze medals at such events in each of the years between 1997 and 2000. In 1999, the amounts to be won by athletes were up to $40,000 for a gold medal, $24,000 for a silver medal and $12,000 for a bronze medal. During the year ended 30 June 1998, the taxpayer received $10,500 under the Medal

Incentive Scheme. In the 1998-1999 year she received $22,500 under the Scheme. Whether her receipts under this Scheme in the 1998-1999 year formed part of her assessable income is at issue in these proceedings.

Some other transactions and events before 1998-1999

37 Some other transactions and events, occurring during the period before the 1998-1999 financial year and associated with the taxpayer's athletic endeavours, should be noticed. First, she made some sponsorship arrangements. In October 1995, ASICS Tiger Oceania Pty Ltd ("ASICS"), a manufacturer of sports clothing, agreed to supply her with footwear, apparel and accessories. In return, the taxpayer agreed to make some personal appearances and to wear ASICS goods in training and competition unless obliged to wear the national team uniform. In 1998, she made a new agreement with ASICS by which ASICS agreed to pay her $7,500 per annum as well as supplying her with footwear, apparel and accessories. She also made sponsorship agreements with two companies unconnected with athletics: Multiplex Constructions (Qld) Pty Ltd ("Multiplex") and DDS Consulting Pty Ltd ("DDS").

38 In 1997, Multiplex agreed to provide the taxpayer with a motor vehicle. The taxpayer agreed to promote Multiplex, to wear advertising material on her sports clothing, to have advertising material on the motor vehicle the company provided, and to make some appearances. In 1997, DDS agreed to pay her up to $5,000 per annum in return for being photographed wearing promotional clothing and attending some functions.

39 During the 1990s the taxpayer took some steps to solicit sponsorship. It may be that the sponsorships the taxpayer had did not result from these efforts so much as from personal contacts with the sponsors and from her achievements on the sporting arena. No finding was made by the primary judge about that question and it need not and cannot be pursued further. But the taxpayer did seek to secure sponsors.

40 Secondly, for a short time, the taxpayer engaged a manager. In July 1997, the taxpayer agreed with World Sports Pty Ltd that Mr Bob Hynes of that company would manage her appearances and sponsorships for 18 months in return for 10 per cent of any payment made for appearances and sponsorships. This agreement was terminated by consent after nine months and during its currency appears to have borne no fruit.

41 Thirdly, the primary judge accepted[18] that the taxpayer did not choose the competitions she entered on the basis of money, but on the basis of her need to gain competitive experience. The taxpayer said[19] that "she did not throw javelins for money and that she would still have done what she did for nothing". That is, as she said in her affidavit, for her, "javelin throwing was all about being able to wear the green and gold for Australia". To achieve that aim it was necessary for her to prepare by travelling and competing in high level competitions.

42 The last of these further matters to notice, before turning to consider the particular receipts in question, is that the taxpayer at all times sought to pursue her career in the Queensland Police Service. She undertook training to advance through the ranks. She took such leave from her police duties (including what was called "sporting leave") as she was allowed. Except for about four months (from 11 October 1997 to 2 February 1998) she undertook full-time duties as a police officer from the time of her induction into the Police Service in May 1992 until she took maternity leave in February 2002.

The receipts in question

43 In the year ended 30 June 1999, the taxpayer received what she described in her return as:

(a) "Prize money at local and international sporting events" totalling $93,429;

(b) "Government grants" of $27,900;

(c) "Sponsorships" of $12,419; and

(d) fees for "appearances" of $2,700.

The prize money she won was from two competitions – the Goodwill Games held in the United States (where she won $US6,000) and the World Cup held in South Africa (where she won $US50,000). In each case, taxation was deducted by local authorities before payment to the taxpayer. She received a total of $93,429.

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18 (2002) 196 ALR 221 at 237 [81].

19 (2002) 196 ALR 221 at 237 [81].

44 What she described as "Government grants" were two payments: $22,500 paid under the AOC Medal Incentive Scheme and a bonus of $5,400 paid by the QAS for her being selected in the Australian Commonwealth Games Team. The taxpayer attended those Games as Female Track and Field Team Captain but, due to injury, did not compete at the Games. As noted earlier, the primary judge held that this payment by the QAS was not part of the taxpayer's assessable income.

45 The sum for "sponsorships" was the value of payments in cash and kind made by her sponsors. Again, as noted earlier, it was conceded that these amounts formed part of her assessable income.

46 Finally, the fees paid to the taxpayer for appearances were sums paid in respect of four of 31 appearances she made at functions during the year. Most of her appearances were at functions organised by schools or community groups. She solicited none of these appearances and did not seek payment for any of them.

The competing contentions

47 The Commissioner submitted that because the taxpayer had turned her talent as an athlete to account for money, the sums she had described in her return were business income. The Commissioner contended that an athlete was to be identified as having turned his or her talent or skills to account for money when others recognised the athlete as a celebrity or personality having marketable value. Thus, so the submission proceeded, the taxpayer was shown to have turned her talent to account for money by either or both of two events: first, when she was paid to endorse a product (as ASICS, Multiplex and DDS had) and, secondly, when she was paid more than the reimbursement of expenses to appear at a function. The absence of any subjective purpose of the taxpayer to profit from her athletic endeavours was said to be irrelevant.

48 The taxpayer submitted that the receipts in issue were to be treated as income only if the relevant receipts arose from an act done in carrying on a business. It was necessary, so the taxpayer submitted, to find not only that a business was being carried out but also that the activity producing the receipt was an activity in the course of carrying on that business. The taxpayer submitted that she was not conducting a business. It was said that the evidence showed that the taxpayer's motivation was her desire to excel, to represent her country and win medals, not to make money.

