

Interpreting the Australian income tax incantation or analysis, when examined through the lens of early twentieth century linguistic philosophy?

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Abstract

This article examines the interpretation of subsection 6(6) of the Income Tax Assessment Act 1997 (Cth). The High Court of Australia has concluded that subsection 6-5(1) should be understood upon the basis that it adopts some or all of the elements of the oft-quoted dictum of Sir Frederick Jordan in *Scott v Commissioner of Taxation*. The article shows that different decisions of the High Court of Australia have cited different statements of the elements of the dictum that ought to be referred to, and some decisions of the High Court have ignored the dictum altogether. Moreover, no High Court decision has analysed the statement of Jordan CJ. This article addresses this absence of analysis by offering an analysis of that dictum having regard to the vibrant, contemporaneous linguistic philosophy of the early twentieth century. This analysis suggests that Sir Frederick

statutory interpretation, linguistic philosophy

1. INTRODUCTION

At the heart of the Australian income tax one of the core assessing provisions is section 65(1) of the Income Tax Assessment Act 1997 (Cth) ± VWDWHV WKDW µ assessable income includes income according to ordinary concepts, which is called RUGLQDU\ LQFRPH¶ 7KLV µSODLQ ODQJXDJH¶ GHILQL common public acknowledgement that a clearer LQ LWLRQ RI µLQFRPH¶ ZD However, statutory guidance regarding the meaning of ordinary income is extremely limited.² Likewise, the extrinsic materials provide no clear guidance upon the meaning of the statutory terms³.

In the course of considering subsection 6(1), the High Court of Australia has emphasised the significance of the statement of Jordan Scott and has indicated WKDW VHYHUDO HOHPHQWV RI KLV +RQRXU¶V VWDW incantation; they identify the essence O QDWXUH R\$ some what to of taxably \¶ different majority decisions in the High Court have adopted different statements of the HOHPHQWV WR EH H[WUDFWHG IURP have been Uprated ULFN - F WKLV µHVH HQWLXOULQDWH RHWKHU also manifest in the specification of the test in the lower courts, in extrajudicial discussion and in extrajudicial scepticism as to the basis upon which amounts are characterised for income

¹ Joint Committee of Public Accounts, Commonwealth Parliament, Assessment of Tax, Report No 326 (1993) 76. Prior to the enactment of the Income Tax Assessment Act 1997 (Cth), Australian income tax legislation at both federal and state levels referred WKH JHQHUDO FRQFHSW RI µLQFRPH

tax purposes.¹⁰ Writing extrajudicially, Chief Justice French opined that judicial
 IRUPXODWLRQV RI WKH LQFRPH FRQFHSW, ZHUH μ E
 JHQHUDO¹¹ ~~in~~ ~~the~~ ~~High~~ ~~Court~~ ~~decision~~ ~~McNeil~~,¹² his Honour
 REVHUYHG WKDW WKH GHSimple ~~Badly~~ ~~Expressed~~ ~~Provision~~ ~~in~~ KRZ
 the one hand attracts a plethora of judicial exposition such that some would say the true
 PHDQLQJ RI WKH VWDWXWH LI.¹³ LW KDV RQH LV EXULH

This confusion regarding the terms that subsection 5(1) is taken to incorporate, and
 also the meaning of those terms, is difficult to dispel because of the absence of close
 DQDO\VLV RI WKH HOHPHQWV RI 6LU)UHGHULFN -RUGD
 that apparently adopt that statement.¹⁴ The absence of such analysis is cause for
 TXHVWLRQLQJ WKH +LJK &RXUW¶V REVHUYDWLRQ WKD
 not a matter of ritual incantation. ,I 6LU)UHGHULFN -RUGDQ¶V VWD
 analysed, what would this analysis reveal? Would it reveal what might hitherto have
 been the hidden elements of the concept of income according to ordinary concepts? Or
 would such analysis expose irresolvable tensions between the elements of that
 statement?

