HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HEYDON, KIEFEL AND BELL JJ

COMMISSIONER OF TAXATION APPELLANT

AND

SYMONE ANSTIS RESPONDENT

Commissioner of Taxation v Anstis [2010] HCA 40
11 November 2010
M64/2010

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

S J Gageler SC, Solicitor-General of the Commonwealth with S H Steward SC and L A Hespe for the appellant (instructed by Gadens Lawyers)

M L Anstis for the respondent (instructed by Michael Anstis)

CATCHWORDS

Commissioner of Taxation v Anstis

Income tax – Assessable income – Respondent received periodic payments of youth allowance under *Social Security Act* 1991 (Cth) – Whether receipts income according to ordinary concepts.

Income tax – Allowable deductions – Respondent incurred certain expenses in undertaking university study – Respondent required to undertake full-time study to establish and retain entitlement to youth allowance – Whether expenses incurred in gaining or producing assessable income – Whether expenses of a private nature.

Words and phrases – "incurred in gaining or producing", "ordinary income", "private or domestic nature".

Income Tax Assessment Act 1997 (Cth), ss 6-5(1), 8-1, 51-1, 51-10, 51-35.

1 FRENCH CJ, GUMMOW, KIEFEL AND BELL JJ. The central issue in this appeal is whether certain expenses incurred by a student undertaking university studies may be deducted under s 8-1 of the *Income Tax Assessment Act* 1997 (Cth) ("the 1997 Act") from the assessable income of that student as a recipient of a "youth allowance" payment. Provision for that payment is made by Pt 2.11 (ss 540-567F) of the *Social Security Act* 1991 ("the Social Security Act")[1].

2 During the relevant period, the respondent (Ms Anstis) was enrolled as a full-time student undertaking a teaching degree at the Australian Catholic University. In her tax return for the year ended 30 June 2006, the respondent returned $14,946 as wages earned as a part-time sales assistant, and $3,622 received by way of youth allowance payments. She claimed as an allowable deduction an amount of $920 for "expenses of self-education", which was reduced from $1,170 by operation of s 82A(1) of the *Income Tax Assessment Act* 1936 (Cth) ("the 1936 Act"). The self-education expenses comprised the depreciation in value of a computer ($692), textbooks and stationery ($264), a "student administration fee" ($80), supplies for children during the respondent's teaching rounds ($75) and travel expenses other than to university ($59).

3 The Commissioner of Taxation ("the Commissioner") maintains that such expenses are not deductible by the recipient of a youth allowance under s 8-1 of the 1997 Act. The Commissioner disallowed the deduction of $920, and later disallowed an objection by the respondent against the amended assessment issued to her. The respondent unsuccessfully sought review of the Commissioner's decision in the Administrative Appeals Tribunal. However, her application to the Federal Court (Ryan J) to "appeal" against the decision of the Tribunal was successful[2]. Thereafter, the Full Court (Finn, Sundberg and Edmonds JJ) dismissed an appeal by the Commissioner against the decision of Ryan J[3].

4 The resolution of the Commissioner's appeal to this Court turns upon three questions. The first is whether youth allowance is assessable income under the 1997 Act. The second is whether the respondent's self-education expenses were

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1 Provisions of the Social Security Act applicable in the present appeal have been amended since the relevant year of income. References in this judgment are to the provisions of the Act as they stood at 30 June 2006.

2 *Anstis v Federal Commissioner of Taxation* (2009) 72 ATR 940.

3 *Federal Commissioner of Taxation v Anstis* (2009) 180 FCR 288.

incurred "in gaining or producing" her assessable income. And the third is whether, if the expenses were so incurred, they were nonetheless to be disallowed as being of a "private" nature. For the following reasons, the income was assessable, the expenses claimed were deductible and not of a "private" nature, and the appeal should be dismissed with costs.