49 Competing contentions were made about the significance, if any, to be attached to the magnitude of the sums in question when compared with the taxpayer's income as a police officer, and to whether the payments under

consideration were periodic or not. The taxpayer's submissions sought, at times, to distinguish between "sport" and "business", and to distinguish between "prizes" or "gifts" on the one hand and "income" on the other. Emphasis was given to the fact that the taxpayer had chosen the events she entered by reference to the quality of the competition she would encounter, not any consideration of the financial consequences of participation or success. What she received as prizes and under the Medal Incentive Scheme were characterised as either gifts or as a means of helping to defray the large expenses she incurred in pursuing her goal of representing her country. What was said to set sponsorship receipts apart from the other receipts in question was that the sponsorship receipts were rewards for services rendered, whereas the other payments were not.

Were the receipts income?

50 Once it is accepted, as the taxpayer did, that the sums paid by sponsors to her, in cash or kind, formed part of her assessable income, the conclusion that she had turned her sporting ability to account for money is inevitable. The sponsorship agreements cannot be put into a separate category marked "business", with other receipts being put into a category marked "sport". Nor can some receipts be distinguished from others on the basis that the activity producing a receipt was not an activity in the course of carrying on what otherwise was to be identified as a business.

51 Agreeing to provide services to or for a sponsor in return for payment was to make a commercial agreement. What the taxpayer received from her sponsors were fees for the services she provided. But when these arrangements are set in the context of her other activities during the year, it is evident that the sponsorship arrangements she made were but one way in which she sought to advance the pursuit of her athletic activities. No doubt, as the taxpayer pointed out, pursuit of her athletic activities was expensive. And it must be accepted that her principal motivations were the pursuit of excellence and the pursuit of honour for herself and her country. But the sponsorship arrangements show not only that the taxpayer made those arrangements to assist her pursuit of athletic activities but also that she was able to make them *because* of her pursuit of those activities. Having this dual aspect, the sponsorship agreements cannot be segregated from other aspects of her athletic activities.

52 All of the receipts now in question were related to the taxpayer's athletic activities. Some of those amounts (in particular, the sponsorship amounts) were paid in return for the taxpayer's agreement to provide services; some (like the Medal Incentive Scheme payments) were not. Perhaps the appearance fees may fall into that former class rather than the latter. Apart from appearance fees, and apart from the amount paid to the taxpayer by the QAS for being selected in the

Australian Commonwealth Games Team, the other payments made to her appear in each case to have been paid in accordance with, or subject to, her undertaking contractual obligations or inhibitions. Thus, the Medal Incentive Scheme payments were made upon condition that she enter an agreement "similar" to the 1996 Team Agreement she had made with the several inhibitions identified earlier in these reasons. The prizes she won, it may be assumed, were paid pursuant to a contractual obligation of the event organisers. (Perhaps there was an express contract to that effect; perhaps the principles in *Carlill v Carbolic Smoke Ball Company*[20] applied; it matters not for present purposes.)

53 What is clear, however, is that at least some of the amounts which the taxpayer received during the 1998-1999 year in connection with her athletic activities were payments made and received in accordance with a contract which stipulated obligations undertaken by the taxpayer. Even if it is right to see payments made to the taxpayer under the Medal Incentive Scheme as unsolicited by her, they were made available only upon her undertaking certain inhibitions not only on her future sporting conduct but also on her future commercial exploitation of success in competition.

54 Taken as a whole, the athletic activities of the taxpayer during the 1998-1999 year constituted the conduct of a business. She wanted to compete at the highest level. To do that cost money – for equipment, training, travel, accommodation. She sought sponsorship to help defray those costs. She agreed to accept grants that were made to her and agreed to the commercial inhibitions that came with those grants so that she might meet the costs that she incurred in pursuing her goals. Although she did not seek to maximise her receipts from prize money, preferring to seek out the best rather than the most lucrative competitions, her pursuit of excellence, if successful, necessarily entailed the receipt of prizes, increased grants, and the opportunity to obtain more generous sponsorship arrangements. That other sports and other athletes may have attracted larger rewards is irrelevant.

55 No doubt it is necessary to take account of the taxpayer's statement that she did not throw javelins for money. There are, however, two things to say about that statement. First, it is not to be understood as some failure by the taxpayer to recognise that success in her sport would bring financial reward. The AOC had repeatedly drawn her attention to the financial consequences of success – especially success at an Olympic Games. Continued payments under the Olympic Athlete Programmes were conditional upon maintaining or

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20 [1893] 1 QB 256.

improving performances in the arena. Secondly, the state of mind or intention with which a taxpayer undertakes activities giving rise to receipts is relevant, but it is only one fact to take into account, in deciding whether the receipts are properly to be classed as income. If a taxpayer has a view to profit, the conclusion that the taxpayer is engaged in business may easily be reached. If a taxpayer's motives are idealistic rather than mercenary, the conclusion that the taxpayer is engaged in a business may still be reached[21]. The "wide survey and exact scrutiny" of a taxpayer's activities that must be undertaken may reveal, as it does in this case, that the taxpayer's activities constituted the carrying on of a business.

56 It is then necessary to say something further about two related questions. Is a distinction to be drawn (as the primary judge did) between the receipts under the Medal Incentive Scheme and the QAS grant? Is a distinction to be drawn (as the taxpayer contended) between prizes and grants? It is convenient to deal with the questions together.

The QAS Grant and the Medal Incentive Scheme; Prizes and grants

57 As noted earlier, prizes may be understood as being paid pursuant to contract. They may not be gratuitous payments. By contrast, the grants made under both the Medal Incentive Scheme and the QAS grant may be seen as gratuitous payments. Athletes undertook obligations as a condition of receiving payments under the Medal Incentive Scheme but it may be that the payer of such sums was under no enforceable obligation to offer them. In the case of the QAS grants, athletes undertook no greater obligation than to repay the sum granted if the athlete returned a positive test for a prohibited drug. The payer (the Queensland Government) was under no obligation to offer the grant.

58 The QAS grant was described as giving effect to the Queensland Government's wish to acknowledge the achievements of Queensland athletes selected for an Olympic, Paralympic or Commonwealth Games team. It sought to do this by having the QAS make what were called "bonus grants" to those athletes who resided, trained, and competed in Queensland, and who were selected to the team "while representing Queensland in an identified selection competition".

