HIGH COURT OF AUSTRALIA

FRENCH CJ
GUMMOW, HEYDON, CRENNAN, KIEFEL AND BELL JJ

Matter No M92/2008

DAVID RAYMOND SPRIGGS APPELLANT

AND

THE COMMISSIONER OF TAXATION
OF THE COMMONWEALTH OF AUSTRALIA RESPONDENT

Matter No M93/2008

MARK RIDDELL APPELLANT

AND

THE COMMISSIONER OF TAXATION
OF THE COMMONWEALTH OF AUSTRALIA RESPONDENT

Spriggs v Commissioner of Taxation
Riddell v Commissioner of Taxation
[2009] HCA 22
18 June 2009
M92/2008 & M93/2008

ORDER

1. *Appeals allowed.*

2. *Set aside the orders made in paragraphs 1 and 2 of the orders of the Full Court of the Federal Court of Australia, made on 22 August 2008 in each appeal, and in lieu thereof order that the appeals to that Court be dismissed.*

On appeal from the Federal Court of Australia

Representation

R Merkel QC with N Orow for the appellants in both matters (instructed by DLA Phillips Fox)

D H Bloom QC with R A Brett QC and M T Flynn for the respondents in both matters (instructed by Australian Government Solicitor)

CATCHWORDS

Spriggs v Commissioner of Taxation
Riddell v Commissioner of Taxation

Taxes and duties – Income tax – Deductions – Appellant taxpayers professional Australian Rules football player and professional rugby league player – Each paid fee to manager for negotiating contract to play with new club – Whether management fee deductible under *Income Tax Assessment Act* 1997 (Cth), s 8-1(1) as outgoing "incurred in gaining or producing" or "necessarily incurred in carrying on a business for the purpose of gaining or producing" assessable income – Whether each appellant carrying on business exploiting sporting prowess and associated celebrity – Relevance of exclusion from definition of "business" in s 995-1 of "occupation as an employee" – Relevance of *Federal Commissioner of Taxation v Maddalena* (1971) 45 ALJR 426; 2 ATR 541.

Taxes and duties – Income tax – Deductions – Whether management fee not deductible pursuant to s 8-1(2)(a) as an "outgoing of capital, or of a capital nature".

Words and phrases – "business", "incurred in gaining or producing", "necessarily incurred in carrying on a business", "occupation as an employee", "ordinary income", "outgoing of capital".

Income Tax Assessment Act 1997 (Cth), ss 6-5(1), 8-1, 995-1.

1 FRENCH CJ, GUMMOW, HEYDON, CRENNAN, KIEFEL AND BELL JJ. These appeals arise out of the assessment of income tax made by the Commissioner of Taxation of the Commonwealth of Australia ("the Commissioner"), the respondent to each appeal, in respect of each of the appellants, Mr David Raymond Spriggs ("Spriggs") and Mr Mark Riddell ("Riddell"), for the year of income ended 30 June 2005 ("the 2005 income year"). Before, during and after the 2005 income year, Spriggs was a professional Australian Rules football player, who played for clubs in the Australian Football Competition, and Riddell was a professional rugby league player, who played for clubs in the National Rugby League Competition.

2 The issue in these appeals is whether the appellants were entitled to deductions, pursuant to s 8-1 of the *Income Tax Assessment Act* 1997 (Cth) ("the ITAA"), for fees paid by each of them to his respective manager during the 2005 income year ("the management fees").

3 The Commissioner refused to allow deductions for the management fees in assessments of the appellants' respective liabilities to income tax in respect of the 2005 income year. Each of the appellants objected to those assessments[1], but their objections were disallowed by the Commissioner. The appellants then appealed from these "objection decisions" to the Federal Court of Australia[2]. The primary judge (Gordon J) concluded that the management fees were deductible, set aside the Commissioner's objection decisions and substituted decisions allowing the deductions[3]. However, the Full Court of the Federal Court (Goldberg, Bennett and Edmonds JJ) ("the Full Court") unanimously allowed appeals by the Commissioner and made orders effectively reinstating the Commissioner's objection decisions[4]. It is from the decision of the Full Court that the appellants now appeal, by special leave, to this Court. The appeals to this Court were heard together.

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1 Pursuant to s 175A of the *Income Tax Assessment Act* 1936 (Cth) and Pt IVC, Div 3 of the *Taxation Administration Act* 1953 (Cth).

2 Pursuant to s 14ZZ and Pt IVC, Div 5 of the *Taxation Administration Act* 1953 (Cth).

3 *Spriggs v Federal Commissioner of Taxation* (2007) 68 ATR 740; *Riddell v Federal Commissioner of Taxation* (2007) 68 ATR 757.

4 *Federal Commissioner of Taxation v Spriggs* (2008) 170 FCR 135.

4 For the reasons which follow, the Full Court was in error to conclude that the management fees were not deductible. Accordingly, the appeals to this Court should be allowed and the orders of the primary judge restored.

The facts

5 Both in the Full Court[5] and this Court, it was accepted by the parties that there is no significant distinguishing feature between the cases of each appellant. The relevant facts of each case are as follows.

6 *Spriggs*. The Australian Football Competition ("the AFL Competition") is the elite Australian Rules football competition conducted by the Australian Football League ("the AFL"), a public company limited by guarantee. At all relevant times, 16 clubs participated in the AFL Competition. From 2000 to 2006, Spriggs played for two of those clubs in succession. In each case, he was contracted to play Australian Rules football on a full-time basis pursuant to an AFL Standard Playing Contract between him, the club and the AFL.

7 Each AFL Standard Playing Contract entered into by Spriggs was a standard contract in a form prescribed by the AFL and the Australian Football League Players' Association Incorporated ("the AFLPA"), modified to include particular conditions relating to Spriggs. Each incorporated a Collective Bargaining Agreement between the AFL and the AFLPA, which will be described in more detail later in these reasons[6].

8 As was agreed in each AFL Standard Playing Contract, the "AFL Player Rules", determined by the AFL, were binding on both Spriggs, as a player, and each club which contracted with him. The AFL Player Rules in effect require that any person playing in the AFL Competition be a party to an AFL Standard Playing Contract. The AFL Player Rules also regulate the conduct of the yearly "AFL National Draft", which enables clubs to select players to play for them from a list of eligible players who have nominated for the Draft.

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5 *Federal Commissioner of Taxation v Spriggs* (2008) 170 FCR 135 at 136 [3] per Goldberg, Bennett and Edmonds JJ.

