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Abstract

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Keywords

High Court, Ronpibon Tin, Federal Commissioner of Taxation

ARTICLES

TURNING BASE METAL INTO GOLD – RONPIBON TIN REVISITED!

*Paul Gerber**

This article is the result of a light hearted after-dinner speech I gave at the Sixth Owen Dixon Dinner at Bond University in which I suggested, tongue in cheek, that the thousands of judges magistrates, Law Reform Commissioners, barristers, solicitors and – dare I say it – Law Professors – junketing to places like Florence, Dublin Paris and New York might derive little comfort from the decision of the High Court in *Ronpibon Tin*¹ if they claim all their expenses as outgoings incurred in achieving ‘professional development’. And this was before Queensland Magistrates decided to close their courts for three days for their annual ‘professional development’ conference, coincidentally taking place at the same time as the State of Origin rugby league match in Brisbane. Jim Corkery, rarely missing an opportunity, quickly challenged me to write an article on *Ronpibon Tin*. So here it is!

To review cases half a century old is hardly novel. I claim support from Lord Denning, who did it all the time. In *Miller v Jackson*,² the famous ‘cricket – trespass’ case, his Lordship was rather dismissive of the 19th century decision in *Sturgess v Bridgmont*,³ claiming that: ‘In the twentieth century, however, apparently a more enlightened attitude prevails’.

*Ronpibon Tin NL v Federal Commissioner of Taxation*⁴ was decided by a unanimous High Court some 55 years ago. What persuaded me to review the case was the recent publicity given to the fact that the last biennial conference of the Australian Bar Association was held in Florence. Other such conferences were held in exotic places like Paris, New York and Dublin. When one Australian newspaper showed a High Court judge gazing wistfully into the window of a Florentine jeweler, noting that all expenses of the lawyers attending the conference were tax deductible, it produced a somewhat defensive response from the (then) President of the Australian Bar

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1 *Ronpibon Tin and Tongah Compound NL v FCT* (1948-1949) 78 CLR 47.

2 [1977] 3 WLR 20.

3 (1879) 11 Ch D 852.

4 Above n 1.

Association, who stated: 'We are not here at the taxpayer's expense, lining our pockets in any way. You get information here you cannot get out of books. ... When there is discussion with practitioners in overseas locations, almost invariably it produces insights and suggestions that are digested, taken home and applied.'

Is it permissible in the days of the global village to question the legal support for a proposition, that the cost of seeking 'almost invariable insights' anywhere in the world constitutes a loss or outgoing necessarily incurred in carrying on a taxpayer's occupation? The loss in revenue is, after all, not insignificant.

Ignoring for present purposes other professionals, like doctors, dentists, acupuncturists and iridologists, who also gain their insights in Aspen, Colorado, coincidentally in the snow season, the law alone harbours thousands of judges, magistrates, Law Reform Commissioners, barristers, solicitors and – dare I say it – Law Professors – all going off to places like Florence in the name of 'professional development', and claiming their expenses in their tax returns (if any). The answer is, of course to be found in good old *Ronpibon Tin!*

But does *Ronpibon Tin* really permit first class travel expenses, luxury accommodation and five course meals accompanied by several bottles of Chateau-neuf-Depape to be wholly deductible items of expenditure under s 8-1(2) (formerly s 51(2))? Support for such an assertion invariably relies on one single sentence from that hallowed case:

It is not for the Court or the Commissioner to say how much a taxpayer ought to spend in obtaining his income, but only how much he has spent.⁵

Is it just possible that that famous sentence is taken out of context? The sentence immediately preceding it states:

The actual expenditure in gaining the assessable income, if and when ascertained, must be accepted. The problem is to ascertain it by apportionment.⁶

What is perhaps overlooked is that Latham CJ, Rich, Dixon, McTiernan and Webb JJ, before reaching that famous statement, pointed out that there are at least two kinds of outgoings which require apportionment for the purposes of s 8-1(2).

5 Ibid 60.

6 Ibid 60.

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One kind consists in undivided items of expenditure in respect of which distinct and severable parts are divided to gaining or producing assessable income, and distinct and several parts to some other cause. In such cases it may be possible to divide the expenditure in accordance with the applications which have been made of the things or services. The other kind of apportionable items consists in those involving a single outlay or charge which serves both objects indifferently.⁷

Few would doubt that discussions with colleagues in overseas locations produces ‘insights and suggestions that are digested, taken home and applied’. Having myself taken full advantage of sabbaticals, as well as attending professional conferences in exotic locations, it would be naïve if I were to deny the ‘junket’ factor involved in living it up, which, if severable, would, in fiscal terms be characterised as an outgoing of a ‘private and domestic nature’, and hence not deductible. Does *Ronpibon Tin* exclude them from apportionment? If in the 19th century, it wasn’t ‘cricket’ to hit a ball for six if it landed in an adjoining neighbour’s garden, leading a Court of Chancery to grant an injunction, well might one ask whether in the 21st century, it is ‘cricket’ to hit a ball all the way to Florence? Ruminating on the problem, I dug up my case note on *Miller v Jackson*, which began with the observation that: ‘The game of cricket seems to arouse latent passions even in the most dispassionate of judges’.⁸

It is submitted that contemporary jurisprudence surely demands a review of the fiscal consequences of such items of expenditure as the costs of vintage wines imbibed in Florence in the name of ‘professional development’, as well as child minding expenses and the cost of travelling to and from work.