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21 cf *G v Commissioner of Inland Revenue* [1961] NZLR 994.

59 The primary judge found that this payment was not income, unlike payments under the Medal Incentive Scheme which were. Of the payments under the Medal Incentive Scheme the primary judge said[22]:

> "[T]hat having regard to the terms of the award, its periodicity and its purpose of encouraging athletes towards medal status it does have the character of income. And this is so, notwithstanding that the award was not the product of any employment or an incident of any employment or business."

By contrast, the primary judge said[23] that the QAS grant:

> "is in a different category in that it is not periodical in the sense which that word was used by the Full Court in *Harris*[24].
>
> ... I do not think that this amount can be seen to have been paid as consideration for being a member of the Australian Commonwealth Games squad, in the sense that it constituted a product of some service rendered or some employment of [the taxpayer]."

There are three different but closely related questions presented by this reasoning. First, what significance attaches in this case to periodicity of payment? Secondly, what significance, if any, may be attached to the payer's motives and whether the payer had an obligation to make the payment? Thirdly, what, if anything, did the taxpayer give in return for the grant? Again, it is convenient to deal with them together because each was but one facet of the taxpayer's general contention that the sums in question were gifts, not income.

60 Regularity or periodicity of payments may point to the activity from which they are produced being an income-producing activity. Income is often (but not always) recurrent or periodical[25]. When the payer of a sum is under no legal obligation to make the payment, identifying the sum as the "product" of an income-producing activity may be a convenient way of describing the reasons

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22 (2002) 196 ALR 221 at 244 [116].

23 (2002) 196 ALR 221 at 244 [117].

24 *Federal Commissioner of Taxation v Harris* (1980) 30 ALR 10.

25 *Federal Commissioner of Taxation v Montgomery* (1999) 198 CLR 639 at 663 [68].

that lead to a conclusion that the sum is income[26]. But the question of recurrence or periodicity bears upon whether there is an income-producing activity. In the present case, it is necessary to recognise that the conclusion that the taxpayer was in business during the year in question follows from other considerations and the relevant question is no longer whether the taxpayer was in business but whether the receipts were income of that business. The taxpayer's business (of turning her athletic activities to account for money) entailed financial consequences if she achieved her aim of representing Australia. Those consequences included not only whatever effect that success may have on her capacity to attract new or more generous sponsorship; it included the financial consequences that would flow to her from those government bodies which sought to support athletes competing at her level. The receipts now in question were paid as a consequence of her success in competition and resulting selection to represent Australia.

61 One of the bodies which sought to support athletes competing at the taxpayer's level was the Queensland Government (acting as it did through the QAS). That the taxpayer was not obliged to provide services to the Queensland Government and, unlike the Medal Incentive Scheme, undertook no new inhibition on her conduct in return for the payment, merely serves to identify the payment as gratuitous. But gratuitous payments may form part of a taxpayer's assessable income. The grant made by QAS, though not recurrent, was paid in recognition of the taxpayer's athletic success in achieving selection for a national athletics team. It was as much a financial product of her athletics activities as her winning a prize in competition, or a sponsor agreeing to pay her to have her endorse the sponsor's product. The talent as an athlete which she had turned to account for money was her ability to compete in her sport and be among the best in both national and international competition. Selection, in earlier years, as a member of the QAS Athlete's Squad Program, and her maintaining her position in the highest level of that program, was one mark of her athletic success. So, too, her inclusion in the Medal Incentive Scheme marked her success. Selection in the national team was (further) recognition of her success.

62 The payment made by QAS, and the payments made under the Medal Incentive Scheme, were rewards for that success. That is, they were rewards from the conduct of her business – the business of deriving financial reward from competing and winning in the athletics arena. The Commissioner was right to

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26 *Federal Commissioner of Taxation v Squatting Investment Co Ltd* (1954) 88 CLR 413; [1954] AC 182; *Hayes v Federal Commissioner of Taxation* (1956) 96 CLR 47; *Scott v Federal Commissioner of Taxation* (1966) 117 CLR 514.

disallow the taxpayer's objection to the inclusion of both the QAS grant and the Medal Incentive Scheme payments in her assessable income.

63 The conclusion that the taxpayer was engaged in a business during the 1998-1999 year proceeds from an acceptance of the proposition that, showing that both before and during that year, the taxpayer was paid to endorse a company or its products as an athlete demonstrated that she had turned her athletic talent to account for money. The amounts involved were more than trivial. They were paid in return for the taxpayer undertaking obligations to promote the sponsor by wearing ASICS footwear, apparel and accessories, by displaying promotional material on the motorcar supplied by Multiplex, and by undertaking appearances for both Multiplex and DDS. Whether there may be other ways of showing that an athlete is engaged in the business of turning athletic talent to account for money is a question that need not be decided. Nor is it necessary to decide whether the bare receipt of sporting equipment or clothing from a seller or manufacturer of those items, coupled with undertaking an obligation to use or wear it would reveal that the athlete has turned talent to account for money. Such cases may present difficult questions of fact and degree.

64 The conclusion that the taxpayer was in business carries with it the conclusions described earlier about the particular receipts in issue. Again, whether other forms of receipt by the taxpayer during this year would have formed part of her assessable income is a question that does not arise. Nor is this Court required to consider the consequences for deductibility of business expenses that follow from a conclusion that the taxpayer was conducting a business.

An alternative argument by the Commissioner

65 Finally, it is not necessary to deal with an alternative argument advanced by the Commissioner that, even if the taxpayer was not conducting a business, the payments made under the Medal Incentive Scheme were nonetheless assessable income. This argument depended upon the Court's decision in *Federal Commissioner of Taxation v Dixon*[27]. That case concerned sums provided by an employer to make up during wartime the difference between the military pay of a person who had enlisted in the armed forces and the pay that person would have earned if still employed in his civilian occupation. Particular attention was given in argument to the statement in the joint reasons of Dixon CJ

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27 (1952) 86 CLR 540.

and Williams J[28] that the amount there in question had the character of income because it "was an expected periodical payment" and because it "formed part of the receipts upon which [the taxpayer] depended for the regular expenditure upon himself and his dependants and was paid to him for that purpose".