6 See [36]-[40].

9 In November 1999, Spriggs was selected by the Geelong Football Club Limited ("Geelong") from the AFL National Draft for that year. On 7 January 2000, he entered into a "Representation Agreement" with Connors Sports Management Pty Ltd ("CSM"). The term of the Representation Agreement was for two years, but it was extended by agreement between the parties and was in place for the 2005 income year. The Representation Agreement relevantly provided:

> "**1. Contract Services:**
>
> CSM hereby warrants that a duly accredited player agent will represent, advise, council [sic] and assist the player[7] in the negotiation and enforcement of his AFL Standard Playing Contract(s) in the Australian Football League.
>
> **2. Appointment:**
>
> CSM will for the full term of this agreement act as the Player's exclusive Agent throughout Australia in respect of the Player's activities as a professional AFL footballer including the players [sic] AFL Contract with his respective Club, endorsements, merchandising, appearances and media contracts.
>
> **3. CSM's compensation:**
>
> If CSM succeeds in negotiating an AFL Standard Playing Contract or contracts acceptable to the player, CSM shall be paid a fee as follows:
>
> 3% of the Player's total gross earnings for the term of the contract[.]
>
> The player will pay the following fees for marketing and media activities:
>
> 20% of the total gross earnings in relation to marketing, and media activities."

10 Spriggs was contracted to Geelong, pursuant to successive AFL Standard Playing Contracts, for the 2000 to 2004 AFL Competition seasons. Mr Paul Connors ("Connors") of CSM negotiated terms to be included in all but the first of these contracts.

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7 Defined in the Representation Agreement to be Spriggs.

11 During the 2004 AFL Competition season, Connors and Spriggs considered that it might be appropriate for Spriggs to move to another club in the AFL Competition. Connors became involved in various negotiations with representatives of a number of clubs towards that end.

12 On 31 October 2004, Spriggs' then current contract with Geelong came to an end. Spriggs was thereupon eligible, under the AFL Player Rules, to nominate for the AFL National Draft. Following negotiations with representatives of the Sydney Swans Ltd ("Sydney") and another club, Connors ultimately agreed on the minimum terms and conditions that Sydney would meet if they selected Spriggs in the Draft. On 20 November 2004, Spriggs was selected in the Draft for that year by Sydney. On 9 December 2004, he entered into an AFL Standard Playing Contract for the 2005 and 2006 AFL Competition seasons, consistent with the terms negotiated by Connors ("Spriggs' 2005/2006 Contract"). Among other things, it provided for a "Base Payment" for the 2005 AFL Competition season of $70,000. The view of the primary judge was that it was a contract of employment[8].

13 On 20 December 2004, CSM issued a tax invoice to Spriggs. Against an amount of $2,100, the notation on the invoice read: "Management and promotional services by CSM for season 2004". This amount was equivalent to 3% of the Base Payment for the 2005 AFL Competition season in Spriggs' 2005/2006 Contract. The conclusion of the primary judge was that the fee was paid by Spriggs to CSM for negotiating Spriggs' 2005/2006 Contract[9]. Including GST of $210, the total amount payable was $2,310. It is this fee which the Commissioner contends is not deductible by Spriggs in the 2005 income year.

14 At the end of the 2006 AFL Competition season, Spriggs' 2005/2006 Contract with Sydney came to an end. He did not subsequently play with any other club in the AFL Competition. The Representation Agreement with CSM came to an end.

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8 *Spriggs v Federal Commissioner of Taxation* (2007) 68 ATR 740 at 752 [47] per Gordon J.

9 *Spriggs v Federal Commissioner of Taxation* (2007) 68 ATR 740 at 751-752 [46] per Gordon J.

15 *Riddell*. The National Rugby League Competition ("the NRL Competition") is the premier rugby league competition in Australia and New Zealand, conducted by National Rugby League Limited ("the NRL"), a public company limited by guarantee. Sixteen clubs participate in the NRL Competition. From 1998, Riddell played for three clubs in the Competition in succession. In each case, he was contracted to play rugby league on a full-time basis pursuant to an NRL Playing Contract between him and his club. There was a Collective Bargaining Agreement, between the Rugby League Professionals Association and NRL clubs, which dealt with industrial issues.

16 The rules and regulations of the NRL Competition, including the "NRL Playing Contract and Remuneration Rules", are determined by the NRL. Under the NRL Playing Contract and Remuneration Rules, any club that participates in the NRL Competition must ensure that the club and its players have complied with those Rules. Under the Rules, any person who wishes to participate as a player in the NRL Competition must, among other things, be a party to a current NRL Playing Contract with a club. The NRL Playing Contract is a standard contract. As was agreed in each NRL Playing Contract entered into by Riddell, the NRL Playing Contract and Remuneration Rules were binding on him.

17 On 29 May 1998, Riddell entered into an agreement with International Sports Management Pty Ltd ("ISM"). He was contracted to play for the Eastern Suburbs District Rugby League Football Club Limited for the 1998 to 2000 NRL Competition seasons. On 27 July 2000, he entered into an NRL Playing Contract with St George Illawarra Rugby League Football Club ("St George") for the 2001 NRL Competition season, and then on 6 June 2001 he entered into an NRL Playing Contract with St George for the 2002 to 2004 NRL Competition seasons.

18 Also on 6 June 2001, Riddell entered into an agreement with SFX Sports Group (Australia) Pty Ltd ("SFX"), which had acquired ISM during the course of 1999. The term of the agreement was five years, and it was in place during the 2005 income year. The second recital stated: "The Player[10] desires to exclusively engage the Manager[11] to exclusively manage his affairs as hereinafter set out." Pursuant to cl 1, SFX agreed to provide the following services to Riddell:

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10 Defined in the agreement to be Riddell.

11 Defined in the agreement to be SFX.

"a) Advise the Player in respect of his sporting career.

b) Negotiate playing contracts on behalf of the Player.

c) Negotiate product endorsements and sponsorship so far as is reasonably possible.

d) Access and arrange legal, financial, superannuation, taxation, insurance and other appropriate advices and services at the request and cost of the Player.

e) Develop and maintain a mutually agreeable communication timetable.

f) Provide such other services and advices as may reasonably be required by the Player."

Pursuant to cl 4(a), SFX was entitled to charge "[t]wenty per cent (20%) of all gross monies or other considerations paid to the Player for sponsorship, media contracts, endorsement for goods and services, advertising or any form of promotional work and any subsequent income earned from the above monies." Pursuant to cl 4(b)(i), SFX was entitled to charge "[s]even percent (7%) of all contract monies paid to the Player including bonuses/incentives negotiated by the Manager."

19 Each of the NRL Playing Contracts entered into by Riddell mentioned above was negotiated by ISM or SFX. During the 2004 NRL Competition season, Darryl Mather ("Mather") of SFX unsuccessfully attempted to negotiate a new NRL Playing Contract for Riddell with representatives of St George. Riddell was then granted permission, as required by his contract with St George and the NRL Playing Contract and Remuneration Rules, to negotiate with other clubs in the NRL Competition. Mather negotiated on Riddell's behalf with representatives of Parramatta National Rugby League Club Limited ("Parramatta") and another club, and, ultimately, agreed terms with the representatives of Parramatta. On 22 June 2004, Riddell entered into an NRL Playing Contract with Parramatta for the 2005 to 2007 NRL Competition seasons ("Riddell's 2005/2007 Contract"). Among other things, it provided for an annual

playing fee of $275,000 for each of those years. The view of the primary judge was that it was a contract of employment[12].