The social security legislation

5 Sections 540-540C of the Social Security Act dealt with qualification for payments of youth allowance. The parties do not dispute that the respondent was qualified to receive youth allowance. In the respondent's circumstances, the relevant qualification criteria were contained in s 540 and required her, throughout the relevant period, to: (i) satisfy "the activity test" in s 541; (ii) be of "youth allowance age" as defined in ss 543-543B; and (iii) be an "Australian resident" as defined in s 7(2). It appears that the respondent, presumably because of her status as a full-time student, was not required to enter into a "Youth Allowance Activity Agreement" under s 544A and so the remaining requirement, in s 540(c), may be put to one side.

6 Section 541(1) provided that a person could satisfy "the activity test" in one of four ways. In the present case, the respondent could satisfy the activity test if she satisfied the Secretary to the relevant Department that she was "undertaking full-time study". Section 541B(1) relevantly provided as follows:

> "For the purposes of this Act, a person is undertaking full-time study if:
>
> (a) the person:
>
> (i) is enrolled in a course of education at an educational institution;
>
> … and
>
> (b) the person:
>
> (i) is undertaking in the particular study period (such as, for example, a semester) for which he or she is enrolled for the course; or
>
> (ii) intends to undertake in the next study period for which he or she intends to enrol for the course;
>
> ...

(iii) … at least three-quarters of the normal amount of full-time study in respect of the course for that period …

… and

(c) the course in question is an approved course of education or study (see subsection (5)); and

(d) in the Secretary's opinion, the person is making satisfactory progress towards completing the course."

7 In forming an opinion under par (d) of s 541B(1), the Secretary was to have regard to the guidelines set by the Minister by legislative instrument (ss 541B(3A)-(3B)). Those guidelines provided that, in the respondent's case, satisfactory progress generally meant completion of the course within the standard minimum length of the course plus an additional period for completion of one uncompleted subject or unit that was part of the course[4].

8 Part 3, Div 2 of the *Social Security (Administration) Act* 1999 (Cth) ("the Administration Act") deals with the determination by the Secretary of claims made under s 11 of that Act for a "social security payment". Section 3(2) of the Administration Act provides that, unless the contrary intention appears, expressions used in the Social Security Act bear the same meaning when used in the Administration Act. Thus a "social security payment", as defined in s 23(1) of the Social Security Act, includes a "social security benefit", which in turn includes youth allowance.

9 Section 37(1) of the Administration Act provides that the Secretary must determine that a claim be granted if satisfied that the claimant is qualified for the payment and the payment is payable. Youth allowance becomes payable to a qualified person on his or her "start day" (s 41(1)). This, if the person is qualified for the payment on the day on which they make a claim for the payment, is the day of the claim (Sched 2, Pt 2, cl 3(1)). It follows that youth allowance became payable to the respondent once she was qualified under Pt 2.11 of the Social Security Act and had made a claim for the payment.

10 Section 43(1) of the Administration Act stipulates that a "social security periodic payment" is to be paid in arrears, and by instalments relating to such periods, not exceeding 14 days, as the Secretary determines. Those periodic

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4 Youth Allowance (Satisfactory Study Progress Guidelines) Determination 1998 (Cth), s 2.1.

payments are defined to include a social security benefit such as youth allowance (Sched 1, cl 1(1)). The instalments are to be paid at such times as the Secretary determines (s 43(2)).

11 The rate of youth allowance payable to the respondent was determined in accordance with a formula set out in s 1067G of the Social Security Act (s 556(1)). In essence, s 1067G provides for a basic rate of allowance (Module B) which may be subject to certain additions or reductions, depending upon the means and circumstances of the recipient and, in some cases, the recipient's parents or partner. The additions include amounts supplementary to the basic rate such as a pharmaceutical allowance (Module C) or remote area allowance (Module K). Further, an amount of "rent assistance" may be added to the person's basic rate under Pt 3.7 of the Social Security Act "to help cover the cost of rent" (s 1070A).