66 The Commissioner submitted that the sums paid under the Medal Incentive Scheme met these descriptions and were, therefore, to be classed as income. This part of the joint reasons in *Dixon*, to which much attention was directed in argument, must be understood, however, in the light of what was said earlier in those reasons. In particular, it must be understood in the light of the relevant question being identified[29] as whether the payments received were incidental to the taxpayer's past or present employment. It may, therefore, be arguable that the statement upon which the Commissioner's argument fastened is not to be understood as a statement of criteria which, apart from the particular context of past or present employment, suffice to identify a receipt as income. It is, however, unnecessary to consider this aspect of the matter further.

Conclusion

67 The Commissioner's appeal should be allowed and the taxpayer's application for special leave to cross-appeal granted, but the cross-appeal dismissed. The consequential orders we have set out earlier should be made.

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28 (1952) 86 CLR 540 at 557.

29 (1952) 86 CLR 540 at 556.

68 KIRBY J. This appeal from orders of the Full Court of the Federal Court of Australia[30] concerns the meaning of "income" in the *Income Tax Assessment Act* 1997 (Cth) ("the 1997 Act") in relation to certain receipts derived during the financial year ended 30 June 1999 by Ms Joanna Stone ("the taxpayer").

69 The point of *factual* interest in the appeal is that the receipts were derived, in several different forms, in consequence of the taxpayer's activities as a champion javelin thrower of such skill that she had won selection for the Australian Olympic team and for other international sporting competitions. In that sense, the appeal presents a question about the extent to which the receipts of contemporary Australian sporting champions (including as prize money), in circumstances like those in this case, are to be classified as "income" and thus liable to tax under Australian taxation law.

70 The point of *legal* interest concerns the way in which the primary judge (Hill J[31]), the Full Court[32] and this Court were invited to resolve the problem. This involved considering first whether it could be said that the taxpayer was engaged in a "business" (of a professional sportsperson) which if so found would render receipts derived in the course of that "business" (without more) "assessable income" within the 1997 Act.

71 If the foregoing is the correct approach to the classification of the taxpayer's receipts, it obviates the awkward necessity of characterising the *individual* receipts derived by the taxpayer. It permits such receipts, in effect, to be aggregated as the "income" derived from the conduct of the "business" and thus to be treated as "personal income" within the 1997 Act. If this approach is correct, it arguably has significant advantages for the Commissioner of Taxation ("the Commissioner"), the appellant in this appeal. It means that the Commissioner is not obliged to show, in the case of each separate receipt, that prize money (for example) won by a champion sportsperson is "income" under Australian income tax law. Depending on the circumstances, that could be an obligation that might prove difficult.

The facts and legislation

72 The facts of the case, concerned with the employment and sporting activities of the taxpayer, are described in the reasons of Gleeson CJ, Gummow,

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30 *Stone v Commissioner of Taxation* (2003) 130 FCR 299.

31 *Stone v Commissioner of Taxation* (2002) 196 ALR 221 at 223 [5].

32 (2003) 130 FCR 299 at 301 [6]-[7].

Hayne and Heydon JJ ("the joint reasons")[33]. Also described there is the passage of the 1997 Act with its express statement that "*assessable income* includes income according to ordinary concepts, which is called *ordinary income*"[34].

73 As the joint reasons explain, this provision is a legislative endorsement of the explanation given by Jordan CJ in *Scott v Commissioner of Taxation*[35] of the meaning of the word "income" as appearing in the *Income Tax (Management) Act* 1928 (NSW)[36]. As Jordan CJ pointed out in *Scott*[37], the definition section in that Act did not define "income". It merely enumerated "by way of illustration, various forms of income which are to be treated as derived from personal exertion". The *Scott* case concerned the liability to income tax of a one-off payment of £7,000 recovered by the chairman of a statutory body which was dissolved under conditions permitting the recovery of compensation by certain office-holders. The Full Court of the Supreme Court of New South Wales held, by majority, that no part of the sum so payable was "income" within the meaning of the Act, so understood[38].

74 In s 6-5(1) of the 1997 Act, there is no express reference to "income" that can be classified as deriving from a "business". In s 995-1(1) ("definitions"), for the purpose of the Act and except so far as the contrary intention appears, a broad definition is given to the word "business". The word is defined to include "any profession, trade, employment, vocation or calling, but does not include occupation as an employee". However, there is nothing in s 6-5(1) on its face to permit the incorporation of this broad definition of "business", as such, in the description of "assessable income" and "ordinary income" as there appearing. It is true that the word "business" has been used many times in judicial elaborations of the meaning of the word "income". However, the special definition of

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33 Joint reasons at [20]-[42].

34 1997 Act, s 6-5(1).

35 (1935) 35 SR (NSW) 215 at 219.

36 Income taxation was first introduced in Australia in 1884 in South Australia. It was introduced in New South Wales and Victoria in 1895. The Federal Parliament first enacted taxes upon "incomes" in the *Income Tax Act* 1915 (Cth): *Austin v The Commonwealth* (2003) 215 CLR 185 at 288 [244].

37 (1935) 35 SR (NSW) 215 at 220.

38 The dissenting judge (Stephen J) concluded that the payment was a retiring allowance within the Act, s 11(i). See (1935) 35 SR (NSW) 215 at 222. The other member of the Court, Street J, agreed with Jordan CJ that the payment was neither a retiring allowance nor a gratuity paid in a lump sum: at 223.

"business" in the 1997 Act, is only for the purposes of that Act. It is not for the purpose of elaborating judicial words. There are several judicial explanations of the word "business", including in this Court where it has been described as a "chameleon-like word", taking its meaning from the context[39]. On that footing, s 995-1(1) and its definition of "business" are irrelevant to the task in hand.