20 On 17 November 2004, SFX issued a tax invoice to Riddell. Against an amount of $19,250, the notation on the invoice read: "2005 Management Fees". This amount was equivalent to 7% of the annual playing fee under Riddell's 2005/2007 Contract. The conclusion of the primary judge was that the fee was payment to SFX for negotiating Riddell's 2005/2007 Contract[13]. Including GST of $1,925, the total amount payable was $21,175. It is this fee which the Commissioner contends is not deductible by Riddell in the 2005 income year.

21 As at 18 July 2007, Riddell was contracted to Parramatta pursuant to an NRL Playing Contract for the 2007 to 2009 NRL Competition seasons.

The applicable legislation

22 Section 8-1 of the ITAA relevantly provides:

> "(1) You can ***deduct*** from your assessable income any loss or outgoing to the extent that:
>
> (a) it is incurred in gaining or producing your assessable income; or
>
> (b) it is necessarily incurred in carrying on a business for the purpose of gaining or producing your assessable income.
>
> …
>
> (2) However, you cannot deduct a loss or outgoing under this section to the extent that:
>
> (a) it is a loss or outgoing of capital, or of a capital nature …" (original emphasis)

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12 *Riddell v Federal Commissioner of Taxation* (2007) 68 ATR 757 at 763 [25], 766 [41] per Gordon J.

13 *Riddell v Federal Commissioner of Taxation* (2007) 68 ATR 757 at 765 [39] per Gordon J.

23 Section 6-5(1) of the ITAA provides:

> "Your ***assessable income*** includes income according to ordinary concepts, which is called ***ordinary income***." (original emphasis)

24 "Business" is defined in s 995-1 of the ITAA as follows[14]:

> "***business*** includes any profession, trade, employment, vocation or calling, but does not include occupation as an employee." (original emphasis)

Decisions of the Federal Court

25 *The primary judge*. As noted above, the primary judge decided in favour of each appellant. Her Honour found that each was carrying on a business as a professional footballer, of which playing for a club was a part, and that the management fee paid by each was incurred in gaining or producing income from that business and carrying on that business. In the light of this finding, her Honour concluded that the management fees were deductible under both limbs of s 8-1(1) of the ITAA.

26 In *Federal Commissioner of Taxation v Maddalena* ("*Maddalena*")[15], this Court concluded that Mr Maddalena, a professional part-time rugby league player, who was also a full-time employee electrician, was not able to deduct travel and legal expenses incurred by him in seeking and obtaining a new employment contract with a club to play rugby league. The Court held that the expenses were not incurred in gaining or producing income from that new employment; rather, they were "incurred in getting, not in doing, work as an employee" and therefore came "at a point too soon to be properly regarded as incurred in gaining assessable income"[16]. The primary judge distinguished *Maddalena*, on the basis that it arose in an era when the position of professional sportspersons was quite different from their position in contemporary times and otherwise on its facts.

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14 This repeats the definition in s 6 of the *Income Tax Assessment Act* 1936 (Cth) as enacted, which has remained unamended since.

15 (1971) 45 ALJR 426; 2 ATR 541.

16 (1971) 45 ALJR 426 at 427 per Menzies J, with whom the rest of the Court agreed; 2 ATR 541 at 549.

27 Finally, following *Sun Newspapers Ltd v Federal Commissioner of Taxation* ("*Sun Newspapers*")[17] and subsequent authorities[18], the primary judge concluded that the management fees were revenue expenses, not capital expenses, and that s 8-1(2)(a) of the ITAA did not apply.

28 *The Full Court.* The Full Court unanimously reversed the primary judge's decision, primarily by focusing on her Honour's findings of fact that the management fees were, in each case, paid for the service of negotiating an employment contract. Despite factual distinctions which the Full Court recognised, the Full Court concluded that *Maddalena* applied to deny deductibility in respect of the management fees. The Full Court considered that even if the appellants were carrying on businesses to the extent of their various endorsements and media appearances, detailed later in these reasons, those businesses were separate from their employment by their respective clubs. The management fees, paid for the negotiation of a new contract with the relevant club, were therefore said not to have been incurred by the appellants in gaining or producing income from their employment or carrying on their respective businesses.

29 In the light of these conclusions, it was not necessary for the Full Court to consider s 8-1(2)(a) of the ITAA. However, the Full Court noted that, had it been necessary, it would have concluded that the management fees were not capital expenses and that s 8-1(2)(a) did not apply.

Submissions in this Court

30 In this Court, it was submitted on behalf of the appellants that each had turned his sporting prowess to account for money and that each was engaged in income-producing activity, a business, which encompassed two related streams of income: "playing income", from playing Australian Rules football or rugby league for his respective club, and "non-playing income", derived from sponsorships, endorsements and similar or related non-playing activities, whether

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17 (1938) 61 CLR 337 at 363 per Dixon J; [1938] HCA 73.

18 *GP International Pipecoaters Pty Ltd v Federal Commissioner of Taxation* (1990) 170 CLR 124 at 137 per Brennan, Dawson, Toohey, Gaudron and McHugh JJ; [1990] HCA 25; *Federal Commissioner of Taxation v Citylink Melbourne Ltd* (2006) 228 CLR 1 at 43 [147] per Crennan J; [2006] HCA 35.

carried out in conjunction with the club or independently of it. Thus, the management fees were said to be incurred in gaining or producing income from the appellants' businesses as professional sportsmen. Neither appellant could be fairly or completely described as having an "occupation as an employee", within the exclusion in the definition of "business" in s 995-1 of the ITAA, quoted above[19]. So much was said to be sufficient for deductibility under either limb of s 8-1(1) of the ITAA. The appellants argued that *Maddalena* was distinguishable and, if not, should be overruled.

31 As part of the appellants' argument, there was some attempt at clarification or expansion of two conclusions of the primary judge: first, that Spriggs' 2005/2006 Contract and Riddell's 2005/2007 Contract ("the playing contracts") were contracts of employment; and secondly, that the management fees, paid under the Representation Agreement with CSM and the agreement with SFX ("the management agreements") by Spriggs and Riddell, respectively, were compensation for negotiating the playing contracts. The appellants argued that the playing contracts were not solely contracts of employment, because they contained terms and conditions upon which the appellants could turn their sporting prowess and associated celebrity to account for money from both their playing and non-playing activities. The appellants also argued that the management fees were not paid solely for negotiating the playing contracts, but for all the services provided by the managers, the successful negotiation of a playing contract being merely the trigger for payment of the management fee.

32 Finally, in response to Notices of Contention by the Commissioner contending that the management fees were capital expenses such that s 8-1(2)(a) of the ITAA applied, the appellants argued that the management fees were not capital expenses because they were recurrent expenses referable to the process by which the appellants turned their sporting prowess to account to derive a regular stream of income.