12 The rate of youth allowance payable was liable to reduction for a period if the respondent committed an "activity test breach" by failing to satisfy the activity test without reasonable excuse (ss 550A(a) and 556(2)). If she committed three or more breaches within a period of two years, the payment would not have been payable to the respondent for a period (ss 550 and 550B). It follows that the respondent would have been liable to a period of reduction or non-payment of youth allowance if she was no longer undertaking full-time study without reasonable excuse. Section 80(1) of the Administration Act also provided that, if satisfied that a person is not or was not qualified for their payment or that their payment is not or was not payable, the Secretary "is to determine that the payment is to be cancelled or suspended". Thus it appears that during the relevant time it was also possible for, if not required of, the Secretary to cancel or suspend the respondent's youth allowance payment if she was not qualified for it due to her ceasing to undertake full-time study or make satisfactory progress in her course[5]. In any event, a sufficient failure, or number of failures, to satisfy the activity test would have resulted in either a period of reduction or non-payment under the provisions outlined above, or a cancellation or suspension of payment under s 80(1).

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5 Section 80(3A) of the Administration Act now provides that youth allowance cannot be cancelled under s 80(1) if the person is qualified for the payment but is subject to a "compliance penalty period". This is defined in s 23(1) of the current version of the Social Security Act as including non-payment by reason of s 550B or s 551. Sections 550B and 551 provide that a failure or failures to satisfy the activity test results in non-payment for a specified period; no provision is made for reducing the rate of payment.

Assessable income under the 1997 Act

13 It is desirable first to refer to the relevant provisions of the 1997 Act. Section 4-15(1) provides that taxable income for an income year is the result of subtracting a taxpayer's deductions from assessable income. The taxpayer's assessable income includes "income according to ordinary concepts", which is called "ordinary income" (s 6-5(1)). As has been said[6], that is an evident reference to the statement by Jordan CJ that the forms of receipt falling within the term "income", and the principles 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"[7]. The reference to "ordinary parlance" and to the "ordinary concepts and usages of mankind" are "no mere matters of ritual incantation; they identify the essential nature of the inquiry"[8].

14 Amounts of ordinary income may be made exempt from income tax by a provision of the 1997 Act or another Commonwealth law (s 6-20(1)). Section 51-1 of the 1997 Act states that "[t]he amounts of ordinary income and statutory income covered by the following tables are exempt from income tax" and notes the existence of exceptions to some of those exemptions. Item 2.1A in the table in s 51-10 provides that, for a full-time student, a "scholarship, bursary, educational allowance or educational assistance" is exempt, subject to s 51-35. That section carves out from the exemption, relevantly in par (b), a "Commonwealth education or training payment" made to a full-time student, which is defined to include youth allowance (s 52-145(1)(b)(iv)). However, the total supplementary amount of such a payment, including, for example, rent assistance and the pharmaceutical and remote area allowances referred to above, are made exempt from income tax (s 52-140).

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6 *Federal Commissioner of Taxation v Stone* (2005) 222 CLR 289 at 294 [8], 310 [73]; [2005] HCA 21; *Spriggs v Federal Commissioner of Taxation* (2009) 239 CLR 1 at 17 [54]; [2009] HCA 22.

7 *Scott v Federal Commissioner of Taxation* (1935) 35 SR (NSW) 215 at 219.

8 *Federal Commissioner of Taxation v Montgomery* (1999) 198 CLR 639 at 661 [64]; [1999] HCA 34.

Is the respondent's youth allowance assessable income?

15 Mr Anstis, a solicitor, is the father of the respondent and appeared on her behalf on the appeal. The respondent's written submissions raised the threshold question whether in any event her youth allowance was assessable income. That issue appears not to have been the subject of dispute before the Tribunal, the primary judge or the Full Court. No notice of contention was filed by the respondent and no leave to cross-appeal sought so as to rely upon that ground. However the Commonwealth Solicitor-General, who appeared for the Commissioner, took no objection to the issue being raised in this Court. Indeed he relied on the basis on which youth allowance is assessable income as supporting the submission that the relevant outgoings were not deductible.

16 The Commissioner contends that a payment of youth allowance is income according to ordinary concepts as a "gain which is one of a number derived periodically", there being no other element of form pointing to a different conclusion[9].

17 In *Federal Commissioner of Taxation v Myer Emporium Ltd*[10], five members of this Court explained:

> "The periodicity, regularity and recurrence of a receipt has been considered to be a hallmark of its character as income in accordance with the ordinary concepts and usages of mankind."