75 It was accepted for the Commissioner that "business" was not otherwise mentioned for the present purposes in the 1997 Act[40]. Accordingly, the Commissioner accepted that his first argument, which turned upon the proposition that the taxpayer was engaged in a "business" that affected the character of the receipts derived in the course of conducting that "business", depended not on the statute but upon the judicial elaborations that have developed around the notion of "income" as such[41].

76 Notwithstanding these concessions, the joint reasons point to the fact that the *Income Tax Assessment Act* 1936 (Cth) ("the 1936 Act") contains in s 6(1)[42] a reference to the fact that "income from personal exertion" included, amongst other things, "income consisting of … the proceeds of any business carried on by the taxpayer". Presumably, reference is made to this provision because of the instruction in s 1-3 of the 1997 Act, that this Act "contains provisions of the [1936 Act] in a rewritten form"[43] and that, if the 1936 Act expressed an idea in a particular form of words and the 1997 Act appeared to have expressed the same ideas in a different form of words, "the ideas are not to be taken to be different just because different forms of words were used"[44]. This provision supports a comment of Professor Richard Krever about the plain English project that

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39 *PP Consultants Pty Ltd v Finance Sector Union of Australia* (2000) 201 CLR 648 at 655 [14]. See also at 654 [12]; *Re Australian Industrial Relations Commission; Ex parte Australian Transport Officers Federation* (1990) 171 CLR 216 at 226.

40 [2004] HCATrans 368 at [56]-[59].

41 [2004] HCATrans 368 at [65].

42 Joint reasons at [17].

43 1997 Act, s 1-3(1). Note that by s 995-1(1) of the 1997 Act a reference therein to "this Act" includes the 1936 Act; cf *Sherlinc Enterprises Pty Ltd v Federal Commissioner of Taxation* [2004] ATC 2022 at 2028 [31]; 55 ATR 1001 at 1008.

44 1997 Act, s 1-3(2). cf *Commissioner of Taxation v Energy Resources of Australia* (2003) 135 FCR 346 at 350 [10]: "The 1997 Act is more than a consolidating statute; it has made significant changes to the 1936 Act."

culminated in the 1997 Act[45]. The project has been left incomplete. To some extent it has complicated matters by the need to reconcile the 1997 Act and the 1936 Act. In particular circumstances, of which this is one, the consequence of the supposed simplification has been to produce an additional complication[46].

77 Where the 1997 Act (being the most recent, later, express statement of the Parliament, applicable to the relevant year of income of the taxpayer) speaks in the language adopted in s 6-5(1) and commands that "income" is, for relevant purposes, to be construed "according to ordinary concepts", a substantial question is presented, at least so far as I am concerned. This is whether the importation of the category of "business" as a sub-classification of "income" conforms to the governing provisions of s 6-5(1) of the 1997 Act, understood according to its language. How is this question to be resolved?

The introduction of the notion of "business" income

78 *Arguments against the importation*: There are a number of reasons why I have hesitated to adopt the approach accepted in the joint reasons to the effect that the first step in deciding the present appeal is to consider whether the taxpayer was carrying on a "business" and, if so, whether the several receipts of various kinds that she accrued are to be accumulated as the "income" of that "business" and for that reason "ordinary income" within s 6-5(1) of the 1997 Act[47].

79 First, this approach is not expressly provided for in the 1997 Act. As I have pointed out, there is no relevant mention there of the word "business". Nor is it mentioned elsewhere in the Act in a way applicable to the resolution of the present problem. In recent times, in many cases, this Court has insisted on the primacy of the language of legislation[48]. That primacy derives from the constitutional command, addressed to the courts, judges and people in every part of the Commonwealth, to treat "all laws made by the Parliament of the

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45 Krever, "Taming Complexity in Australian Income Tax", (2003) 25 *Sydney Law Review* 467 at 484.

46 Krever, "Taming Complexity in Australian Income Tax", (2003) 25 *Sydney Law Review* 467 at 484.

47 Deutsch, *Australian Tax Handbook 2005*, (2005) at 50.

48 cf *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 77 [9], 89 [46]; *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 545 [63]; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 111-112 [249]; *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 10 [24], 24-25 [73].

Commonwealth under the Constitution" as "binding" upon them[49]. It also derives from the character of enacted legislation as the accepted product of the expression of the will of the people who are the ultimate sovereign in the representative democracy of the Australian Commonwealth, established by the Constitution. Against such "laws", and the democratic will so expressed, judges must be hesitant to gloss the statute where doing so diverts the interpreter from giving primary effect to the instruction of the Parliament stated in a valid law.

80 No question of constitutional validity arises in this case. The starting point for this Court's application of federal law to the facts of the case, is therefore the text of that law. There is no point in this Court's insisting that others must treat the statute as the starting point if it does not observe the same rule for itself[50]. This means, in this case, starting with s 6-5(1) of the 1997 Act. On the face of things, that means starting with the question whether the receipts, propounded by the Commissioner as "assessable income" within the 1997 Act, fall within the criterion stated by the Parliament. That criterion makes no reference, as such, to a sub-classification of "income" as receipts from carrying on a "business". Instead, it poses the distinct and arguably different question: whether the contested receipts constitute "income according to ordinary concepts".

81 Secondly, the danger of incorporating judicial words when fulfilling the task of giving meaning to a legislative command (such as appears in s 6-5(1) of the 1997 Act) is that such remarks can easily be taken out of context. Thus, they might pay insufficient attention to the provisions of the legislation there under consideration. This is a very common problem in statutory interpretation. In effect, it derives from the methodology of the common law and the respect that it conventionally accords to judicial elaboration.

82 In every case where an earlier judicial elaboration is said to be relevant to giving meaning to provisions in legislation, it is essential to compare the statutory language that is under consideration. Otherwise, judicial words, uttered in relation to earlier and different statutory formulae, will be applied unthinkingly although the foundation of the written law has changed. A good illustration of this mistake, easy enough to make, was pointed out in *Gipp v The Queen*[51]. Because the *Criminal Appeal Act* 1966 (UK) had used the formula "unsafe or unsatisfactory", that phrase was borrowed by judges and became

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49 Constitution, covering cl 5.

