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THE HIGH COURT DECISION IN *COMMISSIONER OF TAXATION V STONE* AND ITS IMPACT ON SPORT IN AUSTRALIA

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Abstract

During the latter part of the amateur period of the Olympic movement, Australia began a system of grants to Olympic athletes in order to allow athletes to prepare adequately when representing Australia. These grants continued after the Olympic movement decided in 1984 to allow professional athletes to compete at the Olympic Games. With Australia's Olympic athletes now also able to accept prize money and attract sponsorship money, the question arose as to the tax status of this money. In *Commissioner of Taxation v Stone* the High Court held that this money was part of an athlete's taxable income. This, it is suggested, brings Australian tax law in line with the International Olympic Committee's treatment of athletes for the last two decades.

INTRODUCTION

Olympic sports, like athletics and swimming, for the first ninety years of the Olympic movement, were strictly amateur events. To help these amateur athletes achieve success, the Commonwealth and state governments provided funding in the form of training grants. The status of these athletes changed in 1984 when the International Olympic Committee (IOC) decided to allow professional athletes to compete at the Olympic Games. For athletes, swimmers and those in other formerly amateur sports, this allowed them to compete for prize money in non-Olympic events¹ and also to receive sponsorship money. This then raised the question as of the tax status of these grants and other money that athletes were now receiving. This question was recently clarified by a unanimous High Court decision in *Commissioner of Taxation v Stone*² overturning an earlier unanimous decision of the Full Court of the Federal Court. The High Court

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¹ Note that while the Olympic Games now allow professionals to compete, no prize money is actually given at the Games.

² (2005) 79 ALJR 957.

held that prize money and training grants, as well as sponsorship and appearance money, earned by Olympic javelin thrower, Joanna Stone, amounted to taxable income for the financial years in question.

This casenote will therefore examine this High Court decision, and the earlier Federal Court decisions, in relation to the definition of 'business', 'amateur' and 'professional' sportsperson in regard to taxation. It will also consider the impact the decision will have on organisations such as the Australian Sports Commission (ASC) and the Australian Olympic Committee (AOC) in regard to how they fund athletes in the Olympic sports, the latter of which provided the legal backing to Joanna Stone for what was seen as a test case on this particular matter.

I FEDERAL COURT SINGLE COURT DECISION

A *Background Facts*

The trial judge, Justice Hill, first looked at the background facts of Joanna Stone's involvement in javelin throwing and the money she made from it, pointing out that while she had begun competing in the Grand Prix series in Australia in 1994, it was in 1995 that she first won prize money in the amount of \$250. In the same year she also began receiving payments totalling \$5196 under the Olympic Athletic Program due to the fact that she had now reached the top 25 in the world for her event. As Hill J noted, the money given under the program was to help provide athletes with living expenses, and that it was means tested, so that athletes earning over \$50,000 a year were ineligible for the payments.³ Even though Joanna Stone was working full time with the Queensland Police, as she did on at least a part-time basis throughout her athletics career, she was still eligible for the grant. In that same year she finished fifth in the World Athletic Championships in Gothenburg, a competition that offered no prize money, but then won US\$4400 for a second place finish in a meet in Zurich.⁴ Later that year she received her first sponsorship with the sports goods manufacturer, ASICS Tiger Oceania Pty Ltd.⁵

On May 22, 1996, Joanna Stone was advised by Athletics Australia that she was to receive a \$10,020 grant, which was then supplemented by a \$5380 grant from the Queensland Academy of Sport (QAS). Both grants were to aid in her preparation for the upcoming 1996 Atlanta Olympic Games, where she finished sixteenth. In the tax year finishing on June 30,

³ *Stone v Commissioner of Taxation* (2002) 196 ALR 221, 225.

⁴ *Ibid* 226.

⁵ *Ibid* 227.