33 The Commissioner characterised the playing contracts as solely contracts of employment, and the management fees as fees paid for the procuring of those contracts, governed by the long-standing authority of *Maddalena*. The Commissioner contested the appellants' characterisations of the playing contracts and of the management fees, and further submitted that it was not open to the appellants to challenge the primary judge's conclusions on those matters, as they

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19 At [24].

were factual findings which were not challenged in the Full Court. The management fees were characterised by the Commissioner as "employee deductions" and therefore outside s 8-1(1)(b) of the ITAA.

34 Finally, it was contended by the Commissioner that s 8-1(2)(a) of the ITAA operated to deny the deductions claimed because the advantage the management fees had secured were the playing contracts, which were structural assets.

35 In resolving these competing submissions, it is necessary to consider in greater detail the income-producing activities undertaken by the appellants.

The appellants' income-producing activities

36 *Spriggs*. The association of players of Australian Rules football, now named AFLPA, has existed since 1974. It has been involved in the development of a Collective Bargaining Agreement between it and the AFL, containing terms and conditions incorporated into the AFL Standard Playing Contract. Thus, it has now been recognised that playing Australian Rules football in the AFL is work involving industrial relations and some need for collective bargaining.

37 Evidence was given at trial to the effect that players in the AFL Competition are increasingly able to market and promote their own images and personalities[20]. The Collective Bargaining Agreement and the AFL Player Rules are consistent with this.

38 Relevantly, cl 16 of the Collective Bargaining Agreement covers "Additional Services Agreements", which a player may enter with an AFL club or a sponsor of an AFL club as a part of the "promotions/marketing" of that player. Such agreements are required to be in writing, to "represent bona fide commercially based arrangements" and to be lodged with the AFL within 28 days of the date of signing any agreement. Schedule D of the Collective Bargaining Agreement contains guidelines for Additional Services Agreements.

39 In addition, cl 20 of the Collective Bargaining Agreement provides that, subject to certain restrictions, a player may use his own "Image", which is defined to include "a Player's name, photograph, likeness, reputation and

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20 *Spriggs v Federal Commissioner of Taxation* (2007) 68 ATR 740 at 747 [24] per Gordon J.

identity". Schedule E contains guidelines for licensing and expressly recognises a player's entitlement to engage in promotional activity using his Image, with permission if using AFL property or intellectual property, but otherwise independently.

40 It can also be noted that the Collective Bargaining Agreement recognises the position of managers. The evidence was that 90% of AFL players employed the services of managers[21].

41 The AFL Player Rules recognise that players may receive income under their AFL Standard Playing Contracts and also from other sources. Thus, the definition in the AFL Player Rules of "Football Payments" in r 1.1, which must, pursuant to r 2.2, be notified to the AFL for a player to be registered to play with a club in the AFL Competition, is as follows:

> "**Football Payments:** in respect of a Player, any payment, consideration, advantage or other benefit directly or indirectly given or provided to, or applied for the benefit of, the Player or any Associate of the Player and which:–
>
> (a) relates in any way to, or which is connected with, the Player's past, present or future services with a Club as a football player, or any agreement, arrangement or understanding for the Player to join a Club or to refrain from joining a Club; or
>
> (b) is so given, provided or applied by a Club, or by any Associate of a Club, unless the Player, the Club or the Associate of a Club proves to the satisfaction of the Investigations Manager that the payment, consideration, advantage or benefit was paid, given or provided to the Player, or applied for the benefit of the Player or any Associate of a Player, in consideration of bona fide:
>
> (i) employment;
> (ii) marketing; or
> (iii) other services or rights

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21 *Spriggs v Federal Commissioner of Taxation* (2007) 68 ATR 740 at 753 [57] per Gordon J.

> not falling within sub-paragraph (a), rendered by the Player ("Additional Services")." (original emphasis)

42 Pursuant to rr 2.1, 2.2(v) and 2.3.1, as noted above, all players with AFL clubs are obliged to enter a contract of service in a form prescribed from time to time by the AFL and the AFLPA, that is, an AFL Standard Playing Contract. However, Australian Rules football players are no longer tied to a particular club, as once they were[22]. There are now elaborate arrangements for transfer, exchange and participation in the AFL National Draft, which is open to players who are not listed with a club. The AFL National Draft operates on the basis that there is a pool of players, not contracted to clubs, who are available to clubs in an order determined by the previous year's results. There is also a "salary cap" mechanism designed to ensure that wealthier clubs are not able to contract disproportionate numbers of the most successful players. Both mechanisms are intended to achieve the difficult goal of evening out the competition between the clubs and to make the results less predictable[23].

43 Each of the AFL Standard Playing Contracts signed by Spriggs, including Spriggs' 2005/2006 Contract, was a tripartite agreement between Spriggs, his club and the AFL. Spriggs' 2005/2006 Contract contained terms and conditions referable to a contract of service, such as cl 4.2, by which Spriggs agreed to:

> "[f]aithfully, diligently and to the best of his ability, experience and talent, perform the duties applicable to employees in general and, without limiting such duties, the duties of a professional Australian Footballer as set out in this Contract."

However, as noted above, the Collective Bargaining Agreement was expressly incorporated into each of the AFL Standard Playing Contracts signed by Spriggs (pursuant to cl 2) and, pursuant to cl 10.1, both Spriggs and his club agreed to be bound by the AFL Player Rules. Thus, Spriggs' 2005/2006 Contract also contained terms and conditions referable to promotional activities, including those carried out independently of his club. It was, therefore, a contract of

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22 As to which, see *Foschini v Victorian Football League*, unreported, Supreme Court of Victoria, 15 April 1983. See also *Buckley v Tutty* (1971) 125 CLR 353; [1971] HCA 71.

23 Opie and Smith, "The Withering of Individualism: Professional Team Sports and Employment Law", (1992) 15 *University of New South Wales Law Journal* 313 at 336, 338.

employment, as the primary judge concluded, but it was not *solely* a contract of employment. Even if this point was not raised by the appellants in the Full Court below, as a matter concerning the legal construction of a document, it was open to the appellants to raise that construction for the first time in this Court[24].

44 As will be further explained in these reasons, the question of whether the management fees were incurred "in gaining or producing" the assessable income of Spriggs turns upon the characterisation of the tripartite arrangement between Spriggs, his club and the AFL. The answer to the question is not to be found by isolating in those arrangements a contract of employment of the player.

45 From 2000 to 2006, Spriggs received Football Payments (as defined in the AFL Player Rules) under his AFL Standard Playing Contracts and, as a result of negotiations undertaken by CSM, he also derived income from non-playing activities. These variously included appearances at AFL and other promotions, appearances in the "Men For All Seasons Calendar", an appearance on television on the "Footy Show", and the use of his image on playing cards licensed by the AFL.

46 During the 2005 income year, Spriggs' only income from non-playing activities was $641, from licensing fees paid to Spriggs by the AFL for the use of his image on playing cards. His total income for the 2005 income year was $106,869. All but $215, which was interest income, was described in Spriggs' income tax return for the 2005 income year as derived from being a "Professional Sportsperson".

