TAXATION OF ATHLETES POST *STONE*: TOWARDS A LEVEL PLAYING FIELD IN THE ERA OF PROFESSIONALISM

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The rise in the professionalism and earning power of athletes has, in recent years, drawn the increased attention and scrutiny of the Australian Taxation Office. This article discusses two taxation cases involving athletes which have been considered by the High Court of Australia: Commissioner of Taxation v Stone and Spriggs v Federal Commissioner of Taxation. Both cases provide important insights into how the courts are willing to adapt general legal principles in cases involving athletes to ensure a level playing field for all taxpayers.

Part I: Introduction

According to Jennie Granger, Second Commissioner of Taxation, it would be un-Australian for the Australian Taxation Office ('ATO') not to be interested in the taxation of sport.[1] Although sport may be an integral part of the Australian identity it would be naïve to think that the ATO's motives are purely nationalistic.

Australia's sporting industry has grown rapidly in recent years with many athletes now earning significant incomes from their respective sports. Australia's fifty highest earning athletes each earn over one million dollars a year.[2] While the income athletes receive from physically competing has increased, a large proportion of their income is earned through non-playing activities, such as sponsorships, merchandising and media appearances.

Although the taxation of the sports industry has not been scrutinised with great fervour in past years, it has now become a significant focus for the ATO. In addition to a general increased scrutiny of the sporting community, in recent years the ATO has launched specific investigations into the financial affairs of cricketers,[3] rugby league players[4] and the deductions being claimed by AFL players.[5]

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1 Jennie Granger (Second Commissioner of Taxation), 'Being good sports – managing tax risks' (speech delivered at the ANZSLA Annual Conference, Gold Coast, 2 November 2007).

2 John Stensholt, 'Race to the Top', *Business Review Weekly* (Australia), 21–27 January 2010, 27.

3 Phillip Hudson, 'Tax Office looking at cricketers', *Sydney Morning Herald* (online), 24 February 2009 <http://www.smh.com.au/news/sport/cricket/tax-office-looking-at-cricketers/2009/02/23/1235237558093.html>.

4 Nick Tabakoff, 'NRL to face tax invasion after Storm scandal' *The Daily Telegraph* (online), 17 July 2010 <www.dailytelegraph.com.au/sport/nrl/nrl-to-face-tax-invasion-after-storm-scandal/story-e6frexnr-1225892974238>.

5 Ben Packham, 'AFL players in tax probe' *Herald Sun* (online), 28 January 2009 <www.news.com.au/heraldsun/story/0,21985,24978321-19742,00.html>.

This increased scrutiny, triggered by the growing professionalism of the sporting industry, has led to a number of legal challenges to ATO assessments. Two such challenges that have reached the High Court are the subject of this paper.

While the cases of *Commissioner of Taxation v Stone*[6] and *Spriggs v Federal Commissioner of Taxation*[7] have important implications in relation to specific principles of taxation law, they also provide insights into how the courts are willing to adapt general legal principles in cases involving athletes. The increasing professionalism of athletes has revealed that established legal principles are not necessarily suitable when dealing with the taxation of these athletes and that special considerations may need to be taken into account if all taxpayers are to be treated equitably.

Part II of this paper begins by looking at the principles of amateurism and how these have developed as sport has become more commercialised. Part III then provides a brief introduction to some basic taxation concepts. Within this contextual background, Part IV takes a detailed look at *Stone's Case* and more particularly the way in which the principles of amateurism and taxation have been brought together in an attempt to create a level playing field for all taxpayers. Part V considers *Spriggs' Case* and how it helps redress some of the imbalance created by *Stone's Case*.

After completing these detailed analyses, Part V concludes that while *Stone's Case* shows that the courts are willing to adapt legal principles to create a more level playing field for all taxpayers, this level playing field will only be maintained if future cases, such as *Spriggs' Case*, continue to take opportunities to develop this area of the law.

Part II: Amateurism and Professionalism

The fundamental ideal which underpins amateurism in sport is that one should compete purely for the love of the sport.[8] Amateurism and professionalism can therefore be distinguished on the basis of whether one plays sport for its own sake or for some further purpose. Schlatter defines amateurism as

> a state of mind (not a state of fact), according to which the individual practices a sport without any other aim than pleasure and for the physical and spiritual benefits he derives from it, without material gain.[9]

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[6] (2002) 196 ALR 221; rev'd (2003) 198 ALR 541; aff'd (2005) 215 ALR 61 (*'Stone's Case'*).

[7] [2007] FCA 1817; rev'd [2008] FCAFC 150, aff'd [2009] HCA 22 (*'Spriggs' Case'*).

[8] The word 'amateur' derives from the Latin word 'amatorem', meaning lover. See, eg, Peter French, *Ethics and college sports: ethics, sports and the university* (Rowman & Littlefield Publishers, 2004) 11.

[9] Frederic Schlatter, 'Sport versus Amateurism' (1961) 75 *Bulletin du Comit International Olympique* 90.

While the concept of amateurism put forward by Schlatter is widely accepted,[10] there is a divergence of opinion on the best way to measure it. This has led to sporting bodies using different objective factors (or states of fact) as means of classifying athletes as either amateur or professional. These factors include financial reward (unpaid or paid), available time (part-time or full-time), social class (upper or lower), education and morality.

While classifications based on social class and education were particularly prevalent in late nineteenth-century England, more recently the focus has been on whether or not an athlete receives material gain in the form of financial reward. The basic assumption underlying distinctions based on financial reward is that money destroys fair-mindedness and that athletes who receive financial reward must only be competing for that reward.[11] However, simply because an athlete receives prize money does not necessarily mean that they do not play the sport for its own sake; the prize money may simply be incidental to the playing of the sport.

As Paddick identifies, the conceptual difficulty in determining whether an athlete competes for its own sake is where to draw the line between the sport itself and its consequences or outcomes.[12] The distinction lies in those inward-looking outcomes which are conceptually related to the sport and cannot be properly described without reference to the sport (such as the pleasure and excitement of competing) and those which are outward-looking and only contingently related to the sport (such as financial reward).[13] How to make this distinction was the difficult question the High Court was asked to consider in *Stone's Case*.

Impacting on the High Court's deliberations was the augmentation of professionalism, which has been fuelled by the increasing commercialisation of sport. The result has not only been an increase in the number of athletes who have been subsumed as professionals, but also a sharp rise in the earning power of these athletes leading to a widening financial gulf between the professional and amateur. This has made it increasingly difficult for amateur athletes to compete with their professional counterparts and made elite level sport almost the sole domain of the professional.