1997, she had won a total of \$17,000 on the Grand Prix circuit in Australia for various performances. She was also awarded \$650 a month by Athletics Australia as part of its Olympic Athletic Program. To be eligible for this money she had to state that she did not earn more than \$50,000 a year, and that she was not a professional athlete, but as Hill J pointed out, no definition was given of this term.⁶ That financial year also saw her receive her second sponsorship in the form of a car provided by Multiplex Constructions (Qld) Pty Ltd.

During the following taxation year to June 30, 1998, Joanna Stone won \$40,961 after finishing second in the 1997 Athens World Championships, and a further US \$8,000 in prize money and appearance money at the Zurich Grand Prix.⁷ She then received \$10,500 as part of the AOC's Medal Incentive Scheme, a \$5000 sponsorship deal with DDS Consulting Pty Ltd, and a training allowance of \$1200 from the Queensland Academy of Sport.⁸ During the year she attended 31 functions, receiving appearance money for six.⁹

As Hill J pointed out she went into the 1999 taxation year as a member of the Olympic Games A squad, and went on to win the javelin throw at the Goodwill Games and the World Cup where she won US\$6000 and US\$50,000 respectively, as well as receiving \$22,500 from the AOC Medal Incentive Scheme, and \$5400 from the Queensland Academy of Sport.¹⁰ She made a further \$2700 from attending functions, while her sponsorship deals bought in \$11,500 from ASICS and \$2919 from DDS.¹¹

After the end of the 1999 taxation year, the income Joanna Stone earned from sport was negligible, due to a combination of injuries and her desire to compete in the minimum number of competitions required for her to qualify for the 2000 Sydney Olympic Games. At the Sydney Games she finished seventeenth, and subsequently retired from the sport. The court action arose after the Commissioner disallowed Ms Stone's objection, based on the claim that she participated in sport for enjoyment, not money, to the inclusion of the amounts she received during the 1999 income year from her sporting activities.

⁶ Ibid 228.

⁷ Ibid 228-29.

⁸ Ibid 229.

⁹ Ibid 230.

¹⁰ Ibid 230-1.

¹¹ Ibid 231.

B Judgment

After summarising the facts, Justice Hill looked at the question as to whether Joanna Stone was in fact a professional athlete. His Honour pointed out that what he meant by professional was an athlete who carried out a business activity, in contrast to an amateur engaged in what was no more than a hobby. It was also noted that whether a person was carrying on business would depend on a number of factors, but that no single factor would be determinative in a particular case. Instead it was a combination of factors that led to the conclusion.¹² His Honour referred to *Ferguson v FCT*¹³ where it was held that the nature of the activities, particularly if they had a profit-making purpose, was important, as was the repetition and regularity of the activities. Hill J also noted that an athlete who pursues his or her sport as a full-time and money-making activity is clearly carrying on a business, but that a person, such as Joanna Stone, may have more than one activity. In this situation both or neither may be businesses, or just one of the two may be a business. His Honour acknowledged that a profit motive need not be the sole, or even the dominant, motive for an athlete in order to make it a business, and went on to state that it would need to be a substantive motive to reach the conclusion that a business was being carried out.¹⁴

His Honour then stated that 'the present case is on the borderline', acknowledging that 'Joanna Stone engaged in the sport of javelin throwing from an early age because of her enthusiasm for the sport'.¹⁵ Hill J also acknowledged that she did not select competitions on the basis of money, but rather on her need to gain competition experience.¹⁶ His Honour expressed the opinion that athletes who may be considered to be carrying on a business would most likely choose the events they competed in on the basis of profits. Hill J then pointed out that what professional athletes who carry on a business do is to turn their talent to account for money, rather than turn a tangible product to account, which is what occurs with a business that consists of selling a product.¹⁷ Justice Hill then remarked that there are a limited number of ways that an athlete can do this, namely sponsorship, prize money, and appearance money to either compete in

¹² Ibid 234.

¹³ (1979) 26 ALR 307,311. This was a decision of the Full Court of the Federal Court involving the activity of breeding cattle.

¹⁴ *Stone v Commissioner of Taxation* (2003) 196 ALR 221, 235.

¹⁵ Ibid.