This article WDNHV WKH +LJK &RXUW¶V UHMHFWRQ RI ULWY
 DQDO\VLQJ WKH HOHPHQWV RI 6LU)UHGHULFN -RUGDQ
 is to determine whether that statement provides secure foundations for the concept of
 iQFRPH DFFRUGLQJ WR RUGLQDU\ FRQFHSWV 7KH UHI
 LQT X⁶ ~~in~~ ~~Montgomery~~

depict judges applying more or less determinate law in a manner consistent with the rule of law.¹⁸

My argument in this article LV WKDW MXGLFLDO DQDO\VLV RI 6LU) is necessary if the High Court is to move beyond ritual incantation. The statement that apparently specifies the essential nature of the inquiry into the meaning of income. Further, I suggest that such analysis is best undertaken through the lens of the vibrant debate regarding linguistic philosophy which emerged as *Wesley* philosophy worked LWVHOI WKURXJK LWV μOLQJXLVWLF ¹⁹WKHUOHP URP WK included close consideration of different accounts of linguistic meaning. On one view advanced in the course of this debate, any linguistic element (a phrase, sentence,

2. LI WKH VWDWXWRU\ ODQJXDJH LV QRW D μWHUP R μLQFRPH¶ LGHQWLI\ WKH VHW FRPSULVLQJ μRUGL
3. review this broad set in order to identify receipts of a form that are comprehended as income under ordinary concepts and usages; and
4. consider the principles that are applied for determining how much of a receipt WKDW ILWV D UHTXLVLWH IRUP μRXJKW WR EH WU

7KXV IRU VWDWXWRU\ WHUPV ~~What is the subject matter of the~~ μWHU μRUGLQDU\ FRQFHSWV DQG XVDJHV¶ LV DQDO\HG IRU principles governing inclusion in the relevant set. These forms and principles are then applied to identify members of the set identified by the VWDWXWH VXFK DV μLQ approach examines what might be described as the logical fabric of our language that PD\ OLH μEHQHDWK¶ RU EH VHHQ WR XQGUSLQ WKH concepts and usages.

However, on a different interpretation, the proviso in the latter part of Sir Frederick -RUGDQ¶V VWDWHPHQW VXJJHVWV WKDW GLIIHUHQW V EH DGRSWHG 7KLV SURYLVR UHIHUV WR LGHQWLI\LQ SDUODQFH¶ 2Q WKLQ LQWHUSUHWDWLRQ LV DSSURDFK D MXGJH SDUODQFH¶ WR SURGXFH D OLVW RI UHFHLSWV WKDW RUGLQDU\ SDUODQFH¶ 2Q WKLQ LQWHUSUHWDWLRQ identified in the first part of the dictum, the second part of the statement focuses upon WKH μVXUIDFH PHDQLQJ¶ WKDW LV SUHVXPDEO\ REYLF SUHSDUH WR FRPSLOH D OLVW RI WKLQ³⁰ ¶¶. This interpretation appears WR EH VXSSRUWHG E\ 6LU)UHGHULFN REVHUYDWLRQV DUULYHG DW ZLWKRXW DQ\ SUHFHGL 6FRWW¶V FRPSHQVDWLRQ VXP ZDV QRW³¹ and of DFFRUGLQJ WR ³² meaning. An observer could reasonably interpret these REVHUYDWLRQV WR LPSO\ WKDW μLQFRPH¶ LV D ODEH LGHQWLI\ WKH VHW RI UXOHV JRYHUQLQJ LQFOXVLRQ μLQFRPH¶ PD\ KDYH FRPHG WR the hands of Scott and GOW¶¶. This UHDGLQJ RI WKH MXGJPHQW ZH GR QRW QHHG WR DW DW WKH FRQFOXVLRQ WKDW μLQFRPH¶ GRHV QRW UHIH because we intuitively know that the label RWOG QHYHU EH DSSOLHG WR RUGLQDU\ SDUODQFH¶

\$ WKLUG LQWHUSUHWDWLRQ RI 6LU)UHGHULFN¶V UHIH this is no more than a shorthand reference to the analytical extraction of forms/principles described in the first part of the statement. This approach would overcome the possibility of any inconsistency between the first and second parts of the statement, but RQO\ E\ DGRSWLQJ DQ LQWHUSUHWDWLRQ RI μRUGLQDU\ PDMRU LWJHQWLI\ ¶¶. In *Commissionery* in which the majority appeared to treat the two elements as though they were not substitutable.