47 *Riddell*. Save that there is no national draft, the NRL Competition is characterised by arrangements similar to the AFL Competition. Clubs operate with a salary cap and the arrangements permit transfer, exchange and selection of players. As with the AFL Competition, there was evidence at trial that a large number of players in the NRL Competition use managers' services: it was estimated that 95% of the 25 highest paid players at any NRL club are represented by a manager[25].

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24 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438 per Latham CJ, Williams and Fullagar JJ; [1950] HCA 35, quoting *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 at 480 per Lord Watson.

25 *Riddell v Federal Commissioner of Taxation* (2007) 68 ATR 757 at 765 [39] per Gordon J.

48 The NRL Playing Contract and Remuneration Rules recognise that NRL players may receive income under their NRL Playing Contracts, from playing rugby league, and also from other sources. Thus, for the purposes of establishing, in Pt 8.1, a "Salary Cap", providing that each club must ensure that the total aggregate "Remuneration" paid to its players during a season does not exceed a particular amount, r 65 defines "Remuneration" to include benefits paid pursuant to a "Third Party Agreement". Rule 7(1) defines "Third Party Agreement" to mean "any contract, agreement or arrangement, whether entered into by a Club, a Player or some other person or entity on behalf of a Club or a Player, whereby Remuneration is paid to, or for the benefit of, a Player by a Third Party". Rule 100 provides that such Remuneration will be included for the purposes of the Salary Cap calculation, unless, among other things, the agreement was entered into between the player and the third party at arm's length from the club. One factor relevant to that assessment is "[w]hether the Player is to be promoted by the Third Party as a sportsman independent of his Club who is associated with the Third Party as opposed to a Player from his Club".

49 Riddell's 2005/2007 Contract contains provisions referable to a contract of service, such as cl 1.1, which provides:

> "The relationship between the Player and the Club, as evidenced by this Agreement, is one of employee and employer, for the purposes of participating in the NRL Competition …"

However, it was agreed in cl 3.1(h) that, as noted above, the NRL Playing Contract and Remuneration Rules were binding on Riddell. In addition, under cl 3.2, he was permitted to make public appearances and to contribute to press, television and radio, provided the club's consent had been obtained and no conflict of interest arose. Further, the Contract made provision for dealing with "Player Property", defined in cl 29.1 to mean "the name, photograph, likeness, reputation and identity of the Player". Pursuant to cl 3.3, Riddell licensed his Player Property to his club and, pursuant to cl 3.4, Riddell was entitled to use his Player Property for "commercial purposes including, but not limited to, endorsements, advertising, promotions, events and marketing". Thus, in addition to conditions referable to a contract of service, Riddell's 2005/2007 Contract also contained provisions covering publicity and sponsorship, including independent sponsorships. Like Spriggs' 2005/2006 Contract, Riddell's 2005/2007 Contract was a contract of employment, as found by the primary judge, but it was not *solely* a contract of employment.

50 As with Spriggs, the answer to the question of whether the management fees were incurred "in gaining or producing" the assessable income of Riddell is not to be found by isolating a contract of employment from the arrangements between Riddell and his club.

51 From 1998, Riddell received payments under his NRL Playing Contracts and, as a result of negotiations undertaken by ISM and SFX, he also derived income from "sponsorship, media contracts, endorsement for goods and services, advertising or any form of promotional work". These variously included a sponsorship agreement with Puma Australia Pty Ltd, a licensing agreement with Legends Genuine Memorabilia for production of signed lithographs of Riddell, a sponsorship agreement with Microsoft Pty Ltd, an agreement with Playersinc Pty Ltd for production of a Riddell "Action Figurine", and promotional television and radio appearances.

52 During the 2005 income year, Riddell earned $11,394 from various promotional activities negotiated by SFX on his behalf, including a television appearance and various sponsorships. He received $220,174 under his NRL Playing Contracts with St George and Parramatta. All of his income was gained or produced from his activities as a player in the NRL Competition.

Deductibility under s 8-1(1)(a) of the ITAA

53 It is against this background that the operation of s 8-1(1) of the ITAA falls to be considered. For that purpose, regard may be had to the cases decided in respect of its predecessor provisions[26], which were not materially different[27].

54 The issue, in respect of s 8-1(1)(a), is whether a particular "loss or outgoing" was "incurred in gaining or producing … assessable income". There was no debate about the appellants' assessable income. It included amounts paid by their respective clubs for playing in matches; it also included promotional or

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26 Section 51(1) of the *Income Tax Assessment Act* 1936 (Cth); s 23(1)(a) of the *Income Tax Assessment Act* 1922 (Cth).

27 See, eg, *Federal Commissioner of Taxation v Citylink Melbourne Ltd* (2006) 228 CLR 1 at 30 [90] per Crennan J; *Federal Commissioner of Taxation v Day* (2008) 236 CLR 163 at 175 [21] per Gummow, Hayne, Heydon and Kiefel JJ; [2008] HCA 53.

marketing payments for exploiting the celebrity associated with their sporting prowess. It was not disputed that these payments were income according to the concept of "ordinary income" under s 6-5 of the ITAA, that is, within "the ordinary concepts and usages of mankind"[28]. It was also not disputed that the management fees were "outgoings" and were "incurred". The question which was debated was whether the management fees were incurred "in gaining or producing" the appellants' assessable income.

55 It is well settled that incurred "in" gaining or producing means incurred "in the course of" gaining or producing assessable income[29]. In *Ronpibon Tin NL v Federal Commissioner of Taxation* ("*Ronpibon Tin*")[30], this Court explained:

> "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."

The essential question, rephrased in *Federal Commissioner of Taxation v Payne* ("*Payne*")[31], is: "is the occasion of the outgoing found in whatever is productive

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28 See *Scott v Federal Commissioner of Taxation* (1935) 35 SR (NSW) 215 at 219 per Jordan CJ, quoted in *Federal Commissioner of Taxation v Stone* (2005) 222 CLR 289 at 294 [8] per Gleeson CJ, Gummow, Hayne and Heydon JJ; [2005] HCA 21 ("*Stone*"). See also Australia, House of Representatives, Income Tax Assessment Bill 1996, Explanatory Memorandum at 40.

29 *Amalgamated Zinc (De Bavay's) Ltd v Federal Commissioner of Taxation* (1935) 54 CLR 295 at 303 per Latham CJ, 309 per Dixon J; [1935] HCA 81; *Ronpibon Tin NL v Federal Commissioner of Taxation* (1949) 78 CLR 47 at 56-57 per Latham CJ, Rich, Dixon, McTiernan and Webb JJ; [1949] HCA 15; *Charles Moore & Co (WA) Pty Ltd v Federal Commissioner of Taxation* (1956) 95 CLR 344 at 350 per Dixon CJ, Williams, Webb, Fullagar and Kitto JJ; [1956] HCA 77; *Federal Commissioner of Taxation v Payne* (2001) 202 CLR 93 at 99 [9] per Gleeson CJ, Kirby and Hayne JJ; [2001] HCA 3; *Federal Commissioner of Taxation v Day* (2008) 236 CLR 163 at 175 [21] per Gummow, Hayne, Heydon and Kiefel JJ, 192 [69] per Kirby J.