Under the strictest interpretations of amateurism, no distinction is made between different types of financial reward, whether it be in the form of a salary, prize money, sponsorship or a grant.[14] The increased commercial pressures placed on sports to accept professionalism has subsequently led to the majority of

[10] See, eg, Kristin Muenzen, 'Weakening it's own defense? The NCAA's version of amateurism' (2003) 13 *Marquette Sports Law Review* 257, 259.
[11] Robert Paddick, 'Amateurism: An idea of the past or a necessity for the future?' (1994) 3 *The International Journal of Olympic Studies* 4.
[12] Ibid 10.
[13] Ibid.
[14] Ibid 4.

sports relaxing their interpretation of amateurism or dispensing with the idea altogether. As Paddick notes, '[t]he history of international sport could be told as a relentless onslaught on the philosophy of amateurism and the gradual erosion of the attempts to enforce it.'[15]

Perhaps the most notable example of this erosion is the Olympic Games. The Olympic ideal was originally based on the strict interpretation of amateurism under which no athlete could receive any compensation for their athletic prowess.[16] This was strictly enforced and there are numerous examples of athletes being stripped of medals after having been found to breach this requirement.[17] However, as sport became more commercial and the professional athlete more accepted, the focus on amateurism became a 'negative formula of prohibition.'[18] The increasing number of professionals who were prevented by this 'negative formula' from competing at the Olympics, coupled with the proliferation of 'shamateurism' within the Olympics, eventually led to a relaxation of eligibility rules. Today, the eligibility of athletes is determined by each International Federation with only a few sports, such as boxing, retaining a requirement for amateurism.[19]

Perhaps one of the few remaining bastions of amateurism is the National Collegiate Athletic Association ('NCAA'). The underlying focus of the NCAA is on education and morality,[20] although its eligibility criteria have been softened to incorporate limited exceptions to the prohibition on financial rewards.[21] However, whilst its athletes remain amateur, the NCAA has grown to become a professional organisation that willingly exploits its sporting products for commercial gain; the most notable example being the Final Four basketball tournament.[22] A cynic may suggest that the NCAA only retains its strong links to amateurism to help protect its economic and commercial interests by providing a defence to anti-trust claims.[23]

Therefore, while amateurism still represents the idea of one playing sport for its own sake, it remains difficult to determine when an athlete's state of mind has turned to other purposes. This inevitably results, as Doherty asserts, with '[e]ach nation and institution interpret[ing] sports amateurism in terms of its belief

[15] Ibid 2.
[16] John Barnes, *Sports and the Law in Canada* (Butterworths, 2nd ed, 1988) 140.
[17] Deborah Healey, *Sport and the Law* (UNSW Press, 3rd ed, 2005) 4–5.
[18] Barnes, above n 16, 140.
[19] International Olympic Committee, Olympic Charter (7 July 2007) 10, rule 41.
[20] The principles of amateurism set out in article 2.9 of the NCAA Constitution state that 'student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.'
[21] Muenzen, above n 10, 261.
[22] William Rhoden, 'In Tournaments, N.C.A.A. Shines at Its Athletes Expense' *New York Times* (online) 5 April 2009 <www.nytimes.com/2009/04/06/sports/ncaabasketball/06rhoden.html>.
[23] Muenzen, above n 10, 258.

and practice of social values in general.'[24] Australia's income tax laws, which are interpreted to take into account the beliefs and values of ordinary people, therefore provided a perfect opportunity for the High Court to consider when an athlete has the requisite state of mind of a professional.

Part III: The Basics of Income Tax

Athletes, like any other taxpayer, are liable to pay tax on any taxable income they derive during an income year. A person's taxable income is calculated by determining their assessable income and reducing this by the amount of any allowable deductions.[25] Therefore, being able to identify an athlete's income and any allowable deductions is critical in determining their income tax liability.

Assessable income

Assessable income is made up of ordinary income and statutory income.[26] For Australian resident athletes their assessable income will include all ordinary income derived directly or indirectly from all sources, including overseas.[27]

Ordinary income is income according to ordinary concepts,[28] and is essentially determined by what ordinary Australians would consider to be income. This idea has its origins in the judgment of Jordan CJ in *Scott v Commissioner of Taxation*:

> The word 'income' is not a term of art, and what forms of receipts are comprehended within it, and what principles are to be applied to ascertain how much of those receipts ought to be treated as income, must be determined in accordance with the ordinary concepts and usages of mankind …[29]

As there is no specific guidance in the legislation as to what is meant by 'income according to ordinary concepts', it has been left to the courts to interpret.

Apart from salaries earned as an employee of a club or organisation, athletes may have a range of sources of receipts which could be classified as income. These include sponsorships, media and personal appearance fees, and prize money won as a result of competing (but not actual medals or trophies).[30] Scholarships may also be treated as income if certain conditions are placed

[24] Ken Doherty, 'A brief for Amateurism in Sports' (1971) 44 *Bulletin du Comit International Olympique 254.*
[25] *Income Tax Assessment Act 1997* (Cth) s 4–15(1).
[26] *Income Tax Assessment Act 1997* (Cth) s 6–1(1).
[27] *Income Tax Assessment Act 1997* (Cth) s 6–6(2).
[28] *Income Tax Assessment Act 1997* (Cth) 6–5(1).
[29] *Scott v Commissioner of Taxation* (1935) 35 SR (NSW) 215, 219.
[30] *Kelly v FCT* (1985) 16 ATR 478.

on the athlete, such as playing for a particular club.[31] Gifts or testimonial payments are generally not income unless received as a normal consequence of the athlete's earning activity.[32]

For some athletes the amount they receive from these sources may be very small while for others it may be substantial, running into many millions of dollars. Determining exactly which receipts may be properly classified as income according to ordinary concepts is therefore critical.

Even if a receipt is not by itself considered income, if it can be said to have been received by an athlete as part of a business it will be assessable as part of their business income. Historically, many athletes in receipt of not insignificant amounts of money would not have considered themselves to be conducting a business. These athletes would have looked at the nature of the receipts individually (rather than their activities as a whole) to determine what may form part of their ordinary income. The question of exactly when these athletes may be considered to be carrying on a business was the focus of *Stone's Case*.

Deductions

Deductions can be either general or specific. General deductions are losses or outgoings that are incurred in gaining or producing your income or necessarily incurred in carrying on a business for the purposes of producing assessable income.[33] However, losses or outgoings of a capital, private or domestic nature are not deductible.[34] Specific deductions are amounts that specific provisions of the taxation legislation (other than those relating to general deductions) allow you to deduct.