50 *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317 at 359 [127].

51 (1998) 194 CLR 106 at 147-150 [120]-[127]. See also *Conway v The Queen* (2002) 209 CLR 203 at 232 [80].

commonly used in Australia (and it often still is) without regard to the different language of applicable Australian legislation. The use of the borrowed shorthand, without regard to the actual language of the governing law, can lead to error.

83 This is not a hypothetical problem in the present circumstances. Thus, in the course of argument of this appeal, reference was made to various overseas decisions in which judges have elaborated the meaning of "income". In *G v Commissioner of Inland Revenue*[52], the former Supreme Court of New Zealand (McCarthy J) held that receipts derived by a minister of religion (described as an "evangelist") from unsolicited donations given by congregants of his denomination were assessable as his "income". This was so because, it was held, the minister was carrying on a "business".

84 However, as appears from the report of that case[53], the concept of "business" was introduced into the judicial discourse because of the provisions of s 88 of the *Land and Income Tax Act* 1954 (NZ), modelled on earlier English law, stating expressly that receipts were taxable income if they were "profits or gains derived from any business"[54]. Accordingly, it was the express mention in the Act of "business" that took the New Zealand court into an elaboration of the meaning of the notion of "business" as used in common speech[55]. That approach was fully justified by the terms of the New Zealand Act then applicable. If a wide definition of "business" were applied to such a statutory expression, the mere fact that the taxpayer was not primarily motivated by making a profit, would not take the "business" income outside the terms of the enacted law. Thus, for example, if the definition of "business" in s 995-1(1) of the 1997 Act were applicable, the activities of "evangelists" would have fallen within the definition of a "vocation or calling".

85 In the present case, there is no equivalent in the language of the 1997 Act to attract such a statutory definition and to justify the incorporation of separate notions of "business" income. If such notions are to be introduced, this can only be accomplished by an elaboration of the word "income" itself, understood as the 1997 Act provides, "according to ordinary concepts".

86 Thirdly, this brings me to the difficulty which such an elaboration occasions. If the primacy of the statutory command in s 6-5(1) is accepted, the

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52 [1961] NZLR 994.

53 [1961] NZLR 994 at 997.

54 *Land and Income Tax Act* 1954 (NZ), s 88(a).

55 [1961] NZLR 994 at 998.

first step of the Court, in a case such as the present, is not to superimpose an intermediate question as to whether the taxpayer can be treated as "carrying on a business" and then to ask whether various receipts, derived by the taxpayer during the year of income, can be aggregated in some way so as to be regarded *together* as the "income" of that business. Instead, it is to look individually at "the ordinary income you derived directly or indirectly from all sources, whether in or out of Australia, during the income year"[56] and to test the liability of such receipts to income tax by the criterion of whether *each item* of alleged "income" could be so described "according to ordinary concepts".

87 By interposing the notion of a "business", although that word does not appear in the 1997 Act, there is a risk that the statute is glossed in a way disadvantageous to the taxpayer and unduly favourable to the Commissioner. If it were the will of the Parliament to permit the interposition of the notion of "business" (and thus the aggregation of various receipts that thereupon take their colour, in part at least, from the unifying notion of a "business"), it is arguable that the Parliament should make this plain by express enactment. In other words, it should enact some reference to income including "profits or gains derived from any business", just as was done in the New Zealand Act applied in *G's* case. Such an express elaboration does not appear in the 1997 Act.

88 Fourthly, at the least, the repeated insistence by this Court upon fidelity to the primacy of legislation, understood according to its text, suggests that we should start our task (and insist that the courts below do so) by asking whether the various receipts derived by the taxpayer *severally* represent "income according to ordinary concepts"[57] instead of jumping to the non-statutory, judicial elaboration that addresses attention to the aggregating notion of a "business".

89 The two approaches do not necessarily produce the same outcome. That this is so may be seen in the conclusion reached by the primary judge in this case. His Honour started by analysing whether the taxpayer was carrying on a "business" and concluded that she was[58]. However, prudently, he then examined the "individual amounts" to decide whether "some of them would have had the character of income when paid or given to Ms Stone if she did not carry on a business"[59]. After this analysis, the primary judge concluded that, if the taxpayer were not carrying on a "business", three categories of the payments disclosed by the taxpayer would still be included in her assessable income in the year of

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56 1997 Act, s 6-5(2).

57 1997 Act, s 6-5(1).

58 (2002) 196 ALR 221 at 238 [86].

59 (2002) 196 ALR 221 at 239 [90].

income, inferentially because they were "income according to ordinary concepts". These were (1) sponsorship payments from corporate sponsors; (2) appearance fees; and (3) payments made under the Medal Incentive Scheme ("MIS")[60]. Using the same criteria, the primary judge concluded, upon the assumption that the taxpayer was *not* carrying on a "business" (or, by inference that that classification was legally relevant), that the taxpayer's other receipts would not have been "income in ordinary concepts". These were (1) prize money won by the taxpayer; (2) the Queensland Academy of Sport grant; (3) the Oceania Amateur Athletics Association grant; and (4) the Little Athletics reward (the last conceded by the Commissioner)[61].

90 It follows that the approach adopted to this question can make an important difference. If the command of s 6-5(1) is obeyed according to the letter and the decision-maker considers each item of contested "income" according to "ordinary concepts" as the Parliament has provided, a different consequence might ensue than if the Court interposes the judicial gloss that permits the Commissioner to accumulate all the receipts under the umbrella of a suggested "business". So, if this Court's instruction is obeyed, and the primacy of the statute is accepted, a very good reason is needed to permit the Commissioner to introduce the "business income" elaboration with the undoubted advantages that it produces for the revenue and disadvantages for the taxpayer not enacted in the 1997 Act, although that Act is the last word of the Parliament on the applicable law.

91 *The gloss should be accepted*: Notwithstanding these problems, both of text and principle lying in the path of the Commissioner's primary argument, I am prepared in this appeal to resolve the present argument in the Commissioner's favour.