¹⁶ Ibid 237.

¹⁷ Ibid.

competitions or attend functions.¹⁸ Hill J then observed that Joanna Stone did virtually all of these things, before stating that:

Not without some doubt I have reached the conclusion that on the evidence Ms Stone can be said, at least by the time the year of income came, to have 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, that of a policewoman, which she likewise pursued.¹⁹

Thus Justice Hill concluded that in the year of income Joanna Stone was carrying on a business,²⁰ and that it therefore followed that all the rewards of that business or incidental to that business were income on ordinary concepts.²¹

II FULL COURT OF THE FEDERAL COURT DECISION

The subsequent appeal to the Full Court of the Federal Court saw a unanimous decision that overturned, at least in part, the decision of the primary judge.

In a joint decision Heerey, Emmett and Hely JJ firstly noted that the *Income Tax Assessment Act 1997* (Cth) ('the 1997 Act') was the only relevant statute and that no reference had been made to it by the primary judge, and that his Honour had appeared to have proceeded on the basis that the *Income Tax Act 1936* (Cth) ('the 1936 Act') was applicable to the year of income. However, their Honours then went on to point out that it was of no great significance as the language of the 1997 Act was not materially different from that of the 1936 Act, and that the task for the court was to determine whether Joanna Stone's receipts in question were 'income according to ordinary concepts.'²²

Like Justice Hill, their Honours stated that whether a person was carrying on a business would depend on a number of factors with no single factor being determinative in a particular case.²³ In the case of Joanna Stone, the court noted that, in regard to sponsorship, she pursued such money to further her aims as a sportswoman, and while the various grants she

¹⁸ Ibid 237-8.

¹⁹ Ibid 238.

²⁰ Ibid 238.

²¹ Ibid 239.

²² *Stone v Commissioner of Taxation* (2003) 198 ALR 541, 545.

²³ Ibid 554.

received were because of her prowess and achievements as a javelin thrower and were paid on a regular basis, this was not indicative of a business activity. The appearance money, likewise, was seen as not being so systematic as to be part of carrying on a business. It was also the opinion of the court that Joanna Stone without doubt was engaged in a full-time career as a policewoman, with their Honours pointing out that during her career as an athlete she was undertaking additional study and taking steps to secure promotion within the Queensland Police Service.²⁴

The court concluded that Joanna Stone did not carry on a business, but that she had a full-time occupation as police woman, competing in her spare time in competitions, regardless as to whether there was prize money. Their Honours acknowledged that it was possible to carry on a business as well as other activities, but because she had a full-time career her activities were against it being a business activity.²⁵

Their Honours then addressed the principle presented by the Commissioner that there was some intermediate category between sportsman and sportswoman for whom sport is clearly recreation or a hobby, and those who 'are turning their talent to account in money by pursuit of business activity'. The court, however, held that the Commissioner was unable to formulate the criteria for this intermediate category.²⁶ Therefore, in the absence of a finding that Joanna Stone was carrying on a business, the prize money was held not to be assessable income. Their Honours also disagreed with Justice Hill's conclusion that the money under the AOC Medal Incentive Scheme was income according to ordinary concepts, stating that 'in the absence of a finding of business activity, the prize money and grants were not income according concepts.'²⁷ The Full Court of the Federal Court however upheld that appearance money and sponsorship payments were made as rewards for service, and therefore were assessable income.²⁸

²⁴ Ibid 557.

²⁵ Ibid.

²⁶ Ibid 558.

²⁷ Ibid.

²⁸ Ibid.