From an athlete's perspective, deductions can therefore be generally seen as the expenses incurred by the athlete in the process of earning income from their sport. As well as deducting expenses that are related to their actual playing activities, athletes may also deduct expenses related to their non-playing, or business, activities. However, if an expense can properly be deducted under both forms of income the athlete can only claim the deduction once.[35]

It is not possible to list what may be deductible for all athletes generally as each athlete's circumstances will differ. What is an expense of a private or domestic nature for one athlete may be deductible for another. Some specific examples of deductions which athletes have been able to claim include sporting clothing

[31] *Polla-Mounter v FCT* (1996) FCT ATR 47.
[32] *Seymour v Reid* [1927] AC 554; *Moore v Griffiths* [1972] 3 Al ER 399.
[33] *Income Tax Assessment Act 1997* (Cth) s 8–1(1).
[34] *Income Tax Assessment Act 1997* (Cth) s 8–1(2).
[35] *Income Tax Assessment Act 1997* (Cth) s 8–2.

and equipment,[36] certain travel expenses[37] and expenses incurred in keeping fit.[38] However, expenses related to the purchase of specific food,[39] expenses incurred in finding a new club,[40] and medical expenses related to the treatment of injuries or insurance are generally not deductible.[41] Given the age of many of the relevant cases and taxation rulings it is suggested that what is deductible by today's professional athlete should be reconsidered. This is what the High Court did in *Spriggs' Case* when considering whether to apply, distinguish, or overturn the principles set out in *Maddalena's Case* in relation to expenses incurred by an athlete in joining a new club.

Part IV: Stone's Case

The potential importance of the issues raised in *Stone's Case* was evidenced by the fact that the taxpayer, Joanna Stone ('Stone'), was given funding by the ATO under its Test Case Litigation Program.[42] Such assistance is provided only when the ATO considers it likely that a case may resolve tax issues affecting a significant number of taxpayers and will develop a legal precedent relevant to the administration of the taxation system. The Australian Olympic Committee ('AOC'), concerned about the taxation treatment of payments made under its Medal Incentive Scheme ('MIS'), also provided Stone with funding.[43]

Background facts

Stone was Australia's leading female javelin thrower, representing Australia in numerous international competitions including the 1996 Atlanta Olympics were she placed sixteenth and the 2000 Sydney Olympics were she placed seventeenth. Arguably the highlight of her career was winning a silver medal at the 1997 World Championships in Athens. Throughout the majority of her career Stone also worked as a police officer with the Queensland Police Force.

During her career as a javelin thrower, Stone was in receipt of various monetary rewards from prizes, grants and sponsorships but these were relatively small

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[36] Australian Taxation Office, *Expenditure incurred by professional footballers*, IT 54, 19 November 1979.
[37] *Federal Commissioner of Taxation v Ballesty* (1977) 77 ATC 4181.
[38] *Case J3* (1976) 77 ATC J3; Australian Taxation Office, *Expenditure incurred by professional footballers*, IT 54, 19 November 1979.
[39] *Commissioner of Taxation v Cooper* (1991) 91 ATC 4396.
[40] *Federal Commissioner of Taxation v Maddalena* (1971) 71 ATC 4161 ('*Maddalena's Case*').
[41] Australian Taxation Office, *Expenditure incurred by professional footballers*, IT 54, 19 November 1979; Australian Taxation Office, *Income tax: is a professional sportsperson who is required to take out private health insurance entitled to a deduction for related contributions under subsection 51(1)?*, TD 93/22, 11 February 1993.
[42] Australian Commissioner of Taxation, 2002/03 Annual Report <www.ato.gov.au/corporate/content.asp?doc=/content/39007.htm&page=223&H10_2_5_1_2>.
[43] 'Olympians win tax battle with ATO' *Sydney Morning Herald* (online), 11 May 2007 <www.smh.com.au/news/sport/olympians-win-tax-battle-with-ato/2007/05/11/1178390535649.html?s_cid=rss_smh>.

amounts and were received infrequently. However, in 1999, in the lead up to the Sydney Olympics, these amounts increased significantly.

For the year ending 30 June 1999, Stone submitted an assessable income of $39,832 to the ATO, representing her salary as a police officer. Stone also noted certain receipts which totalled $136,448, which she claimed were not assessable as income despite being well in excess of the average taxpayer's annual income. These receipts arose directly and indirectly from her javelin throwing activities and included prize money at local and international events ($93,429), government grants ($27,900, including $22,500 from the AOC's MIS), sponsorships ($12,419), and appearance fees ($2,700).

When the Commissioner assessed Stone's return it aggregated her salary as a police officer and the sporting receipts as assessable income. The question that was in dispute was whether the sporting receipts were assessable income. A concession made by Stone, that was ultimately critical to the final decision in the High Court, was that the sponsorship amounts were income.

Decision at first instance

The decision at first instance was heard in the Federal Court by the late Justice Hill.[44] The significance of Hill J presiding over the case cannot be underestimated. His Honour has been described as a 'tax titan'[45] and the pre-eminent tax judge in Australia, with his judgments being influential in the development of Australian tax law.[46] The reasoning of his judgment ultimately set the framework for, and was influential in, the High Court's decision.

Justice Hill began his judgment by noting that if it could be said that Stone was carrying on the business of a professional athlete then the proceeds of that business, being all of her sporting receipts, would be income according to ordinary concepts.[47] However, even if she received income as an amateur, these receipts may individually be assessable as income.[48] This was in accord with the general principles set out in Taxation Ruling 1999/17.

The importance of the distinction between business and individual income was summarised by Kirby J in the High Court when he correctly noted that if Stone were held to be carrying on a business it 'obviates the awkward necessity of

[44] *Commissioner of Taxation v Stone* (2002) 196 ALR 221.
[45] Richard Vann in Fiona Buffini, 'Tax Titan Was No Heir but Had all the Grace' *Australian Financial Review* (26 August 2005), 29 <www.grahamhillaward.com.au/web/taxtitan.pdf>.
[46] Justice Michael Kirby, 'Justice Graham Hill and Australian Tax Law' Inaugural Justice Graham Hill Memorial Lecture, Taxation Institute of Australia Annual Conference, Hobart, 15 March 2007 <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_15mar07.pdf>.
[47] *Commissioner of Taxation v Stone* (2002) 196 ALR 221, 233.
[48] Ibid 224.

characterising the *individual* receipts derived by the taxpayer'.[49] This would provide the Commissioner with the significant advantage of not having to show that each separate receipt was income within ordinary concepts.

Clearly athletes who pursue their sport on a full-time basis for significant financial reward, such as professional golfers and international cricketers, would be regarded as carrying on a business. However, in cases like Stone, Hill J noted that making such determinations has been made harder by the blurring of the distinction between amateur and professional as sport becomes more commercialised.[50] In particular, his Honour noted that when the Olympics required athletes to be amateurs there was a deterrent for athletes to turn professional, making it easier to identify amateurs. However, once this discrimination was eliminated so that both amateurs and professionals were allowed to compete, the distinction between the classes of athletes became less clear.[51] Stone appeared to be one of these Olympic athletes stuck in the ether between amateur and professional.