92 First, the taxpayer, although represented by most experienced counsel, did not challenge the "business income" accumulation argued for the Commissioner. On the contrary, at every level of the consideration of the issues in contest in this appeal, the case has been argued on the same footing. For the taxpayer, it has been accepted that the first issue to be decided is whether she was conducting a "business". The case has therefore been presented and argued on that basis. Although the issues that concern me were raised during the argument of the appeal in this Court, no attack was made by the taxpayer on the foregoing approach. This is not, therefore, a case in which this Court should embark upon that task for itself. Especially is this so because, to do so, would require a substantial analysis of the old case law by reference to its applicability in the

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60 (2002) 196 ALR 221 at 244 [119].

61 (2002) 196 ALR 221 at 244-245 [119]-[120].

circumstances now applying under the 1997 Act, a matter not undertaken by either party.

93 Secondly, the use of the "business income" classification is recognised in this Court's analysis of the meaning of "income", at least so far as the 1936 Act is concerned. Thus, Fullagar J made reference to it as one recognised sub-category of "income" when explaining in *Hayes v Federal Commissioner of Taxation*[62] the distinction which the law drew at that time between receipts that are to be characterised as "income" and receipts that are "gifts". In that case, Fullagar J explained[63]:

> "A voluntary payment of money or transfer of property by A to B is prima facie not income in B's hands. If nothing more appears than that A gave to B some money or a motor car or some shares, what B receives is capital and not income. But further facts may appear which show that, although the payment or transfer was a "gift" in the sense that it was made without legal obligation, it was nevertheless so related to an employment of B by A, or *to services rendered by B to A, or to a business carried on by B, that it is, in substance and in reality, not a mere gift but the product of an income-earning activity*".

94 This way of looking at individual receipts, by reference to a context that suggests that they take on a character of "income", certainly predated the 1936 Act. Thus, Jordan CJ made reference to the "business" income classification in *Scott*[64]. Whether this course was prompted by the express language of still earlier statutes from which the idea had been borrowed or whether it was inherent in the sources of "income", as such, is not the present point.

95 Where the receipts said to be "income" are derived from an activity that can be described as a "business" of the taxpayer, many cases in this Court have accepted the view that such a source can lend colour to the character of the receipts so as to justify the conclusion that, together, they constitute the "income" of a "business" in which the taxpayer is engaged with a view to profit being derived from such business: *W Nevill & Co Ltd v Federal Commissioner of Taxation*[65]; *Martin v Federal Commissioner of Taxation*[66]; *Federal*

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62 (1956) 96 CLR 47.

63 (1956) 96 CLR 47 at 54 (emphasis added).

64 (1935) 35 SR (NSW) 215 at 219.

65 (1937) 56 CLR 290 at 301 (in relation to deductions incurred in producing assessable income).

66 (1953) 90 CLR 470 at 474, 479.

Commissioner of Taxation v Myer Emporium Ltd[67]. In addition to the judicial endorsement of this approach, it has been accepted by knowledgeable scholars, such as Professor Ross Parsons[68]. Of course, their analysis would be influenced by the approach of this Court.

96 In *Federal Commissioner of Taxation v Montgomery*[69], a case concerned only with the 1936 Act, the joint majority reasons[70] pointed out that some economists have long advocated an approach to the definition of "income" different from that adopted by the courts – one that would replace notions of "income flow" with concepts of gain or realised gain[71]. Neither in *Montgomery* nor in this appeal did the parties ask this Court to reconsider the approach conventionally taken to the meaning of "income"[72]. This is another reason why this appeal is not an occasion to consider whether the 1997 Act introduces, or warrants, a new approach. To the extent that s 6-5(1) might suggest that it does, s 1-3(2) suggests the contrary.

97 Thirdly, the last-mentioned provision adds a textual reinforcement for the principle of construction that would, in any case, favour the assumption of both parties that the "business" classification of receipts should continue to apply into the 1997 Act. It is so often mentioned in the reasoning of this Court addressed to earlier legislation, and so frequently applied by this Court and by other courts and officials, that had it been the purpose of the Federal Parliament by the 1997 Act to change that approach, one might have expected such a change to be clearly indicated in that enactment.

98 Thus, it would have been referred to in the Treasurer's Second Reading Speech in support of the Bill that became the 1997 Act and in the text of that Act. The absence of reference to such a change suggests a legislative purpose to continue with the established approach. That conclusion is further reinforced by

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67 (1987) 163 CLR 199 at 209-210; cf Deutsch, *Australian Tax Handbook 2005*, (2005) at 135.

68 Parsons, *Income Taxation in Australia: Principles of Income, Deductibility and Tax Accounting*, (1985) at 141.

69 (1999) 198 CLR 639 at 662 [66].

70 Of Gaudron, Gummow and Hayne JJ and myself.

71 Simons, *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy*, (1938); cf Parsons, "Income Taxation – An Institution in Decay?", (1986) 12 *Monash University Law Review* 77.

72 (1999) 198 CLR 639 at 662 [66].

s 1-3(2). The approach permitting aggregation of income sources linked by a postulated "business" undoubtedly favours the Commissioner and facilitates the collection of the revenue. It has the advantage of accommodating significant changes in the nature of employment, such as are occurring in the Australian economy[73]. It permits a global approach to disparate sources of a taxpayer's receipts where they can be grouped together and attributed to a "business" which the taxpayer is found to have carried on. If sometimes this results in bringing to tax receipts which individually might not have been regarded as income according to ordinary concepts, that may not be such a surprising outcome. Thus, although viewed in isolation prize money (like lottery winnings) might not, in Australia, be regarded as income according to ordinary concepts[74] – producing in other countries explicit provisions not appearing in our law so as to bring them to tax[75] – viewed in the context of a receipt attributed to a taxpayer's "business", its character as "income" may become clearer.

99 In effect, therefore, the interposition of attention to the source of the receipts (whether employment, the provision of services or the conduct of a "business" or otherwise) bears out the importance of characterising the impugned receipts by reference to all of the facts and circumstances of the case.