30 (1949) 78 CLR 47 at 57 per Latham CJ, Rich, Dixon, McTiernan and Webb JJ.

31 (2001) 202 CLR 93 at 100 [11] per Gleeson CJ, Kirby and Hayne JJ, noted in *Federal Commissioner of Taxation v Day* (2008) 236 CLR 163 at 179 [30] per Gummow, Hayne, Heydon and Kiefel JJ.

of actual or expected income?" In *Federal Commissioner of Taxation v Day*[32], the majority said:

> "That no narrow approach should be taken to the question of what is productive of a taxpayer's income is confirmed by cases which acknowledge that account should be taken of the whole of the operations of the business concerned in determining questions of deductibility." (footnote omitted)

56 While s 8-1(1)(a) of the ITAA does not, in terms, refer to the carrying on of a "business", in considering deductibility under that provision, it may be "useful and necessary"[33] to consider whether the taxpayer is carrying on a business. This is because the conduct of a business is one of the ways, according to the "ordinary concepts and usages of mankind", in which a person may earn income. Whether a particular loss or outgoing is deductible will depend on the way in which the taxpayer gains or produces their income. Where a taxpayer earns income from a business which they operate, a loss or outgoing may be incurred "in the course of" gaining or producing their income, when the same loss or outgoing would not be incurred "in the course of" gaining or producing income from service as an employee.

57 Section 8-1(1)(a) is available both to a taxpayer who earns income as an employee and also to a taxpayer who earns income from a business carried on by the taxpayer[34]. If each of the appellants was engaged in the business of exploiting their sporting prowess and associated celebrity, as contended on their behalf, it becomes necessary to ask whether the management fees were incurred in the course of gaining or producing their assessable income from that business. The answer may be different from that which would apply if the appellants were not conducting businesses, but were no more than employees.

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32 (2008) 236 CLR 163 at 180 [33] per Gummow, Hayne, Heydon and Kiefel JJ.

33 *Stone* (2005) 222 CLR 289 at 296 [16] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

34 *Federal Commissioner of Taxation v Green* (1950) 81 CLR 313 at 319 per Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ; [1950] HCA 20.

58 This distinction was recognised in *Maddalena*[35], where Menzies J, with whom the rest of the Court agreed, said:

> "Had the taxpayer claimed as a deduction the expenses of changing from one job to another as an employee electrician his outlay would not have been an allowable deduction. The expenditure would have been incurred in getting, not in doing, work as an employee. It would come at a point too soon to be properly regarded as incurred in gaining assessable income. Nor would the expenditure have been an outgoing in carrying on a business. There is a difference of first importance for present purposes between an electrician who seeks work as an employee and an electrician who seeks contracts to do work as a principal. In the former case the electrician would not have a business; in the latter he would. In the latter, therefore, what he spent to obtain contracts to do electrical work would be properly regarded as an outgoing of his business. There is, however, a clear distinction between the two cases."

The late Professor Parsons made the same point[36]:

> "Whether the applicability of the first limb or the second limb is in question, the inquiry must be concerned with the connection between the expense and the *particular process of derivation of income*." (emphasis added)

59 The existence of a business is a matter of fact and degree. It will depend on a number of indicia, which must be considered in combination and as a whole. No one factor is necessarily determinative[37]. Relevant factors include, but are not limited to, the existence of a profit-making purpose, the scale of activities, the commercial character of the transactions, and whether the activities are systematic and organised, often described as whether the activities are carried out in a business-like manner[38].

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35 (1971) 45 ALJR 426 at 427; 2 ATR 541 at 549-550.

36 *Income Taxation in Australia*, (1985) at 313 [5.33].

37 *Evans v Federal Commissioner of Taxation* (1989) 20 ATR 922 at 939 per Hill J.

38 See, eg, *Martin v Federal Commissioner of Taxation* (1953) 90 CLR 470 at 473-474 per Webb J, 479, 481 per Williams ACJ, Kitto and Taylor JJ; [1953] HCA 100; *Ferguson v Federal Commissioner of Taxation* (1979) 26 ALR 307 at 311 per Bowen CJ and Franki J; *Federal Commissioner of Taxation v Walker* (1985) 16

(Footnote continues on next page)

60 Where it is determined that a taxpayer is conducting a business, the next question will be the "scope" of that business[39]. It may be that the taxpayer pursues two separate fields of endeavour, which are properly described as two separate businesses or a business and some other non-business activity. In *Payne*, the taxpayer conducted a deer farming business and, quite apart from that business, was employed as a pilot by an airline: the two were activities of "unrelated income derivation"[40]. On the other hand, a taxpayer may pursue separate income-producing activities as part of a single business[41]. The question is one of fact, turning upon the degree of connection and interdependence between the activities. One must consider "the whole of the operations of the

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ATR 331 at 334-335 per Ryan J; *Evans v Federal Commissioner of Taxation* (1989) 20 ATR 922 at 939-943 per Hill J.

39 See, eg, *GP International Pipecoaters Pty Ltd v Federal Commissioner of Taxation* (1990) 170 CLR 124 at 138-142 per Brennan, Dawson, Toohey, Gaudron and McHugh JJ.

40 (2001) 202 CLR 93 at 101 [14] per Gleeson CJ, Kirby and Hayne JJ. See also, eg, *Westfield Ltd v Commissioner of Taxation* (1991) 28 FCR 333 at 343 per Hill J; *Lees & Leech Pty Ltd v Commissioner of Taxation* (1997) 73 FCR 136 at 147 per Hill J. See further *Scales v George Thompson & Co Ltd* (1927) 13 TC 83 at 88-89 per Rowlatt J.

41 See, eg, *GP International Pipecoaters Pty Ltd v Federal Commissioner of Taxation* (1990) 170 CLR 124 at 139-140 per Brennan, Dawson, Toohey, Gaudron and McHugh JJ; *Jennings Industries Ltd v Federal Commissioner of Taxation* (1984) 2 FCR 273 at 281 per Bowen CJ, Woodward and Fitzgerald JJ; *Commissioner of Taxation v Marshall & Brougham Pty Ltd* (1987) 17 FCR 541 at 548 per Bowen CJ; *Memorex Pty Ltd v Federal Commissioner of Taxation* (1987) 77 ALR 299 at 310-311 per Davies and Einfeld JJ, 315 per Pincus J. See also *Westpac Banking Corp v Commissioner of Stamp Duties* (2003) 55 ATR 50 at 67-69 [67]-[74] per White J. See further *Gloucester Railway Carriage and Wagon Co v Inland Revenue Commissioners* [1925] AC 469 at 474-475 per Lord Dunedin; *North Central Wagon and Finance Co Ltd v Fifield* [1953] 1 WLR 610 at 613-614 per Jenkins LJ; (1953) 34 TC 59 at 69-70; *Cannon Industries Ltd v Edwards (Inspector of Taxes)* [1966] 1 WLR 580 at 589-590 per Pennycuick J; [1966] 1 All ER 456 at 463-464.

business concerned in determining questions of deductibility"[42]. To determine whether a taxpayer is conducting a business and the scope of that business, as said in a different context, "it is necessary to make both a wide survey and an exact scrutiny of the taxpayer's activities"[43].