Whether a person can be said to be carrying on a business depends upon a combination of factors, with no single factor being determinative.[52] While Taxation Ruling 1999/17 confirms that athletes may be found to be carrying on a business, it provides little guidance on specific factors that should be taken into consideration. In his judgment Hill J made particular reference to the criteria set out in *Ferguson v Federal Commissioner of Taxation*[53] where it was held that the nature of the activities, particularly if they have a profit making purpose, may be important as well as other indicia such as the repetition and regularity of the activities, whether the activities are organised in a business-like manner, and the volume of operations and amount of capital employed. *Ferguson* also confirmed that a taxpayer, such as Stone, can concurrently carry on more than one business.[54]

However, in the present case Hill J felt that the state of mind (rather than the extent of the activity) should be particularly influential as

> some athletes … may clearly be seen to be undertaking a business, while others will be *pursuing their sport for its own sake*. The question whether the athlete is carrying on a business will not be resolved in these cases by considering the activity he or she engages in, but rather by a consideration of the motive or purpose for doing so.[55]

[49] *Commissioner of Taxation v Stone* (2005) 215 ALR 61, 76.
[50] *Commissioner of Taxation v Stone* (2002) 196 ALR 221, 223–224.
[51] Ibid 224.
[52] Ibid 234.
[53] (1979) 26 ALR 307 ('*Ferguson*').
[54] Ibid 311.
[55] *Commissioner of Taxation v Stone* (2002) 196 ALR 221, 235 (emphasis added).

In this passage his Honour clearly draws on the idea of amateurism (i.e. pursuing sport for its own sake) and suggests that it is incompatible with the concept of an athlete undertaking a business. The corollary of this is that if an athlete does not undertake sport for its own sake (i.e. not as an amateur) they will be undertaking a business and as such all receipts they receive either directly or indirectly from the sport may be aggregated. However, the question that still remains is when does an athlete not play sport purely for its own sake?

Although his Honour initially emphasised the relevance of a profit motive in establishing the requisite state of mind (as used in *Ferguson*), he later acknowledged that profit need not be the sole or even dominant motive.[56] This suggests that even if the athlete's dominant motive for competing is for the enjoyment and sake of playing sport, this will not prevent a finding that they are carrying on a business.

Justice Hill eventually settled on a test that did not take profit into consideration by holding that the critical question was whether an athlete could have been said to have turned their talent to the pursuit of money in the way in which one would expect a professional athlete to do so.[57] Presumably it is at this point that an athlete can be said to be 'commercially exploiting their skills' for the purposes of Taxation Ruling 1999/17.[58] Justice Hill therefore attempts to answer the question posed by Paddick (when does an athlete no longer play sport for its own sake) as the point when the athlete can be said to have turned their talent to account for money.

Justice Hill believed there were a number of ways in which an athlete could turn their talent to the pursuit of money including obtaining sponsorship (which, relevantly in *Spriggs' Case*, may be assisted by hiring a manager), participating in competitions with prize money and receiving appearance fees. After observing that Stone pursued most of these activities at some level, Hill J held that Stone had

> turned her undoubted talent to account for money, notwithstanding that she clearly also competed in sporting competitions to improve her talent and notwithstanding that she had another occupation.[59]

Once it was found that Stone was carrying on a business it was a natural consequence that all of the rewards of that business or the rewards that are incidental to that business were income according to ordinary concepts.[60] Therefore, all of the prize money and grants received by Stone formed part of her

[56] Ibid 235.
[57] Ibid 236.
[58] Australian Taxation Office, *Income tax: sportspeople – receipts and other benefits obtained from involvement in sport*, TR 1999/17, 24 November 1999, 29.
[59] *Commissioner of Taxation v Stone* (2002) 196 ALR 221, 238.
[60] Ibid 239.

assessable income. The fact that Hill J did not specifically find that Stone turned her talent for the purpose of making profit appears to be an acknowledgement that profit was not Stone's primary motive for obtaining financial reward.

The test used by Hill J seems to place a significant amount of weight on the athlete's intention through the traditional concept of amateurism rather than looking more closely at the other indicia of what constitutes a business. While Taxation Ruling 1999/17 acknowledges that an athlete may carry on a business even if not all of the usual business indicia are present, it does not suggest that intention should be the dominant consideration.[61]

Traditionally the carrying on of a business has been held to be not just a matter merely of intention but rather a matter of activity.[62] In a case which draws certain parallels with Stone, a public servant who composed, rehearsed and performed songs in their spare time was found to be carrying on a business. In reaching this finding the court focused not so much on the intent of the taxpayer but whether the activities were undertaken in a continuous and repetitive business-like manner.[63]

However, although not referred to in Hill J's judgment, there have been a number of cases which do support the weight placed by his Honour on the taxpayer's subjective intention.[64] In particular the High Court in *Federal Commissioner of Taxation v Myer Emporium* held that gains made otherwise than in the ordinary course of carrying on a business, as understood using the traditional business indicia, can nevertheless constitute income if they arise from a transaction which the taxpayer entered into with the intention of making a profit or gain.[65] Therefore, while the decision of Hill J does place an unusually high emphasis on intention, it is not without judicial support.

This has not stopped some suggesting that the emphasis Hill J placed on intention signals a concerning shift in the focus of the business indicia test to intention, as opposed to the other indicia of business.[66] However, it is suggested that Hill J's specific reference to athletes and the concepts of amateurism operate to limit the application of his test to athletes. In doing so Hill J appears to suggest that the usual indicia of business may not be appropriate when considering the activities of athletes and therefore other indicia, such as the amateurism state of mind,

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[61] Australian Taxation Office, *Income tax: sportspeople – receipts and other benefits obtained from involvement in sport*, TR 1999/17, 24 November 1999, 29.
[62] *Inglis v Federal Commissioner of Taxation* (1979) 28 ALR 425, 429.
[63] *Case R96* (1984) 84 ATC 637.
[64] See, eg, *Babka v FCT* (1989) 89 ALR 373, 380; *Federal Commissioner of Taxation v Radnor Pty Ltd* (1991) 102 ALR 187, 199.
[65] *Federal Commissioner of Taxation v Myer Emporium* (1987) 71 ALR 28, 32.
[66] Beth McDermott, 'Commissioner of Taxation v Stone (2005) 215 ALR 61: Its implications for the Role of Intention in Assessing Business Receipts, and the treatment of Gains Made by Athletes' (2006) 28(2) *Sydney Law Review* 373, 378.

may necessarily be required to play a more prominent role in dealing with the rise of the semi-professional class of athlete.