III THE HIGH COURT DECISION

After the decision of the Full Court of the Federal Court it was now the Commissioner's turn to appeal, this time to the High Court, where another unanimous decision overturned the Full Court of the Federal Court decision and held that all the money was assessable income. Gleeson CJ, together with Gummow, Hayne and Heydon JJ, delivered a joint decision with Kirby J delivering a separate judgment that supported the main principles stated in the joint judgment

A *The Joint Judgment*

In the joint judgment Gleeson CJ *et al* first addressed the issue as to what constituted a professional sportsperson. Their Honours pointed out that professional sport 'may be thought to be a phenomenon of the second half of the 20th century,' stating that the expression was one that has become associated with those who principally play sport for reward.²⁹ Their Honours then noted that historically distinctions had been drawn between cricketers who were 'gentleman' and those who were 'players', and between professional boxers, golfers and tennis players, and their amateur colleagues.³⁰ The court acknowledged that in sports like boxing and rugby football different rules applied to amateurs and professionals, but that in the present day the distinction was thought of as depending on whether the individual sought to make the playing of sport a full-time occupation and the principal source of income.³¹ However, the court acknowledged that classifying a participant as a professional or not has its problems, noting that it could distract attention from the content of the relevant question as to whether the receipts were in fact income, or inject presuppositions into the debate that should not be made.³²

Their Honours therefore turned their attention to the question of carrying on a business and 'income according to ordinary concepts.' The court noted that the conclusion that receipts are ordinary income will proceed from a conclusion that that the person involved was conducting a business.³³ It was also noted that sporting activities may be, but will not always be, distinct from business activities.³⁴

²⁹ *Commissioner of Taxation v Stone* (2005) 79 ALJR 956, 959.

³⁰ *Ibid*

³¹ *Ibid*.

³² *Ibid*.

³³ *Ibid*.

³⁴ *Ibid* 960.

Gleeson CJ *et al* acknowledged that the submissions of Joanna Stone sought at times to distinguish between sport and business, and also to distinguish between income from prizes and gifts. The submissions also emphasised that she chose the events she entered into for their suitability as a competition, not for any financial consideration.³⁵ The court however held that once it was accepted that the money Joanna Stone received from sponsors formed part of her assessable income, 'the conclusion that she turned her sporting ability to account to money was inevitable'.³⁶ The sponsorship deals, in the court's opinion, could not be segregated from other aspects of her athletic activities, because while they were sought to assist her pursuit of athletic activities, they also indicated that 'she was able to make them *because* of her pursuit of those activities.'³⁷

Their Honours also noted that the AOC repeatedly drew her attention to the financial consequences of success, particularly at the Olympic Games, as the amounts to be won were A\$40,000, \$24,000 and \$12,000 for gold, silver and bronze medals respectively.³⁸ This therefore needed to be taken into consideration in regard to the claims by Joanna Stone that she did not throw javelins for money. In regard to this matter the court noted that if a person has a view to profit then it is relatively easy to conclude that he or she is engaged in business, but even where the motives are more 'idealistic than mercenary the conclusion that the taxpayer is engaged in business may still be reached.'³⁹

Their Honours then raised the issue of two related questions, namely should a distinction be made between receipts under the Medal Incentive Scheme and the QAS grant, and should a distinction be drawn between prizes and grants.⁴⁰

The court noted that prizes may be paid pursuant to a contract and may not be gratuitous payments, while grants such as the Medal Incentive Scheme and the QAS grant may be seen as gratuitous payments.⁴¹ Their Honours

³⁵ Ibid 963-4.

³⁶ Ibid, 964.

³⁷ Ibid 964. Note that the English soccer players from the 1966 World Cup each received a £1000 bonus for their win which was held not to be taxable: see *Moore v Griffiths* [1972] 3 All ER 399. A cricketer who was granted a benefit match for his services to the Kent Cricket Club was held not to be assessable in respect of the sum of money given to him from what was raised at this benefit match: see *Seymour v Reed* [1927] AC 554.