61 The appellants relied on the decision of this Court in *Federal Commissioner of Taxation v Stone* ("*Stone*")[44] for the proposition that their activities, including those performed under the playing contracts, constituted the conduct of a business of turning their sporting prowess to account for money. *Stone* concerned a professional athlete who received prizes, grants, appearance fees and cash from sponsorship. The Court concluded that the athlete's activities constituted the conduct of a business and that these various receipts constituted income of the business. The Court recognised that times had changed from the days when "[s]port was the antithesis of work"[45] and when, for a well-known amateur golfer to lend his name for reward to advertise a commercial product, would be conduct unworthy of his amateur status[46]. Gleeson CJ, Gummow, Hayne and Heydon JJ said[47]:

> "'Professional sport' may be thought to be a phenomenon of the second half of the twentieth century. It was during that century that the

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42 *Federal Commissioner of Taxation v Day* (2008) 236 CLR 163 at 180 [33] per Gummow, Hayne, Heydon and Kiefel JJ. See also *W Nevill & Co Ltd v Federal Commissioner of Taxation* (1937) 56 CLR 290 at 301 per Latham CJ; [1937] HCA 9.

43 *Western Gold Mines NL v Commissioner of Taxation (WA)* (1938) 59 CLR 729 at 740 per Dixon and Evatt JJ; [1938] HCA 5, quoted in *Federal Commissioner of Taxation v Montgomery* (1999) 198 CLR 639 at 663 [69] per Gaudron, Gummow, Kirby and Hayne JJ; [1999] HCA 34; *Stone* (2005) 222 CLR 289 at 297 [19] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

44 (2005) 222 CLR 289.

45 Opie and Smith, "The Withering of Individualism: Professional Team Sports and Employment Law", (1992) 15 *University of New South Wales Law Journal* 313 at 314.

46 *Tolley v J S Fry & Sons Ltd* [1931] AC 333.

47 *Stone* (2005) 222 CLR 289 at 295 [12].

> expression came to be associated with those who made their principal pursuit the playing of sport for reward."

Their Honours added that the distinctions between amateur and professional status "were never tidy"[48].

62 Even in previous times, in certain contexts, courts had no difficulty in finding that playing football was work. In 1909, in *Walker v The Crystal Palace Football Club Ltd*[49], Farwell LJ said:

> "It may be sport to the amateur, but to a man who is paid for it and makes his living thereby it is his work."

In a similar vein, in 1971, this Court stated in *Buckley v Tutty*[50]:

> "The fact that football is a sport does not mean that a man paid to play football is not engaged in employment … The position of a professional footballer vis-à-vis his club is that of employer and employee".

63 In this case, the Commissioner did not dispute that the non-playing activities from which each appellant earned income constituted a "business". However, the Commissioner contended that, following *Maddalena* and in the light of the exclusion of "occupation as an employee" from the definition of "business" in s 995-1 of the ITAA, it was necessary to separate the appellants' Australian Rules football and rugby league playing activities, which could be characterised as employment, from their non-playing activities. On this basis, the Commissioner argued that the management fees were not incurred in the course of earning income as employees, as they were incurred to obtain new employment contracts, as in *Maddalena*. Further, it was argued that they were not incurred in the course of earning income from the non-playing businesses, because they were paid to the managers solely for procuring the new employment contracts, not for any purposes of the businesses, as characterised by the Commissioner.

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48 *Stone* (2005) 222 CLR 289 at 296 [14].

49 [1910] 1 KB 87 at 93, a case under the *Workmen's Compensation Act* 1906 (UK).

50 (1971) 125 CLR 353 at 372 per Barwick CJ, McTiernan, Windeyer, Owen and Gibbs JJ.

64 The Commissioner's arguments must be rejected.

65 It is possible to obtain and perform an employment contract as part of, and during the course of, running a business, as is illustrated by *Commissioner of Taxes (Vict) v Phillips*[51]. In that case, Starke J described how the taxpayer carried on business, in partnership with his brother, as amusement managers and directors, and how, as part of that business, the taxpayer was employed as the governing director of a company which operated a theatre. Income under the employment contract was income of the business and, accordingly, agreed periodic compensation payments to the taxpayer for cancellation of the employment contract was income of the business. For that reason, half of the compensation was to be included as part of the taxpayer's assessable income.

66 *Maddalena* does not oblige the approach for which the Commissioner contended. As noted above, the Court there expressly considered that different results as to deductibility could follow if a taxpayer were conducting a business, as opposed to being only an employee. The Court concluded that Mr Maddalena's contract with the rugby league club was a contract of employment and that expenses incurred in procuring that contract were not incurred in the course of earning income under that contract. In reaching that conclusion, it is plain that the Court concluded that Mr Maddalena was not conducting a business. That is not surprising, given the facts of the case: his activities as a rugby league player were part-time; there was no evidence as to any indicia of a business, a part of which was Mr Maddalena's employment; in particular, nothing in the case suggested that Mr Maddalena conducted himself in a business-like way, for instance by retaining a manager; and movement between clubs was more difficult and less structured than it is today. This explains the distinction drawn by Menzies J[52]:

> "[I]t is common knowledge that because a man is a successful professional he can earn fees from advertising and other sources which, of course, form

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51 (1936) 55 CLR 144; [1936] HCA 11. See also Parsons, *Income Taxation in Australia*, (1985) at 141 [2.429]: "Where … the question is whether there is a business of performing services of which a contract is a revenue asset, the fact that the contract is an employment contract does not preclude a conclusion that there is a business."

52 (1971) 45 ALJR 426 at 427; 2 ATR 541 at 549.

> part of his assessable income. Nothing I say in this judgment bears upon expenditure to earn such fees. Here it is the agreement with Newtown that the taxpayer spent money to secure."

On the facts of *Maddalena*, there was nothing to suggest that the gaining of any such advertising and other fees were, together with employment by a club, part of a business.

67 The definition of "business" in s 995-1 of the ITAA, set out above[53], also does not require the result contended for by the Commissioner. That definition does not apply in respect of s 8-1(1)(a), where the statute calls, not for the identification of a "business" as defined, but rather for the identification of the means of gaining or producing "income"[54]. Moreover, the definition does not state that a contract of employment cannot form part of a business. What the definition provides is that a person will not be taken to be conducting a business *merely because* the person earns income under a contract of employment. Something more than that would be required for there to be a business.

68 The facts here are quite different from those in *Maddalena*. As noted above, it is not disputed by the Commissioner that the appellants' non-playing activities constitute businesses. Having regard to the indicia of a business described above[55], it is plain that they do. It would be artificial on the facts here to separate the stream of income from those activities, from the stream of income from the appellants' playing contracts with the clubs, as suggested by the Commissioner. The appellants' promotional activities, exploiting their celebrity, were inextricably linked to their respective employments of playing Australian Rules football and rugby league.