Hill J stressed that while it may be convenient to use the terms 'professional' and 'amateur' to distinguish between business and non-business activities, distinctions made for purposes of income tax law should not be confused with distinctions made in the sporting context.[67] Therefore, Hill J's judgment should not be misread as having replaced the business indicia test with a test founded on amateurism, nor should it be thought to have explicitly redefined what we understand an amateur to be. Rather, Hill J has sought to use the ideals which underpin amateurism to shape the business indicia test when it is used to determine whether athletes carry on a business.

Decision of the Full Federal Court

The decision of Hill J was unanimously overturned on appeal to the Full Federal Court.[68] In their judgment Heerey, Emmett and Hely JJ did not dispute the principles espoused by Hill J but they disagreed with how these principles should be applied to the particular facts. Their Honours considered it to be more relevant to consider whether there had been some system in the way in which Stone had engaged in the activities which produced the receipts and whether the activities had been engaged in a business-like way in accordance with ordinary commercial principles.[69] In particular they looked at whether the obtaining of the income receipts was the objective of the activities undertaken by Stone and seemed to therefore place greater weight on the other, more traditional, indicia of business.

The Full Federal Court noted that while it was true that Stone sought out sponsorship this was in order to further her aims as a sportswoman, and although she received grants and appearance fees because of her prowess as a javelin thrower, their occurrence was not so systematic as to reveal that they were part of carrying on of a business.[70] Instead these amounts were sought to help cover the considerable costs involved in training and competing. While their Honours agreed that even if an activity is not expected to derive profit, the activity may still be characterised as a carrying on a business. They did not believe Stone undertook her activities for the purpose of obtaining receipts in a way which demonstrated obtaining the receipts was the object of the activities.[71]

Their Honours also felt that the fact that Stone only undertook training and competitions outside of, and in addition to, her full-time occupation as a police

[67] *Commissioner of Taxation v Stone* (2002) 196 ALR 221, 233.
[68] *Stone v Commissioner of Taxation* (2003) 198 ALR 541.
[69] Ibid 554–555.
[70] Ibid 556–557.
[71] Ibid 554.

officer was an indication that the activity was undertaken for a purpose other than profit making.[72]

Essentially the Full Federal Court held that the concept of amateurism should not prevent someone from receiving receipts if their motive for playing sport is for the sake of it. In this case the Full Federal Court felt that the facts did not show that Stone played sport for purposes other than its own sake, rather her receipts were received in order to allow her to pursue this sport. This impliedly imposed a more relaxed interpretation of amateurism by requiring at least some intention to make a financial gain (or profit).

Decision of the High Court

The majority judgment in the High Court was delivered by Gleeson CJ, Gummow, Hayne and Heydon JJ. After looking at the development of professional sport, the High Court, as Hill J had done in the Federal Court, warned that although looking at whether an athlete is a professional may assist in determining whether receipts are income, such an investigation must not derogate from looking properly at whether the receipts were income.[73]

In relation to the importance of Stone's intention the majority felt that this was relevant but was only one factor to be taken into account. If Stone had a view to making profit the conclusion that she was undertaking a business would be more easily reached; however, such a conclusion could still be reached if her motives were more idealistic.[74] Their Honours then confirmed that the requisite test is whether or not the taxpayer has turned their talent to account for money.

Therefore, it is not the athlete's motive for which they pursue their chosen sport that is important (although it may help), rather it is at the point when they intend to also turn their talent to account for money. For the purposes of taxation law, it is at this point that the athlete is no longer an amateur. The difference between one's motive for playing and the intent to turn one's talent to account for money is subtle but important. Even if one has idealistic intentions it does not necessarily mean that they have not also turned their talent to account for money. The specific intention or motive of the athlete to seek profit will be one, but not the only, way this can be proved.

Once Stone conceded that the money paid to her by sponsors was part of her assessable income, the court held that it was an inevitable conclusion that she had turned her sporting talent to account for money.[75] Even though Stone's principal motivation may have been the pursuit of excellence, the sponsorships

[72] Ibid 557.
[73] *Commissioner of Taxation v Stone* (2005) 215 ALR 61, 65.
[74] Ibid 72.
[75] Ibid.

showed not only that Stone had made the arrangements to assist in defraying these costs but also that she was able to make those arrangements because of the pursuit of those activities. In this sense the sponsorship agreements had dual purposes which could not be segregated from her other athletic related activities.[76] The majority therefore concluded that because Stone was paid more than trivial amounts by sponsors, she had turned her athletic talent to account for money.[77] This suggests that the acceptance of sponsorship money will almost always be enough to show the requisite intent.

While Kirby J agreed with the majority, he delivered a separate judgment and affirmed the approach taken by Hill J, making specific reference to the appropriateness of the decision given the 'changing character of sporting activity at the level of elite or celebrity sporting champions.'[78]

Like the majority, Kirby J also accepted that although Stone's primary motivation was to pursue her dream of excellence and success in her chosen sport of javelin, it was open to a finding that she also decided to turn her sporting talents to her economic advantage.[79] It is interesting that Kirby J used the words 'economic advantage' rather than profit or turning her talent to account for money. This may have been an attempt to reach a compromise between the different emphasis placed on profit (favoured by the Full Federal Court) and money (favoured by Hill J). It implies something more than simply receiving money but not a threshold so high as to require an intent to actually seek to make a profit. Despite this apparent attempt to reach a compromise, Kirby J went on to use the word profit as though it were equivalent to economic advantage by finding that:

> once the view of profit became a real feature of the taxpayer's sporting endeavours it had a dual consequence. It gave a logical and factual unity to most of the receipts connected with her sport and unconnected with her employment as a police officer. Moreover, it warranted the Commissioner's conclusion that the receipts that individually might not have been regarded as 'income' took on that character.[80]

The question of exactly when an athlete should be considered a professional for the purpose of income tax is perhaps the most contentious feature of the various judgments. Should it be judged by reference to a profit motive, economic advantage or simply obtaining money? Chris Davies suggests that the money approach taken by the High Court dismisses the athlete's motivation as an

[76] Ibid.
[77] Ibid 74.
[78] Ibid 83–84.
[79] Ibid 84.
[80] Ibid.

important factor in determining whether or not they are an amateur.[81] However, a better view is that it simply reinstates the traditional strict interpretation of amateurism that amateur athletes should receive no financial reward. Whether or not this goes too far given the more relaxed interpretation of amateurism in today's commercial sporting context is a matter of debate. It is suggested that the broad approach adopted by the High Court is appropriate and, as they stated, their interpretation of amateurism for the purposes of income tax should not be confused for the purposes of the sporting context. In this respect the approach adopted by the High Court brings Australian law into line with how the International Olympic Committee has been treating athletes for a number of years.[82]

Practical Consequence of Stone's Case

While *Stone's Case* confirms that athletes can carry on a business for the purposes of income tax, more significantly it shifts the focus of the traditional business indicia test to the athlete's intention by considering whether they have turned their talent to account for money.