³⁸ Ibid, 962, 965.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

then pointed out that income is often, though not always, recurrent or periodical, with the question of recurrence or periodicity having a bearing on whether there is an income-producing activity. However it was also noted that in the present case the conclusion that the taxpayer was in business in the year in question followed from other considerations. The question, therefore, was no longer whether the taxpayer was in business, but whether the receipts were income of that business. The taxpayer's business, turning her athletic activities to account for money, entailed financial consequences if she achieved her aim of competing and representing Australia, with the receipts in question being paid as a consequence of her success in achieving this goal.⁴²

It was then noted that the QAS grant, although not recurrent, was paid in recognition of the taxpayer's athletic success in achieving national selection, with the court considering it to be as much a financial product of her athletics activities as the prize money she won and the sponsorship deals that she was able to secure. This grant, as well as the payment under the Medal Incentive Scheme, was a reward for athletic success, and therefore a reward from her conduct of her business, namely deriving financial reward from competing in athletics. Their Honours therefore held that the Commissioner was correct in disallowing the taxpayer's objection to the inclusion of both the QAS grant and the Medal Incentive Scheme in her assessable income. It was further noted that the money paid in sponsorship indicated 'that she had turned her athletic talent to account for money', with it also being noted that 'the amounts involved were more than trivial.'⁴³ This then supported the conclusion that the taxpayer was involved in a business during the 1998-9 taxation year.⁴⁴

B Judgment of Kirby J

Justice Kirby firstly noted that there was both a *factual* and *legal* interest in the appeal. The factual interest lay in that the receipts were derived in a number of ways from the taxpayer's activities as a champion javelin thrower. His Honour then acknowledged that this raised the broader issue of whether the receipts of contemporary Australian sporting champions in circumstances like those of Joanna Stone, were to be classified as taxable income. The point of *legal* interest involved the way the problem was to be resolved, with the first consideration being whether it could be said that the taxpayer was engaged in the business of being a professional sportsperson, with the consequence being that receipts so derived would be assessable

⁴² Ibid 965-6.

⁴³ Ibid 966.

⁴⁴ Ibid.

income.⁴⁵ Kirby J suggested that this approach to the classification of the taxpayer's receipts allowed the receipts to be aggregated as the 'income' derived from the conduct of a business, and hence would be treated as 'personal income' under the 1997 Act. His Honour then noted that this meant that it was not necessary to characterise each *individual* receipt.⁴⁶

Justice Kirby referred to *Scott v Commissioner of Taxation*⁴⁷, noting that it had been held in that case that 'income' had not been defined in the *Income Tax (Management) Act 1928* (NSW), but that the Act merely enumerated, by way of illustration, various forms of income which were to be treated as being derived from personal exertion. His Honour then pointed out that s6-5(1) of the 1997 Act had no express reference to 'income' that could be classified as being derived from a 'business', and that under s995-1 (1) a broad definition was to be given to the meaning of the word 'business' in regard to the purposes of the 1997 Act. The word is defined to include any profession, trade, employment, vocation or calling, though it should also be noted that it does not include occupation as an employee.⁴⁸ His Honour went on to state that the term 'income' needed to be construed 'according to ordinary concepts' and that this then raised the question as to 'whether the importation of the category of 'business' as a sub-classification of 'income' conformed to s6-5 (1) of the 1997 Act.'⁴⁹

In regard to this question, Justice Kirby observed that there was no relevant mention in the 1997 Act of the word 'business' income. His Honour suggested that s6-5(1) did not 'superimpose an intermediate question as to whether the taxpayer could be treated as "carrying on a business"', before asking whether the various receipts derived by the taxpayer during the relevant tax year 'can be aggregated in some way so as to be regarded *together* as the "income" of that business.'⁵⁰ Kirby J then stated that:

Instead, it is to look individually at "the ordinary income you derived directly or indirectly from all sources, whether in or out of Australia, during the income year" and to test the liability of such receipts to income tax by the criterion of whether *each item* of alleged "income" could be so described "according to ordinary concepts."⁵¹

⁴⁵ Ibid 967.

⁴⁶ Ibid.

⁴⁷ (1935) 35 SR (NSW) 215, 219.

⁴⁸ *Commissioner of Taxation v Stone* (2005) 79 ALJR 956, 968.

⁴⁹ Ibid 969.

⁵⁰ Ibid 970.

⁵¹ Ibid.