18 Some years earlier in *Federal Commissioner of Taxation v Dixon*[11], this Court considered whether payments received in the year ended 30 June 1943 from an employer by a former employee, who had enlisted and was serving in the defence forces, to compensate him for the difference between his military pay and the civilian wage he would otherwise have received, were income for the purposes of the 1936 Act. The employee made no undertaking that he would return to the employ of his employer, and no undertaking was given that he would be re-employed upon completion of his war service. Dixon CJ and Williams J took several factors into account in deciding that the payment was income according to ordinary principles under s 25 of 1936 Act[12]. Their Honours

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9 Parsons, *Income Taxation in Australia* (1985) at 70 [2.172], 73 [2.179].

10 (1987) 163 CLR 199 at 215; [1987] HCA 18.

11 (1952) 86 CLR 540; [1952] HCA 65.

12 See Barrett, *Principles of Income Taxation*, 2nd ed (1981) at 32-33 [5.07]-[5.08].

relied on the expression "allowances or gratuities received in the capacity of an employee or in relation to any services rendered" in the definition of "income from personal exertion" in s 6 of the 1936 Act[13]. They held that the payments were really incidental, regardless of their source, to his employment or service as a solider[14]. After considering the total situation of the taxpayer, they concluded[15]:

> "Because the £104 was an expected periodical payment arising out of circumstances which attended the war service undertaken by the taxpayer and because it formed part of the receipts upon which he depended for the regular expenditure upon himself and his dependants and was paid to him for that purpose, it appears to us to have the character of income."

The other member of the majority, Fullagar J, referred to periodicity as having had some importance in previous cases[16], but did not regard it as decisive and held the payments were in effect in substitution for wages and thus income under s 25[17].

19 There is a difficulty in making good absolute propositions in this field. In *Federal Commissioner of Taxation v Montgomery*[18], Gaudron, Gummow, Kirby and Hayne JJ recognised that:

> "income 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".

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13 (1952) 86 CLR 540 at 556.

14 (1952) 86 CLR 540 at 556-557.

15 (1952) 86 CLR 540 at 557. McTiernan and Webb JJ dissented.

16 *Seymour v Reed* [1927] AC 554 at 570; *Atkinson v Federal Commissioner of Taxation* (1951) 84 CLR 298 at 308; [1951] HCA 64.

17 (1952) 86 CLR 540 at 567-569.

18 (1999) 198 CLR 639 at 663 [68].

20 Thus, by itself, periodicity of receipts will not necessarily be sufficient to give to those receipts the character of income[19]. The periodical nature of a receipt, as was recognised in *Dixon*[20], enables the recipient to rely upon such amounts for regular expenditure[21]. However, periodicity alone was not the basis on which Dixon CJ and Williams J held that the payments to the taxpayer in *Dixon* were in the nature of income. The character of a receipt in the hands of the taxpayer is determined having regard to the totality of the circumstances. That a receipt is periodical is a characteristic tending to show that it is received as income.

21 In *Keily v Commissioner of Taxation*[22], White J derived assistance from the reasoning of Dixon CJ and Williams J in *Dixon*, when deciding whether an aged pension payable under a previous version of the Social Security Act was income. His Honour referred to the passage in *Dixon* set out above and said[23]:

> "In the case of an aged person's pension, the generally accepted characteristics of income (recurrence, regularity and periodicity) are all present. In addition, the pensioner has a continuing expectation of receiving periodic payment, an expectation arising out of established government policy with respect to the support and welfare of aged citizens. Pension payments form part of the receipts upon which a pensioner depends for support. And a pension is paid to the pensioner for that purpose. A pensioner, therefore, satisfies the criteria or characteristics of income discussed in *Dixon's* case."

A periodic pension or allowance, paid by way of compensation for loss of income that would otherwise have been received, has also been held to be income according to ordinary concepts[24]. An allowance paid regularly to a student

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19 Cf *Federal Commissioner of Taxation v Stone* (2005) 222 CLR 289 at 308 [65]-[66].

20 (1952) 86 CLR 540 at 557.

21 Cf Parsons, *Income Taxation in Australia* (1985) at 72-73 [2.177]-[2.178].

22 (1983) 32 SASR 494 at 495.