Stone's Case does not necessarily change the fundamental principles underpinning taxation law, however it does broaden what was previously understood to be the parameters in relation to athletes. This result, as specifically referred to by Kirby J, gives the Commissioner a significant advantage by not only increasing the potential number of athletes who may be held to be carrying on a business but by also increasing the pool of receipts which may be taxable.

However, the decision only provides limited guidance on when an athlete may have actually turned their talent to account for money. Therefore, while *Stone's Case* provides that the principles which underpin amateurism are relevant, it still does not definitively deal with how this is to be measured. As the High Court noted, other than those arising from the specific facts, they were not required to decide what circumstances might evidence that an athlete has turned their talent to account for money.[83]

The limited guidance that can be taken from the facts of *Stone's Case* is that only where an athlete does not win any substantial prize money while competing, does not have any significant sponsorship or media deals, does not have a manager and is not paid appearance fees to compete they will probably not be carrying on a business. However, athletes should be wary that even if all of the above criteria are met it may still be open to a court to find that they are undertaking a business.

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[81] Chris Davies, 'The High Court Decision in *Commissioner of Taxation v Stone* and its Impact of Sport in Australia' (2005) 12 *James Cook University Law Review* 112, 126.
[82] Ibid 127.
[83] *Commissioner of Taxation v Stone* (2005) 215 ALR 61, 74–75.

Although many athletes will now be found to be carrying on a business, they will be able to offset this to some extent by arranging their business activities in a tax effective manner and utilising the availability of certain deductions. The availability of deductions is the focus of the next part of this paper.

Part V: Spriggs' Case

While *Stone's Case* dealt with the circumstances in which an athlete may be carrying on a business it was not required to deal with the next logical step; the deductibility of expenses incurred in carrying on that business. *Spriggs' Case* gave the High Court the opportunity to consider this issue.

It is generally accepted that expenses incurred in obtaining or changing jobs are not deductible because those expenses arise at a point in time too early to be regarded as being incurred in producing assessable income.[84] In *Maddalena's Case* the High Court specifically held that the travelling and legal expenses incurred by former rugby league player Alan Maddalena while negotiating a playing contract were not deductible. In *Spriggs' Case* the question that arose was whether a management fee incurred in negotiating a new playing contract was deductible.

Facts

In late 1999 David Spriggs ('Spriggs') was drafted to the Geelong Football Club in the Australian Football League ('AFL'). Shortly thereafter Spriggs engaged Connors Sport Management Pty Ltd ('CSM') as his exclusive agent to negotiate his standard AFL playing contract and other endorsements and media contracts. Under the AFL's Player Rules a player is only able to play in the AFL if they are registered with the AFL and have entered into an employment contract in a form prescribed by the AFL and the AFL's Players' Association.[85] In late October 2004 Spriggs' contract with Geelong ended and he was delisted.

As a result of his prior registration as an AFL player with Geelong, Spriggs was eligible to enter the AFL National Draft. After talking with several clubs, CSM negotiated a set of minimum terms with the Sydney Football Club. Spriggs was subsequently drafted by Sydney and he entered into a playing contract with them in early December 2004. A month after Spriggs was drafted by Sydney, and eleven days after signing the playing contract, CSM issued an invoice to Spriggs for $2,310 which was said to be for 'Management and promotional services by CSM for season 2004'.

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[84] *Federal Commissioner of* Taxation v Maddalena (1971) 71 ATC 4161; Australian Taxation Office, *Income tax and fringe benefits tax: costs incurred in preparing and administering employment agreements*, TR 2000/5, 8 March 2000.

[85] Australian Football League, Player Rules (2008) rules 2.1 and 2.3.1.

As well as receiving the income under his various contracts with Geelong and Sydney, Spriggs also derived income from additional non-playing activities including promotional and media appearances, featuring in the 'Men For All Seasons Calendar', and use of his image on football cards. The amounts earned from these activities varied, but were not significant during 2004 and 2005.

Spriggs contended that the management fee should be an allowable deduction for the 2004/05 income year.

It should be noted that the courts concurrently heard a similar case involving a management fee paid by National Rugby League ('NRL') player Mark Riddell. As the facts relating to Riddell, including the framework of the NRL's rules, are similar to Spriggs the two cases were dealt with together. As such, reference in this paper will be made just to Spriggs; however, the principles discussed will apply equally to Riddell.

Decision at first instance

The decision at first instance was handed down in the Federal Court by Justice Gordon on 23 November 2007.[86]

Justice Gordon looked firstly at the substance of the management fee and held that it was a payment for CSM negotiating a playing contract and not, as Spriggs contended, for the more general management services listed on the invoice.[87] However, her Honour noted that just because the fee was incurred in negotiating a contract of employment it did not mean that it was not deductible.[88] As such, the fee was prima facie properly incurred by Spriggs in gaining or producing his assessable income and was deductible under section 8–1(a) of the *Income Tax Assessment Act 1997* (Cth) ('ITAA97').

Her Honour then considered whether the management fee could also be said to have been incurred by Spriggs in carrying on a business and therefore be alternatively deductible under section 8–1(b) of the ITAA97. After making specific reference to the reasoning in *Stone's Case*, Gordon J found that Spriggs' position was not distinguishable and that the fact he had sought income from the additional non-playing activities indicated that he had 'turned his football talent to account for money.'[89] Given the favourable result it obtained in *Stone's Case*, the Commissioner did not seek to contradict the principles underpinning this finding; however, it did try to argue that this case was distinguishable because CSM's relative lack of success in securing non-playing activities showed that Spriggs was not sufficiently marketable to sustain a viable business. Justice

[86] *Spriggs v Federal Commissioner of Taxation* [2007] FCA 1817.
[87] Ibid [46].
[88] Ibid [47].
[89] Ibid [48].

Gordon correctly dismissed the Commissioner's contention, noting that, in the absence of a sham, viability is not determinative of whether a business is being carried on.[90] The management fee was therefore held to have been incurred by Spriggs in carrying on a business.[91]

So while the management fee was prima facie deductible under both limbs of section 8–1(1) of the ITAA97, her Honour then had to turn her attention to whether the principles of *Maddalena's Case* were applicable, and more specifically, whether or not the management fee was incurred at a point that was too soon to be relevant to Spriggs' income producing activities.

Her Honour noted that the fee was incurred within the established framework of the AFL Player Rules, the agreement with CSM and the standard AFL playing contract and that within this framework Spriggs had been generating ongoing income since being recruited by Geelong in 1999.[92] Justice Gordon observed that had Spriggs simply re-signed with Geelong at the end of 2004 rather than joined Sydney the management fee would have clearly been deductible.[93] Her Honour could not therefore reconcile why, within the framework of the AFL, a distinction should be made between signing a new contract with the same club and signing a new contract with another club.