69 Looking at their activities as a whole, the appellants were engaged in the business of commercially exploiting their sporting prowess and associated celebrity for a limited period. Those businesses were well established before the

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53 At [24].

54 See also Parsons, *Income Taxation in Australia*, (1985) at 131 [2.393].

55 At [59].

management fees were incurred[56]. Neither of the appellants was exclusively or simply an employee of his club. They each exploited their sporting prowess and associated celebrity with different clubs over the years during which they played in the AFL Competition and the NRL Competition, respectively. There was a synergy between playing activities and non-playing activities, each of which was an income-producing activity.

70 The conduct of such a business by each of the appellants was anticipated in the framework provided by the playing contracts and the various other related documents described above[57]. That framework contained numerous provisions governing the appellants' rights to enter contracts with third parties in order to exploit their celebrity.

71 Furthermore, each of the appellants conducted the whole of his business in a commercial and business-like way, in particular by retaining a manager. The appellants' managers had duties which included, but went well beyond, the negotiation of playing contracts. The obligations imposed by the management agreements underscore the association between the appellants' playing activities and promotional activities.

72 Even assuming that the management fees were paid solely for the service of negotiating the playing contracts, that service and the management fees were productive of both playing income and non-playing income, each flowing from the business of each appellant of exploiting his sporting prowess and associated celebrity.

73 There existed here sufficient connection between the outgoing, the management fees, and the gaining or producing of assessable income from the business of exploiting sporting prowess and associated celebrity, for the management fees to be deductible under s 8-1(1)(a) of the ITAA. They were incurred in the course of gaining or producing income from the appellants' respective businesses.

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56 Considerations of the kind relevant to a loss or outgoing incurred near the commencement of a business therefore do not arise: cf *Steele v Deputy Commissioner of Taxation* (1999) 197 CLR 459; [1999] HCA 7.

57 At [36]-[52].

Deductibility under s 8-1(1)(b) of the ITAA

74 The broad application of s 8-1(1)(a) of the ITAA, including its application to income derived from a business, means that, on the facts here, s 8-1(1)(b) adds little.

75 In *Ronpibon Tin*, the overlap between the limbs of the predecessor section to s 8-1(1) of the ITAA[58], which often renders the second limb otiose, was noted[59]. It was held that a loss or outgoing will be "necessarily incurred in carrying on" a business if it is "clearly appropriate" or "adapted" for the carrying on of the business[60]. Restating the test another way, the loss or outgoing will be "necessarily incurred" if it is "reasonably capable of being seen as desirable or appropriate from the point of view of the pursuit of the business ends of the business"[61].

76 As noted above, the Commissioner submitted that s 8-1(1)(b) had no application, because the deductions for the management fees were "employee deductions". However, as already explained, the appellants were properly to be considered as conducting businesses of turning their sporting prowess and associated celebrity to account for money. For the reasons already explained, the businesses included repeatedly performing the services of playing for their respective clubs under the playing contracts. Section 8-1(1)(b) is capable of operating in these circumstances. No inhibition to that conclusion arises from the definition of "business" in s 995-1, set out above[62], insofar as "occupation as an employee" is excluded from that definition. This is because, as already explained, that exclusion requires only that, for there to be a business, there must be something more than occupation as an employee. Here, there was.

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

59 (1949) 78 CLR 47 at 56 per Latham CJ, Rich, Dixon, McTiernan and Webb JJ.

60 (1949) 78 CLR 47 at 55-56 per Latham CJ, Rich, Dixon, McTiernan and Webb JJ.

61 *Magna Alloys & Research Pty Ltd v Federal Commissioner of Taxation* (1980) 33 ALR 213 at 235 per Deane and Fisher JJ. See further *Federal Commissioner of Taxation v Snowden & Willson Pty Ltd* (1958) 99 CLR 431 at 437 per Dixon CJ, 443-444 per Fullagar J; [1958] HCA 23.

62 At [24].

77 In the light of that conclusion, it is plain that the management fees were appropriate and adapted for the carrying on of the appellants' businesses. They were reasonably capable of being seen as desirable or appropriate, having regard to the ends of those businesses. They were necessarily incurred in carrying on those businesses and were deductible under s 8-1(1)(b) of the ITAA.

Were the management fees capital expenses under s 8-1(2)(a) of the ITAA?

78 In the light of these conclusions, it is necessary to consider whether s 8-1(2)(a) of the ITAA, in respect of outgoings of capital or of a capital nature, is engaged. As already noted, on this point, the Full Court did not doubt the conclusion of the primary judge that that provision was not engaged.

79 The starting point is the frequently repeated statement of Dixon J in *Sun Newspapers*[63]:

> "There are, I think, three matters to be considered, (*a*) the character of the advantage sought, and in this its lasting qualities may play a part, (*b*) the manner in which it is to be used, relied upon or enjoyed, and in this and under the former head recurrence may play its part, and (*c*) the means adopted to obtain it; that is, by providing a periodical reward or outlay to cover its use or enjoyment for periods commensurate with the payment or by making a final provision or payment so as to secure future use or enjoyment."

80 The Commissioner contended that, in each case, the playing contract was a structural asset and that, as the management fee was paid to procure that playing contract, it was an outgoing of a capital nature.

81 That argument of the Commissioner must be rejected, even assuming that the management fees were paid solely for the service of negotiating the playing contracts.

82 As to the character of the advantage sought, namely the playing contracts, those contracts were revenue assets. They were not lasting assets, but were of a relatively short-term nature and subject to renewal. Each of the appellants

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63 (1938) 61 CLR 337 at 363 per Dixon J.

entered into a number of playing contracts, with different clubs, in the course of his business.

83 As to the other matters mentioned by Dixon J in *Sun Newspapers*, the management fees were a recurrent expenditure, in respect of the playing contracts, which were revenue assets. The management fees did not secure a lasting asset. They were only incurred upon successful negotiation of the playing contracts. They formed part of the remuneration to the respective managers under the management agreements. Those agreements obliged the managers to provide services in several related respects, all of which were concerned with exploiting the appellants' sporting prowess and associated celebrity on an ongoing basis.

84 For those reasons, the management fees were not an outgoing of capital or of a capital nature and s 8-1(2)(a) of the ITAA did not apply.

Conclusion

85 The management fees paid by each of the appellants were deductible under both s 8-1(1)(a) and (b) of the ITAA, and they were revenue expenses which were not covered by s 8-1(2)(a). The orders of the primary judge should be restored.

Orders

86 The orders should be to allow the appeals to this Court, set aside the orders in paragraphs 1 and 2 of the Full Court's orders made on 22 August 2008 in each appeal to that Court and, in their place, order that the appeals to that Court be dismissed. In accordance with submissions made by the parties, there should be no order as to the costs of the appeals to this Court, and the orders of the Full Court that there be no order as to the costs of each appeal to that Court should not be disturbed.