23 (1983) 32 SASR 494 at 495-496.

24 *Melkman's Executor v Commissioner of Taxation* (1987) 15 FCR 311 at 312-313; affirmed on appeal: *Melkman v Commissioner of Taxation* (1988) 20 FCR 331 at 336.

teacher by way of a bond, a condition of which required him to repay all or part of the bond if he failed to complete a teachers' training course and be a full-time teacher for three years, was held in New Zealand not to be a gratuity but income according to ordinary concepts[25].

22 The Solicitor-General emphasised in his submissions that youth allowance is a periodic "living allowance", enabling the recipient to rely upon the payment as regular expenditure for the recipient and any dependants. The provisions of the Social Security Act do not stipulate or limit the manner in which payments of youth allowance may be expended. Recipients are not required to account to the Secretary for the manner in which payments are in fact expended. But as is made clear in *Dixon*, actual reliance by the taxpayer is not required to give a receipt the character of income.

23 In the present case, the respondent was paid periodically in accordance with s 43 of the Administration Act. It is apparent from the terms of Pt 2.11 of the Social Security Act that the legislative purpose of youth allowance is the provision of income support to young Australians who are unemployed and looking for work, who have medical conditions impeding their ability to study or work, or who are undertaking apprenticeships or full-time study[26]. Insofar as that policy reflects the character of the expenditure by the Commonwealth as payer, it is not determinative of the character of the receipt in the hands of the taxpayer as recipient[27], but it nonetheless explains why the respondent received the payments. In the present case, the reasoning of White J in *Keily* applies with some force. Youth allowance payments enable recipients to rely upon them for regular expenditure, and recipients can expect to receive those payments but only so long as they satisfy the various requirements of the social security legislation. It follows that such amounts are income according to ordinary concepts.

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25 *Reid v Commissioner of Inland Revenue* (1983) 6 TRNZ 494 at 499-501; 6 NZTC 61,624 at 61,629-61,630. See also *Commissioner of Taxation v Ranson* (1989) 25 FCR 57 at 64-65.

26 See also the second reading speech for the Social Security Legislation Amendment (Youth Allowance) Bill 1997 (Cth): Commonwealth, House of Representatives, *Parliamentary Debates* (Hansard), 2 October 1997 at 9121.

27 *Federal Commissioner of Taxation v McNeil* (2007) 229 CLR 656 at 663 [20]; [2007] HCA 5.

24 Such a characterisation is consistent with the assumption[28] made by the Commonwealth Parliament in s 51-1 of the 1997 Act that, but for their exemption in Item 2.1A of s 51-10, payments of "educational allowances" or "educational assistance" are amounts of income according to ordinary concepts. At least since 1951, when the exemption in s 23(z) was inserted in the 1936 Act[29], amounts in the nature of youth allowance were considered to be income as that term is understood in ordinary usage[30]. And since 1985, when par (v) of s 23(z) was inserted adding a further exception to the exemption[31], amounts received by students under tertiary education assistance schemes have not enjoyed the benefit of that exemption.

Were the deductions incurred in gaining or producing the respondent's assessable income?

25 The essential provision concerning deductions is s 8-1 of the 1997 Act, which provides in relevant part as follows:

> "(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;
>
> …
>
> (2) However, you cannot deduct a loss or outgoing under this section to the extent that:
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> …

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28 See *Deputy Federal Commissioner of Taxes (SA) v Elder's Trustee and Executor Co Ltd* (1936) 57 CLR 610 at 625-626; [1936] HCA 64; *Grain Elevators Board (Vict) v Dunmunkle Corporation* (1946) 73 CLR 70 at 85-86; [1946] HCA 13.

29 *Income Tax and Social Services Contribution Assessment Act* 1951 (Cth), s 5(c).

30 See Commonwealth, Committee on Taxation, *Report on Income Tax – Scholarships and Similar Payments for Educational Purposes (Reference No. 11)*, 10 October 1951 at 3.

31 *Taxation Laws Amendment Act (No 3)* 1985 (Cth), s 21(c).

(b) it is a loss or outgoing of a private or domestic nature".