It was the opinion of Kirby J that interposing this notion of 'business' that did not appear in the 1997 Act may mean 'that the statute is glossed in a way disadvantageous to the taxpayer and unduly favourable to the Commissioner.'⁵² His Honour also expressed the opinion that if the notion of 'business' was to be incorporated, then arguably Parliament should have made this plain by exact enactment, pointing out that this had been done in the relevant legislation in *G v Commissioner of Inland Revenue*,⁵³ namely the *Land and Income Tax Act 1954* (NZ).⁵⁴ Justice Kirby then noted that the primary judge concluded that if the taxpayer was not carrying on a 'business' three categories of payments, namely sponsorships, appearance fees and payments under the Medal Incentive Scheme were income, though prize money, the QAS grant, Oceania Amateur Athletics Association grant and Little Athletics reward were not.⁵⁵

However his Honour went on to point out that counsel for the taxpayer did not challenge the 'business income' accumulation that was argued by the Commissioner. Instead the first issue to be decided was whether the taxpayer, Joanna Stone, was conducting a business. Kirby J noted that this appeal was not the occasion to consider whether the 1997 Act introduced a new approach that might be suggested by s6-5 (1). Justice Kirby also noted that the use of the 'business income' classification was recognised by High Court's analysis of the 1936 Act, and that there was therefore an argument that if it had been the purpose of the 1997 Act to change this approach, then this would have been clearly indicated, both in the Treasurer's Second Reading speech and in the text of the 1997 Act.⁵⁶ The absence of the intention for such a change, in his Honour's opinion, 'suggests a legislative purpose to continue with the established approach', a conclusion which in Kirby J's view was reinforced by the wording of s1-3 (2).⁵⁷

Justice Kirby then remarked that it was 'important to characterise the impugned receipts by reference to all of the facts and circumstances of the case', pointing out that this approach had been correctly adopted by Hill J in the original trial.⁵⁸ A general consideration in relation to the present case was the changing character of sporting activity of elite sportspersons, with Justice Kirby stating that this change was noted by the High Court in other contexts, such as the recent case involving News Ltd and South

⁵² Ibid.

⁵³ [1961] NZLR 994.

⁵⁴ *Commissioner of Taxation v Stone* (2005) 79 ALJR 956, 970.

⁵⁵ Ibid 970-1.

⁵⁶ Ibid.

⁵⁷ Ibid 972-3.

⁵⁸ Ibid.

Sydney.⁵⁹ Kirby J also commented that such a consideration was closely connected to the modern media of communications, international interest in sport, and the attention of advertisers, sponsors and supporters in sporting champions that follows on from such an interest.⁶⁰

It was the opinion of Kirby J that in the original trial the evidence had clearly established that Joanna Stone had turned her sporting ability to her economic advantage, though his Honour accepted that Joanna Stone was not *solely* motivated by this, acknowledging that there can be a number of motivations for most human activity. Whatever the motivations, it was open for the primary judge to conclude 'that at a given point, before the year of income, the taxpayer decided to turn her sporting talents also to her economic advantage.'⁶¹ Justice Kirby then went on to state that:

[O]nce 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.⁶²

Prizes, for instance, usually lack periodicity and regularity, and because they depend on so many chance factors would not normally take on the character of 'income' without some additional unifying ingredient. It was therefore the interposition of the taxpayers 'business' that was the additional ingredient linking the several receipts, reinforcing the conclusion that their character was that of income even though this conclusion may not have been reached if each had been reviewed individually.⁶³

⁵⁹ *News Ltd v South Sydney District Rugby League Football Club Limited* (2003) 77 ALJR 1515. For a discussion of this case see Chris Davies 'News Ltd v South Sydney District Rugby League Football Club Limited: The High Court Decision' (2003) 10 *James Cook University Law Review* 116-128.

⁶⁰ *Commissioner of Taxation v Stone* (2005) 79 ALJR 956, 973.

⁶¹ *Ibid* 973

⁶² *Ibid*.

⁶³ *Ibid* 974.