In looking at the AFL framework, Gordon J made no distinction between the income Spriggs received from his employment and business activities. As will be discussed later, while Gordon J's observations make sense from the perspective of Spriggs' business activities, they do not, with respect, appear to be correct when considering just his employment. If a person enters into a new contract with the same club they are effectively renewing the existing contract and there is no real break in the existing contractual relationship. However, if a person such as Spriggs is delisted and has to find a new club there is a period of time where they are effectively unemployed (for Spriggs this was the period between when he was delisted in late October 2004 and when he signed with Sydney in early December 2004). The failure to make the distinction between the two sources of income may have been one of the reasons why the Full Federal Court disagreed that the expense was deductible as part of Spriggs' business activities.

Justice Gordon then went on to find that the more persuasive reason for finding in favour of Spriggs was that the management fee was not actually incurred prior to the generation of the assessable income. The fee was charged nearly two weeks after the contract had been signed and was only incurred if the playing contract was signed. If no playing contract had been signed, the terms of the

[90] Ibid [48]–[52].
[91] Ibid [53].
[92] Ibid [57]–[58].
[93] Ibid [60].

agreement between Spriggs and CSM meant that CSM would not have been entitled to the fee.[94]

Justice Gordon therefore distinguished the current case from *Maddalena's Case* on the basis that in *Maddalena's Case* the expenses were incurred before the playing contract was entered into and regardless of whether or not the playing contract was ultimately secured.[95]

While Gordon J drew a very fine distinction it appears to be open on the facts. It is also arguably in accordance with the Commissioner's views on agent fees as set out in Taxation Ruling 95/20. Interestingly, immediately before drawing the distinction, Gordon J noted that Spriggs was a full time professional footballer and that *Maddalena's Case* was decided in 'an era of professional sportsmen and women which bears little or no resemblance to professional sport in the twenty first century.'[96] With respect, it is unclear how the issue of professionalism necessarily impacts on the particular distinctions drawn by Gordon J. As discussed below, the issue of professionalism may help indicate the existence of a business, but it is not, by itself a reason for deciding that an expense is properly deductible.

Decision of the Full Federal Court

The Commissioner successfully appealed to the Full Federal Court with Goldberg, Bennett and Edmonds JJ hearing the appeal.[97]

The Full Federal Court essentially found that the facts were not distinguishable from those of *Maddalena's Case* and, with reference to the reasoning in *Federal Commissioner of Taxation v Payne*,[98] the management fee was not incurred in gaining or producing Spriggs' income as a professional footballer but rather by the need to be in a position where he could set about the task by which the assessable income would be derived.[99] In particular their Honours seemed to have placed heavy reliance on their belief that the facts of *Maddalena's Case* involved a framework similar to the AFL framework referred to by Gordon J and that it is the nature of the service for which the management fee is charged and not the time when it was paid that is critical.[100] To this extent the court did not accept the fine distinction drawn by Gordon J and perhaps mistakenly interpreted Gordon J's reference to the AFL framework as being limited to employment income.

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[94] Ibid [57]–[60].
[95] Ibid [63].
[96] *Spriggs v Federal Commissioner of Taxation* [2007] FCA 1817, [61].
[97] *Commissioner of Taxation v Spriggs* [2008] FCAFC 150.
[98] (2001) 202 CLR 93.
[99] *Commissioner of Taxation v Spriggs* [2008] FCAFC 150, [45].
[100] Ibid [43].

The Court then went on to consider whether or not the management fee was deductible as a business expense. During the appeal the Commissioner had conceded that the non-playing activities were a business while Spriggs had conceded that that the specific contractual arrangement with the clubs did not of themselves amount to a business.[101] Spriggs did however argue that the contractual arrangement should be viewed within the boarder income-generating framework of his career as a professional sportsman and that the ordinary notion of business should be extended to include the services provided to a club under an employment contract.[102]

Nevertheless, the Full Federal Court found that even if the non-playing activities constituted a business they were separate and discrete from Spriggs' activities as a player.[103] They then, arguably, went one step too far by holding that if the business was confined to his non-playing activities then the management fee, which was incurred exclusively in the negotiation of his employment contract, was not incurred in the course of carrying on of that business.[104] The Court effectively held that once it was accepted that the management fee was incurred in relation to Spriggs' employment as a footballer it could not be deductible in relation to his separate, but intrinsically related, business activities.

The Full Court therefore held that the management fee was not deductible under either of the limbs in section 8–1 of the ITAA97.

Decision of the High Court

The High Court unanimously overturned the decision of the Full Federal Court; however, rather than reinstate the distinction drawn by Gordon J in relation to the timing of the fee as an employment expense, the High Court took the more interesting line of reasoning, with greater practical importance in light of *Stone's Case*, in finding that the management fee was deductible as an expense necessarily incurred in the carrying on of a business.

Although the Full Federal Court correctly held that the management fee was incurred only in negotiating Spriggs' employment contract, it erroneously disregarded the importance and effect that the playing contract had on Spriggs' non-playing activities. As the High Court noted in some detail, the AFL Standard Playing Contract which Spriggs was a party to incorporates the AFL Player Rules and Collective Bargaining Agreement and specifically contemplates players receiving income from other, non-playing, activities including promotional and marketing activities.[105] While the non-playing activities were separate and

[101] Ibid [26]–[29].
[102] Ibid [29].
[103] Ibid [48].
[104] Ibid [48]–[49].
[105] *Spriggs v Commissioner of Taxation* [2009] HCA 22 [36]–[43].

discrete from his playing activities they were not mutually exclusive or unrelated. Nevertheless, the Full Federal Court had held that the contract of employment was not relevant to Spriggs' non-playing activities; a conclusion which the High Court correctly rejected.[106]

Spriggs was only able to carry out his non-playing activities because he was recognisable and had achieved a (small) degree of celebrity. This recognition had only been attained because Spriggs was able to play football in the AFL. However, to play football it was an AFL condition that he enter into an AFL Standard Playing Contract. As Gordon J noted, Spriggs was only able to provide the additional non-playing services because he was a contracted AFL player.[107] At the application to seek leave to appeal to the High Court, counsel for the Commissioner also appeared to concede that without the contract of employment Spriggs could not have earned any income from his sporting talent, either from playing football or from other activities.[108] This contract therefore served dual purposes; it was to enable him to earn income as an employee but it also enabled him to produce assessable income from his non-playing activities. What is more, the contract itself expressly provided for this.