26 The deduction for depreciation of the computer properly fell to be determined not under s 8-1 but under s 40-25 of the 1997 Act. The Commissioner did not argue before the Tribunal or the primary judge that it was the different test in s 40-25 that applied. The Full Court refused to entertain the Commissioner's argument regarding s 40-25[32] and the matter was not raised in this Court.

27 As for the remainder of the expenses, the test to be applied to deductions under s 8-1(1)(a) is not materially different from its predecessors, and regard may be had to the decided cases concerning the latter[33]. The preposition "in" found in the phrase "in gaining or producing" has long been understood as meaning "in the course of" gaining or producing[34]. In *Ronpibon Tin NL v Federal Commissioner of Taxation*[35], when dealing with s 51(1) of the 1936 Act, this Court held that for a loss or outgoing to be deductible 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".

28 The circumstances giving rise to the present appeal are, as Ryan J noted[36], quite different from the authorities[37] dealing with "self-education expenses". In those cases the taxpayer carried on a business, or was already in employment, to which the studies related. The prospect of the future employment of the

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32 (2009) 180 FCR 288 at 294-295 [24]-[25].

33 *Spriggs v Federal Commissioner of Taxation* (2009) 239 CLR 1 at 17 [53].

34 *Amalgamated Zinc (De Bavay's) Ltd v Federal Commissioner of Taxation* (1935) 54 CLR 295 at 303, 309; [1935] HCA 81; *Spriggs v Federal Commissioner of Taxation* (2009) 239 CLR 1 at 18 [55].

35 (1949) 78 CLR 47 at 57; [1949] HCA 15.

36 (2009) 72 ATR 940 at 953 [59], 955 [63].

37 *Federal Commissioner of Taxation v Finn* (1961) 106 CLR 60; [1961] HCA 61; *Federal Commissioner of Taxation v Hatchett* (1971) 125 CLR 494; [1971] HCA 47; *Federal Commissioner of Taxation v Smith* (1978) 19 ALR 493; *Federal Commissioner of Taxation v Lacelles-Smith* (1978) 8 ATR 524.

respondent as a teacher was not the basis on which her education expenses have been held to be deductible. Rather, the question is whether the occasion of her expenses was productive of her "passive income"[38], in the form of youth allowance, and assessable on the basis of the reasoning in *Dixon* and *Keily*.

29 It may be said that the income was assessable not by reason of any personal exertion or exploitation of property on the part of the respondent. However, contrary to the submission by the Commissioner, that does not inexorably lead to a conclusion that there may be no deductions of any kind allowed under s 8-1 of the 1997 Act. The notion of "gaining or producing" income within the meaning of s 8-1(1)(a) is wider than those activities which may be said to *earn* income. According to its ordinary meaning, to "gain" means not only to "earn or obtain (a living)" but to "obtain, secure or acquire" or to "receive"[39]. Similarly, the ordinary meaning of the verb "produce" is to "bring (a thing) into existence"[40] and is not limited to bringing something into existence by mental or physical labour.

30 Essential to the inquiry of deductibility is the identification of that which is productive of the assessable income[41]. To put it another way, one must ask how the assessable income was (or was expected to be) gained or produced. Contrary to what the Full Court said, the respondent was not "paid to undertake [study]"[42] and that was not required to be so for the deductions to be allowable. Rather, as Ryan J said[43], the assessable youth allowance income received by the respondent was gained or produced by her entitlement to that payment consequent on the determination by the Secretary that she qualified for the payment. That statutory right to payment[44] would be retained by her, without

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38 See Parsons, *Income Taxation in Australia* (1985) at 469 [8.56].

39 *New Shorter Oxford English Dictionary*, 4th ed (1993).

40 *New Shorter Oxford English Dictionary*, 4th ed (1993).

41 See *Federal Commissioner of Taxation v Day* (2008) 236 CLR 163 at 179 [31]; [2008] HCA 53.

42 (2009) 180 FCR 288 at 297 [40].

43 (2009) 72 ATR 940 at 952 [54]-[55].