IV THE DECISION AND THE IMPACT ON AUSTRALIAN SPORT

The significance of *Commissioner of Taxation v Stone* can be judged by the fact that the AOC was willing to support the case financially to the sum of \$1.139m,⁶⁴ and that both parties to the dispute were willing to appeal the matter after losing at a particular stage of the case. There is also little doubt that, given the money available from organisations like the AOC and ASC, as well as individual sponsorship deals, the decision was significant. The ASC, for instance, is in the process of distributing \$6.8m in grants, with the decision in this case having a potentially major impact on the tax status of these grants for many athletes.⁶⁵ After the decision was handed down the President of the AOC, John Coates, immediately contacted the Commissioner of Taxation, Mike Carmody, to clarify what type and what level of sponsorship would mean that an athlete was in business, and therefore likely to have all income from sport considered taxable.⁶⁶

All the decisions at the various stages of the case looked at the question as to what was a professional and an amateur sports person. The primary judge, Hill J, stated that athletes could be divided into professionals who carried out a business activity and amateurs who engaged in a hobby. The Full Court of the Federal Court, meanwhile, stated that the Commissioner failed to establish that there was an intermediate category between these two. With all due respect to their Honours, the author would suggest that there has always been an intermediate category, namely semi-professional or part-time professionals, who earn a reasonable amount from their sport, but not enough to live on. For instance in *Johnston v Cliftonville Football and Athletic Club*,⁶⁷ a case involving a challenge to the maximum wage system utilised by the Northern Ireland Football League, the plaintiff was described as a 'part-time professional.' In Australia fulltime professional football is relatively recent. Up until around twenty years ago players in competitions like the then Victorian Football League (VFL) and the NSW rugby league competition had full time careers with what they earned from football being no more than a part time, second income.⁶⁸

⁶⁴ Rodney Dalton and Annabelle McDonald, 'Olympic gold to go to the taxman', *The Australian* (Sydney), 27 April 2005, 3.

⁶⁵ Rodney Dalton and Jenny McAsey, 'Sparring resumes in sport tax battle', *The Australian* (Sydney), 28 April 2005, 5.

⁶⁶ *Ibid.*

⁶⁷ [1984] NI 9.

⁶⁸ For instance, former Footscray (now Western Bulldogs) full-forward, Jack Collins, who played in the 1954 premiership side, noted on *Grumpy Old Men* that during his career he was paid six pounds a week in his job as a carpenter

The joint decision in the High Court also looked at the issue of professional and amateur, noting for instance that there was a time in cricket when there were amateur gentlemen and professional players and there were, or are, amateur and professional players in sports like rugby, golf and boxing. Curiously the High Court decision, like the previous Federal Court decisions, did not look at the history of the amateur aspect of Joanna Stone's sport, athletics, or more precisely, track and field. It is also suggested that such an examination also explains why Australia began to give financial support to top Olympic athletes in the form of grants.

As Mandell,⁶⁹ points out, when the Olympic Games were revived in the 1890's a strict amateur rule for competitors was adopted, though this had as much to do with the prevalent class structure of the time than with actual animosity towards the winning of prize money by sportspeople.⁷⁰ For instance, at the Sorbonne Congress in June 1894, where the revival of the Olympic Games was instigated, the prevailing view of Baron Pierre de Coubertin was that only amateur sport was clean and that professional sport turned 'superior athletes into circus performers'. Mandell suggests that this view was popular amongst many of the aristocratic elite who dominated the early years of the International Olympic Committee, not because they necessarily agreed with it, but because it consolidated their power base in the fledgling organisation.⁷¹

To illustrate how strict this Olympic amateur rule was can be judged from the decision to disqualify 1908 silver medallist in swimming, Frank Beaurepaire, from the 1912 Stockholm Olympic Games because he held down a job as a physical instructor which at the time was enough for someone to be classified as a professional. However he was allowed to compete at the 1920 Antwerp Olympic Games. A more famous and more controversial decision from the 1912 Stockholm Olympic Games was to strip American Jim Thorpe of his gold medal in the decathlon when it was later discovered that he had played semi-professional baseball. When the IOC abandoned the amateur rule in 1984, Jim Thorpe's medal was returned to his children.