This brings me to *Lunney v FCT*.⁹

An English Lord Justice – I’ve long forgotten who – once claimed that not even the gods have been given the power to undo the past. His Lordship failed to indicate which gods he was referring to. Some ‘gods’ can – indeed should – undo the past. One need only to look what the ‘gods’ have done to the law of *tort*, having decently interred invitees, licensees, trespassers, *Rylands v Fletcher*, nuisance and Lord Atkin, to name but a few. I spent years at this university teaching a subject then known as *torts* which the ‘gods’ have since sent to the glue factory. *Hic jacet*.

7 Ibid 59.

8 (1978) 52 ALJ 220.

9 (1958) 100 CLR 478.

Readers will recall that in *Lunney*, the High Court was asked whether fares, paid by ordinary people to enable them to go day by day to their regular place of employment or business and back to their homes, are deductible expenses, allowable against the assessable income earned by the employment or business. We all know that a unanimous court answered that question with a resounding 'No'.

It is my belief that that decision has become an anachronism, a fossil based on an age, which has ceased to be remotely relevant to today's society. An explanation of how this came about in England was provided by Denning LJ in *Newsom v Robertson*:¹⁰

In the days when income tax was introduced, nearly 150 years ago, most people lived and worked in the same place. The tradesman lived over the shop, the doctor over his surgery, and the barrister over his chambers, or, at any rate, close enough to walk to them or ride on his horse to them. There were no travelling expenses of getting to the place of work. Later, as means of transport quickened, those who could afford it began to live at a distance from their work and to travel each day by railway into and out of London. So long as people had a choice in the matter – whether to live over their work or not – those who chose to live out of London did it for purposes of their home life, because they preferred living in the country to living in London. The cost of travelling to and fro was then obviously not incurred for the purposes of their trade or profession.

Nowadays many people have only limited choice as to where they shall live. Businessmen and professional men cannot live over their work, even if they would like to do so. ... They must live outside, at distances varying from three miles to 50 miles from London. They have to live where they can find a house. Once they have found it, they must stay there and go to and from it to their work.

The historic irony was not lost on Chief Justice Dixon in *Lunney*. After noting the history of travel expenses against the backdrop of the English legislation, his Honour noted:

Times have changed; ... The question having been agitated, it became necessary to turn to the Australian authorities by which it was settled long ago. It was surprising to find how few they were, and that they depended rather upon their persuasive authority than their imperative character. ... These views have remained unchanged up till this case. ... To escape from the course of reasoning on which the decisions proceed requires the taking of refined and rather insubstantial distinctions. I confess for myself, however,

10 [1953] Ch 7, 15, 16.

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that if the matter were to be worked out all over again on bare reason, I should have misgivings about the conclusion. But this is just what I think the Court ought not to do.¹¹

Given the conservative approach taken by the Dixon Court, referred to dismissively by ‘progressive’ lawyers for its adherence to strict legalism and precedent, and compare it with the judicial activism of the majority of our present High Court, it is boldly submitted that the time has arrived for that Court to ‘work the matter all over again’, instead of relying on ancient precedents whose underpinning has long since been exposed as irreconcilable with modern living conditions.

The above view may be heresy to Justice Heydon, the author of a controversial essay entitled ‘Judicial Activism and the death of the Rule of Law’, a chilling monograph in which his Honour exposes what he claims to be the flaws of modern judges: ‘ambitious, vigorous, energetic and proud ... [who] think they can not only right every social wrong, but achieve some form of immortality in doing so.’¹² (This essay was written before his Honour was himself elevated to the High Court). Alas, the learned author provided no answer to his own question: ‘How are community values to be discovered?’

Lunny’s case has cast a long shadow. Why are child-minding expenses not allowable if the care of a taxpayer’s children is the only means by which he or she can derive assessable income? In *Lodge v FCT*¹³, and the cases that followed it,¹⁴ such claims have been disallowed. The facts in *Lodge* were not in dispute. If the taxpayer had not employed someone to mind her child, she would not have been able to earn her assessable income. There is surely a strong argument in favour of characterising such outgoings as having been incurred ‘in’ producing assessable income, applying s 8-1 as explained in *Ronpibon Tin*. To the single mum in Clapham, returning home from work by bus and paying a goodly part of her wages to her children’s minder, the necessary connection with the production of her assessable income is obvious.

11 Ibid 485-6.

12 *Quadrant*, January-February 2003, 9, 14.

13 (1972) 128 CLR 171.

14 *Martin v FCT* (1984) 84 ATC 4513, *Jayatilake v FCT* (1991) 91 ATC 4516.

Alas, Mason J, in an all too brief judgment, held otherwise:

Although the expenditure which the appellant incurred in placing her daughter in a nursery was necessary to enable her to earn income, that, as I see it, is not enough to satisfy the requirements of the law as it is expressed in s. 51 of the Act and as it has been interpreted.¹⁵ (My underlining).

The eccentricity of the law in this area is obvious: A full High Court has held that a taxpayer who insured himself against *loss* of income is entitled to treat the premium as an allowable deduction.¹⁶

15 Ibid 176.

16 *FCT v DP Smith* (1981) 147 CLR 578.