44 See *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 31 [38], 65-66 [140], 155 [452]; [2009] HCA 23.

reduction, non-payment, suspension or cancellation, so long as she maintained her qualification for the payment by satisfying the activity test by undertaking full-time study so defined.

31 The reason or motive of the respondent for incurring those education expenses, which could be characterised, for example, as obtaining a qualification to undertake future employment as a teacher, is not determinative of the question whether they were incurred in gaining or producing income[45]. The occasion of the outgoings was to be found in what the respondent did to gain or produce, by establishing and retaining her entitlement to, the receipts provided by the terms of the social security legislation.

Were the deductions of a private nature?

32 Against the prospect that the outgoings were deductible under s 8-1(1)(a), the Commissioner relied on an alternative ground of appeal that the outgoings were nonetheless of a "private" nature and so were not deductible by reason of s 8-1(2)(b). This ground was not raised in the Federal Court but, in the absence of any further evidence the taxpayer might have led affecting this question of law, the grant of special leave in this Court encompassed that ground.

33 In *John v Federal Commissioner of Taxation*[46], Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ accepted that on then existing authority a loss or outgoing could be incurred in gaining or producing assessable income and yet not be deductible by reason of its domestic nature. Their Honours went on to consider losses or outgoings of a private nature and said[47]:

> "In *Federal Commissioner of Taxation v Hatchett*[48] Menzies J commented that '[i]t must be a rare case where an outgoing incurred in gaining assessable income is also an outgoing of a private nature'. His Honour's statement was accepted by Wilson J, with whom Mason J agreed, in

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45 *Federal Commissioner of Taxation v Day* (2008) 236 CLR 163 at 183-184 [39]; cf *Fletcher v Federal Commissioner of Taxation* (1991) 173 CLR 1 at 17; [1991] HCA 42.

46 (1989) 166 CLR 417 at 427; [1989] HCA 5.

47 (1989) 166 CLR 417 at 431.

48 (1971) 125 CLR 494 at 498.

> [*Federal Commissioner of Taxation v*] *Forsyth*[49]. This view bears a close similarity to the view expressed in *Ronpibon Tin*[50] in relation to a loss or outgoing incurred in gaining or producing exempt income. However, in the case of a loss or outgoing incurred in gaining or producing exempt income, it is that characteristic which takes it outside the description of a loss or outgoing incurred in gaining or producing assessable income, whilst the view expressed in *Hatchett*[51] is that the fact that an outgoing falls within the description of a loss or outgoing incurred in gaining or producing assessable income serves (other than in a rare case) to stamp the loss or outgoing as one not bearing the character of a loss or outgoing of a private nature.
>
> We do not see any necessary antipathy between a loss or outgoing incurred in gaining or producing assessable income and a loss or outgoing of a private nature."

Their Honours then applied the test of "essential character" as adopted in *Handley v Federal Commissioner of Taxation*[52] and *Forsyth*.

34 The question presented for resolution on this appeal is unusual because the outgoings incurred in study undertaken by the respondent were not deductible by reason of that study bearing some relation to an existing business or existing employment on her part. Those outgoings were deductible by reason of their being incurred in the course of her retention of a statutory right to payment. The authorities of *Federal Commissioner of Taxation v Hatchett*[53] and *Commissioner of Taxation v Finn*[54] are thus of limited assistance in the instant case; those taxpayers were in employment, and the outcome for each decision in this Court turned on the question of whether the outgoings were incurred in gaining or producing income.

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49 (1981) 148 CLR 203 at 216; [1981] HCA 15.

50 (1949) 78 CLR 47.

51 (1971) 125 CLR 494.

52 (1981) 148 CLR 182; [1981] HCA 16.

53 (1971) 125 CLR 494.

54 (1961) 106 CLR 60.

35 The terms "private" and "domestic" in s 8-1(2)(b) would seem difficult in their application to an entity other than a natural person. It is also difficult to apply them where, unlike the situation in *Commissioner of Taxation v Cooper*[55], there is no available dichotomy between an essentially "private" expense and an essentially "working or business" expense.