This decision meant that for the ensuing decades Australia, like all other countries, could only select amateurs for its Olympic team. However, in

and three pounds as footballer: Fox Footy Channel, *Grumpy Old Men*, 13 September, 2005.

⁶⁹ Richard D Mandell, *The First Modern Olympic Games* (1976), University of California Press.

⁷⁰ Ibid 88.

⁷¹ Ibid.

the 1960's and 70's the Eastern Bloc countries supported its best athletes, for instance, by giving them jobs in the military where they could train on a fulltime basis. For Australia everything reached a crucial point with a disastrous performance at the 1976 Montreal Olympic Games, which directly resulted, not only in the creation of the Australian Institute of Sport (AIS) and subsequently state based institutes and academies, but also the establishment of government grants to enable athletes to train for the then still amateur Olympic sports. This was to change when the IOC decided to drop the amateur requirement from the Olympic Games in 1984. Thus, from that time the Olympic movement no longer distinguishes between amateur and professional athletes.⁷²

In regard to the present case, it is suggested that the High Court's decision dismisses an athlete's motivation, that is, why they pursue their activity, as a crucial factor in determining whether a person is a professional or an amateur athlete. Rather, from a taxation perspective, it is the point at which the athlete in question turns his or her attention to the pursuit of money that is the crucial factor. The joint decision, when looking at the question as to what is meant by a professional sportsperson, noted that this was really a question as to whether the receipts in question were income, not an actual definition or distinction between professional and amateur sportspeople, with Kirby J likewise stating that a view of profit was an important consideration. In regard to the decision's possible impact on athletes, Rob Woodhouse, a former Olympic swimmer and now a leading sports agent, noted that it could be beneficial for some lower level athletes because it will allow them to be treated as conducting a business and therefore allow them to claim their expenses.⁷³ Another possibility is for the AOC and ASC to see if grants can be given tax free status, like many post-graduate research scholarships. It should be noted, however, that the means test used for these research grants is far more stringent than that used by the AOC in regard to its grants that were the subject of the present litigation. It is suggested therefore that having the grants made part of an athlete's income and then allowing genuine expenses to be tax deductible,

⁷² Note, however, that at the Olympic Games only amateur boxers are allowed. This was a decision of the sport itself. Amateur boxing is distinguished from professional boxing by fewer rounds in a fight and the use of protective headgear. Since the advent of professionals in rugby union in 1995, the only other significant world sport that divides itself into amateur and professional is golf, with club players being restricted to the amateur ranks, and professionals to the professional ranks. While golf professionals have called for golf to be included in the Olympic Games, if golf was admitted, unlike boxing, it would be the professionals who would compete.

⁷³ Dalton and McDonald, above n 64, 3.

is the more likely and more suitable situation, despite the AOC's fear and claim that it will force athletes to become accountants.⁷⁴

V CONCLUSION

The decision in *Commissioner of Taxation v Stone*, therefore, in the author's opinion, brings Australian law into line with how the IOC has been treating Olympic athletes like Joanna Stone for over two decades. It is therefore suggested that the money she earned during the time in question had to be treated as income, given both the nature of modern sport and the requirements of the 1997 Act. In the case of Joanna Stone, while she had a fulltime career in the Queensland Police Force, she was also turning her athletic ability for financial gain, and her javelin throwing was in effect producing a second income. Since for other taxpayers a second income is considered to be taxable, it does not seem unreasonable a second income derived from the business of turning one's sporting ability to the pursuit of money should be taxable.

The unanimous High Court decision therefore has clarified what activities in relation to athletes constitute carrying on a business and therefore represent taxable income. Thus, while Joanna Stone tried to argue that sport and business could, and should, be kept separate, the decision reaffirms the courts' view that modern day sport is very much a business.

⁷⁴ Dalton and McAsey, above n 65, 5.