100 This was the approach that the primary judge adopted, and correctly so[76]. In terms of the evidence, it was especially appropriate to the present case because of general and specific considerations. The general included the changing character of sporting activity at the level of elite or celebrity sporting champions[77]. I would be prepared to take notice of the change that has come over sport in several of its manifestations in recent decades. It is a change that has been mentioned by this Court in other contexts[78]. It is one closely connected to the modern media of communications, the international interest in sporting excellence and the consequent attention of advertisers, sponsors and supporters

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73 cf *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 40-41 [43]-[44], 49 [69]-[70].

74 Hannan, *A Treatise on the Principles of Income Taxation*, (1946) at 22.

75 For example *Internal Revenue Code* 1986 (US), s 74 (26 USC 74); *Income Tax Act* 1961 (India), s 2(24)(ix).

76 (2002) 196 ALR 221 at 239 [90]; cf *Christie v Federal Commissioner of Taxation* (1956) 96 CLR 59 at 61.

77 Kelly, *Sport and the Law: An Australian Perspective*, (1987) at 426.

78 *News Ltd v South Sydney District Rugby Football Club* (2003) 215 CLR 563 at 597-599 [103]-[109]; *Zhu v Treasurer of New South Wales* (2004) 79 ALJR 217 at 225-228 [51]-[61], 250 [167]-[168]; 211 ALR 159 at 171-174, 204-205.

who see advantages for themselves in being associated with images of sporting champions of all kinds.

101 The particular features of the evidence that indicate that the taxpayer turned her sporting skills to her economic advantage were correctly identified by the primary judge[79]. They were well established by the evidence. Their characterisation called forth the impression of the decision-maker based on an assessment of all of the facts[80].

102 It was no answer to say that the taxpayer was not *solely* motivated by the objective of economic profit. Motivation for most human activity is complex and multifarious. I would be prepared to accept that the primary motivation of the taxpayer was to pursue her "dream" of excellence in her chosen sport and success on behalf of herself, her State and her country. However, that does not negate the conclusion, which was open to the primary judge, that at a given point, before the year of income, the taxpayer decided to turn her sporting talents also to her economic advantage. In doing so, she followed what many other sporting people in Australia and elsewhere have done. There is no dishonour in it. But it has consequences for the Australian law on income tax.

103 Doubtless the taxpayer did what she did, in part, to defray the not insubstantial costs associated with her pursuit of international sporting excellence. She did not lessen her zeal for personal excellence nor her desire to bring credit on her State and on Australia. However, once the view of profit became a real feature of the taxpayer's sporting endeavours it had a dual consequence. It gave a logical and factual unity to most of the receipts connected with her sport and unconnected with her employment as a police officer. Moreover, it warranted the Commissioner's conclusion that the receipts that individually might not have been regarded as "income" took on that character. They therefore warranted the essential conclusion of the primary judge. There was no error in that conclusion, according to the conventional approach to "business income" under Australian taxation law. The Full Court erred in giving effect to its different conclusion.

104 The joint reasons[81] suggest that the reasons of the primary judge "did not identify the particular respects in which the taxpayer's objection was allowed". The joint reasons also conclude that "allowing the objection in part is consistent only with concluding that one or more of the disputed receipts was not

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79 (2002) 196 ALR 221 at 235-238 [69]-[84].

80 *Martin* (1953) 90 CLR 470 at 479.

81 Joint reasons at [4].

assessable".[82] However, as I read the reasons of the primary judge, it is clear that he did *not* conclude that the disputed receipts, or any of them, were not assessable as income. On the contrary, he dealt with the several payments separately only "in case the present matter should go further".[83] This point was recognised by the Full Court.[84] This explains why, at the conclusion of his reasons on assessable income the primary judge expressly said: "I would accordingly dismiss the application to the court."[85] The apparent disparity in the orders which he made, allowing the application "in part"[86], is readily explained. It was necessary for the primary judge to allow the appeal and set aside the objection decision, as he did, to permit the reassessment of deductions – a matter upon which the Commissioner had accepted the need to amend the assessment.[87] This interpretation is confirmed by the stated purpose of the primary judge's order remitting the assessment to the Commissioner "to reassess ... such deductions as shall be [agreed or determined]".[88]

105 At no stage did Hill J hold that the Queensland Academy of Sport grant or other contested items were not "income" in the hands of the taxpayer. On the contrary, his Honour's approach and conclusion is now endorsed by this Court. When carefully considered, it was not uncertain.

Orders

106 In all other respects, I agree with what is said in the joint reasons. This is not necessarily a result to which I would have come, without the past authority accepted by this Court and uncontested in this case. In "ordinary concepts", intermittent prize money and occasional special grants would not, in most Australian eyes (or in mine), be regarded as having the character of "income", at least when such receipts are viewed individually and in isolation from each other. Prizes, in particular, depend upon providence, are usually intermittent and ordinarily lack periodicity and regularity. They depend upon so many chance

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82 Joint reasons at [4].

83 (2002) 196 ALR 221 at 239 [90].

84 (2003) 130 FCR 299 at 301 [6]-[7].

85 (2002) 196 ALR 221 at 245 [121].

86 (2002) 196 ALR 221 at 245 (order 1).

87 (2002) 196 ALR 221 at 223 [3].

88 (2002) 196 ALR 221 at 245 (order 3).

factors that they would not normally take on the character of "income" without some additional unifying ingredient.

107 It is the interposition of the postulate of the taxpayer's "business" that affords that additional ingredient that helps to link the several receipts and to colour them – each of them reinforcing the conclusion of the character of "income" that might not otherwise have been drawn reviewing them individually. Approached in this way, as the parties' counsel agreed, the Commissioner's assessment was entirely orthodox. It was correct, according to the law accepted as applicable.

108 Because I am of the view that there was no error in the primary judge's reasons and ultimate conclusions and because the orders in the joint reasons confirm the orders made by the primary judge, I agree in the orders proposed in the joint reasons.