36 In *Cooper*, Lockhart J and Hill J held that expenditure by a footballer, in accordance with an instruction by his coach, on amounts of food and drink he consumed in addition to his normal meals were not incurred in gaining or producing income, and were in any event of a private nature[56]. Hill J explained that[57]:

> "the essential character of expenditure on food and drink will ordinarily be private rather than having the character of a working or business expense. However, the occasion of the outgoing may operate to give to expenditure on food and drink the essential character of a working expense in cases such as those illustrated of work-related entertainment or expenditure incurred while away from home."

37 Hill J, in considering the positive limb of s 51(1) of the 1936 Act, referred in *Cooper* to the English Court of Appeal decision in *Norman v Golder (Inspector of Taxes)*[58]. There, Lord Greene MR said that medical expenses, food and clothes were "laid out in part for the advantage and benefit of the taxpayer as a living human being" and so were not "wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation" under the then applicable rule concerning deductions. The Master of the Rolls held further that medical expenses could not be deducted as they were expenses for a domestic or private purpose in contrast to being for the purpose of a trade or profession. However, that may be difficult to reconcile with his Lordship's earlier statement that medical expenses were laid out *in part* for the benefit of a taxpayer as a human being, which implies mixed purposes of expenditure. There is no such dichotomy of purposes under the 1997 Act, as is particularly apparent in this case, and *Norman v Golder* must be read accordingly.

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55 (1991) 29 FCR 177.

56 (1991) 29 FCR 177 at 185, 201-202.

57 (1991) 29 FCR 177 at 201.

58 [1945] 1 All ER 352 at 354.

38 The Commissioner contended that the respondent's expenditure was private in nature as it was an attempt by her to better herself as an individual; it was an investment in "human capital". However, in *Finn*, Windeyer J observed[59]:

> "Outgoings incurred for the genuine purpose of acquiring or maintaining knowledge and skill in a vocation do not become an outgoing 'of a private nature' simply because the taxpayer got pleasure and satisfaction in increasing his knowledge and attainments."

It follows that the respondent's desire to obtain a degree, whether to enable her to become a teacher or for some other reason, cannot deny the circumstance that expenses occasioned by her enrolment, full-time study and satisfactory progress in that degree were incurred by her as a recipient of youth allowance. The outgoings did not lose their connection with the "position" she held as a recipient of youth allowance simply because she might have been studying for reasons other than enjoying an entitlement to youth allowance. As Hill J recognised in *Cooper*[60], in relation to the consumption of food or drink, the concept of a particular type of expenditure being absolutely or always "private" cannot be sustained. There is no sufficient foundation for a conclusion that the expenditures by the respondent were essentially private in nature within the sense of s 8-1(2)(b) of the 1997 Act.

Order

39 The appeal should be dismissed with costs.

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59 (1961) 106 CLR 60 at 70.

60 (1991) 29 FCR 177 at 201. See also the remarks of Wilcox J at 189.

40 HEYDON J. The respondent drew attention to the Second Reading Speech for the Social Security and Other Legislation Amendment (Australian Apprentices) Bill 2009, delivered in the House of Representatives on 28 May 2009 by the Minister for Education, Minister for Employment and Workplace Relations and Minister for Social Inclusion. The purpose of the respondent's reference was to refute a contention advanced by the appellant that all social security payments including Youth Allowance and Disability Support Pension have the same relevant characteristics. The respondent aimed to do this by showing that payments made pursuant to social security legislation can have multiple objectives. The passage relied on was[61]:

> "Tackling climate change and building a more environmentally sustainable base for Australian industry and the Australian economy are among the great challenges facing the nation.
>
> The programs that are the subject of this legislation represent significant steps to meet the growing demand for skills in sustainability."

The Minister also said[62]:

> "Skills for Sustainability for Australian Apprentices is an outcome of the Australia 2020 Summit and aims to accelerate industry's and the tertiary education sector's response to climate change by providing practical incentives for industry to focus on developing skills for sustainability."

These passages illustrate the truth that recourse to Second Reading Speeches is rarely helpful.

41 Otherwise I agree with French CJ, Gummow, Kiefel and Bell JJ that the appeal should be dismissed, and with their reasons for that conclusion.

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61 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 28 May 2009 at 4695.

62 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 28 May 2009 at 4695.