While the High Court concluded that Spriggs was engaged in a business of exploiting his sporting prowess for which he received income,[109] for the expense to be deductible it must not be incurred at a point too soon to be regarded as being incurred in the carrying on of the business. While arguably the principles in *Maddalena's Case* may suggest that as an employment expense the fee was incurred at a point too soon to the earning of the employment income, the circumstances in which the potential deduction arose in relation to the business income were different and therefore need to be analysed separately. Under the test developed in *Stone's Case*, an athlete engages in a business when they have turned their talent to account for money.[110] The High Court found that Spriggs was engaged in the business of commercially exploiting his celebrity for a number of years with different clubs and that although there was a synergy between his playing and non-playing activities the business was well established before the management fee was incurred.[111] Indeed, the High Court held that the fact that Spriggs had retained a manager who provided services which went beyond just the negotiation of his playing contracts helped establish that he was carrying on a business.[112] Therefore, while the contract of employment can help athletes gain recognition, it is not a pre-requisite to the continued operation of their non-playing activities which may be based on this recognition.

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[106] Ibid [64].
[107] *Spriggs v Federal Commissioner of Taxation* [2007] FCA 1817, [58].
[108] *Spriggs v Commissioner of Taxation* [2008] HCATrans 405.
[109] *Spriggs v Commissioner of Taxation* [2009] HCA 22 [57].
[110] *Commissioner of Taxation v Stone* (2005) 215 ALR 61, 71.
[111] *Spriggs v Commissioner of Taxation* [2009] HCA 22 [69].
[112] Ibid [71].

The outcome may have been different if the management fee had been incurred in relation to Spriggs' first contract to play in the AFL as arguably at this point in time he may not have turned his talent to account for money. However, even in these circumstance the fee could arguably still be deductible. For example, LeBron James, the number one draft pick in the National Basketball Association's 2003 draft, signed a US$90 million contract with Nike as a high school student even before signing a contract to play with the Cleveland Cavaliers.[113] Even if an athlete has not started earning income from their non-playing activities there may be certain circumstances where expenses are nonetheless deductible.[114] It is certainly conceivable that in coming years a first round pick in the AFL National Draft may have signed sponsorship agreements before being selected and, as the test in *Stone's Case* suggests, sponsorship is a strong indicator of the carrying on of a business.

The ability to generate income independently of the playing contract is what Crennan J referred to as 'stand-alone celebrity' at the application to seek leave to appeal to the High Court.[115] As the income from non-playing activities can be earned independently of an employment contract the entering into a subsequent employment contract cannot be at a point too soon to be relevant to the income producing activities. While someone such as David Beckham may enjoy this kind of celebrity, Spriggs was reliant on having an employment contract to help earn income from his non-playing (or non-employment) activities.[116] Once Spriggs had started earning income from his non-playing activities any subsequent employment contract simply aided the continuation of this business. This is what Gordon J was alluding to when her Honour referred to Spriggs being in the AFL system with its framework of rules and agreements. The High Court therefore effectively held that, once Spriggs was in that system, he could obtain the 'celebrity' to help him earn income from his non-playing activities; changing clubs within this framework simply provided a continuation of his ability to play football within the AFL system and enhanced his ability to earn income from his non-playing activities.[117]

Practical consequence of Spriggs' Case

While on face value it may appear that the High Court's decision will allow all management fees for negotiating playing contracts to be deductible, there are several aspects of the judgment which taxpayers and their advisers should be wary of:

[113] Arno Scharl, Larry Neale and Jamie Murphy, 'Analyzing the Prevalence of Sports-Related Terms among the Web Sites of Global Corporations'(2004) 3(2) *International Journal of Computer Science and Sport* 5, 6.
[114] *Federal Commissioner of Taxation v Smith* (1981) 34 ALR 16, 20–21.
[115] *Spriggs v Commissioner of Taxation* [2008] HCATrans 405.
[116] Mr D.H. Bloom QC in *Spriggs v Commissioner of Taxation* [2008] HCATrans 405.
[117] *Spriggs v Commissioner of Taxation* [2009] HCA 22 [70].

(1) The sportsperson must have been carrying on a business (i.e. had turned the talent to account for money).

(2) This business must have been established at the time the fee was incurred (therefore it may be unlikely to apply in relation to a sportsperson's first contract).

(3) The playing contract must have had some benefit to their non-playing activities (this will usually be the case but there may be circumstances where this is not true).

(4) The High Court made particular reference to the fact that the contracts in question specifically contemplated the sportsperson undertaking non-playing contracts. This may provide a way for future courts to limit the availability of the deduction.

The decision of the High Court in *Spriggs' Case* represents a small but important development in relation to deductions available to athletes post *Stone's Case* and may provide some basis and guidance for future development in taxation law involving athletes who are 'carrying on a business'.

Part VI: Conclusion

While athletes may be concerned about the implications of the High Court's decision in *Stone's Case*, it should be seen as addressing potential imbalances between the taxation of athletes and ordinary taxpayers. This imbalance has only been exacerbated by the increasing commercialisation of sport and consequent increases in athlete income.

Much of the income received by athletes is now generated through their non-playing activities. The complex motivations for pursuing sport coupled with the development of professionalism make it difficult to classify some 'semi-professional' athletes as carrying on a business under the business indicia test despite these athletes being in receipt of significant amounts of money. It therefore seems logical and appropriate for the concepts of amateurism, as used in the sporting context, to be used to help adapt the traditional business indicia test so that greater emphasis is placed on intention. This has resulted in a sensible approach to dealing with the unique circumstances sport can present while remaining within the existing legislative and judicial framework.

By focusing the test on whether or not an athlete has 'turned their talent to account for money' the High Court has incorporated a relatively strict view of amateurism. However, it is suggested that through this general development in attitude towards the taxation of athletes the High Court has created a more level playing field for all taxpayers.

This playing field will only remain level if these concepts continue to evolve and keep pace with developments in both the law and sport. In this respect the decision of the High Court in *Spriggs' Case* is appropriate. In *Stone's Case* the concept of when an athlete may be engaged in a business was clearly broadened so that professional athletes would be taxed more equitably with other taxpayers. The fact that the taxpayer, Joanna Stone, had a manager was one of the factors that the court felt helped evidence that she was interested in acquiring sponsorship and therefore that she was carrying on a business.[118] If the High Court is to use the existence of a manager to help indicate the carrying on of a business then it would have been inconsistent for it to not allow the expenses incurred in engaging such a manager to be deductible.

Stone's Case and *Spriggs' Case* go some way to ensuring that athletes and ordinary taxpayers are on a level playing field. As tax is a complex and dynamic area of the law, this playing field will only remain level if cases such as these continue to develop the law to meet the challenges of the increased commercialisation of sport.

[118] *Commissioner of Taxation v Stone* (2002) 196 ALR 221, 237.