7KHVH WHQVLRQV ZLWKLQ 6LU)UHGHULFN¶V VWDWHPHQW section 5 of this article. However, for present purposes it suffice it to say that Jordan CJ

³⁰ See the discussion of the naming theory of meaning in section 4.2.
³¹ *Scott v Commissioner of Taxation* (1935) 35 SR (NSW) 215, 219.
³² *Ibid.*

might be taken to have contemplated two quite different approaches to identifying the PHDQLQJ RI µLQFRPH¶ %HIRUH WXUQLQJ WR IXUWKI appropriate to review the adoption of the statement of Jordan CJ by the High Court of \$XVWUDOLD LQ VRPH GHFLVLRQV XSRQ WKH PHDQLQJ decades.³³

3. THE HIGH COURT'S ADOPTION OF THE JORDAN CJ DEFINITION OF INCOME WHEN INTERPRETING SUBSECTION 6-5(1)

In the course of considering the definition of ordinary income in subsection 6-5(1) in some decisions the High Court has emphasised the significance of the statement of Jordan CJ. The purpose of this section of the article is to establish two propositions with UHVSHFW WR WKH DGRSWLRQ RI 6LU)UHGHULFN¶ V VW 7KH ILUVW SURSRVLWLRQ LV WKDW WKH HOHPHQWV R analysed by the High Court. Following from this first proposition, the second proposition is that this absence of analysis has allowed different judicial paraphrases of 6LU)UHGHULFN¶ V VWDWHPHQW WR EH DGRSWHG ZLW

This statement of the majority **Montgomery** indicates that Sir Frederick **N V V W D W H P H Q**

ZDV DQ μHYLGTHQ We Decision of the CJ Scott 6 LU)UHGHULFN statement in Scott was there extracted in full.

Later in the joint judgment in Stone the plurality noted that the existence of a business DFWLYLW\ μSHUKDSV YHU\ RIWHQ¶ ZLOO FDUU\ ZLWK L business activity are ordinary income.⁴⁰ However, the joint judgment appears to have

Memorandum accompanying the Bill for the ITAA 1997.⁴⁶ Deciding that section-3 applies without analysing its terms first is contrary to the description of orthodox interpretative practice set out in various High Court decisions.⁴⁷ This is particularly significant given the rebuttable presumptive rule of statutory interpretation that different statutory words are presumed to be intended to have a different meaning.⁴⁸

rationale for displacing the statutory text of subsection 5(1) with some other judicial words more or less drawn from the statement of Sir Frederick Scott

This proliferation of general statements of principle regarding the process for

This is the metaphysical aspect of statutory interpretation; and

2. Once

XQLYHUVDO VXFK DV μLQFRPH¶ WKHUIRUH HQWDLOV LQFRPH ,Q 3ODWR¶V PHWDSKRU ~~It is believed that~~ the shadows of the Forms are seen on a cave wall. Unable to see the Forms directly, the observers are consigned to only ever seeing shadows of those Forms. One reading of the Cave metaphor is that ordinary people live their ~~respective~~ lives without ever seeing the purity of Forms, which have to be rediscovered by philosophers who reveal ~~all~~ this priori knowledge by rational thought, rather than discovering knowledge by empirical investigation of the world.

Another form of realism is ~~at~~tributed to Aristotle. In broad terms, one reading of Aristotle⁶⁴ is that he accepted that universals exist, but unlike Plato, Aristotle considered

Prior to this renewed interest in language as a philosophical problem⁷⁰ it was widely accepted that language meant what it referred to, and the use of language to refer to >td b

FRQYHQWLRQDO DFFRXQW PXVW DFFHSW WKDW μWUXW
LV QRW FRQVLVWHQW ZLWK WKH X⁸⁸QLYHUVDOLW\ WKDW

This philosophical examination of the foundations of linguistic meaning is relevant to the present examination of the dictum of Jordan CJ in several ways. First, linguistic philosophy highlights the fact that the foundations of the meaning of linguistic ~~statements~~ cannot be taken for granted. Second, the first proposition is reflected in the echoes of the semantic and pragmatic threads, of both common understandings of the foundation of linguistic meaning and also of linguistic philosophy, to be found in ~~the~~ ~~dictum~~ of Jordan CJ, a matter taken up in section ~~five~~ of this article. Third, the examination of the foundations of linguistic meaning, characteristic of linguistic philosophy, highlights the matters that one might expect to be considered if reference ~~dictum~~ of Jordan CJ is to reach beyond ritual incantation with judicial analysis of the elements of the dictum.

5. UNDERSTANDING SIR FREDERICK JORDAN ¶

5.2 Analytical approaches to μ L QFRPH \uparrow UHIOHFWHG LQ 6LU) UHGHULFN -RU to orthodox interpretation of non-technical statutory language

In this context we can begin to μ GHUVDQG 6LU)UHGHULFN -RUGD adoption of his forms/principles framework. This framework for interpreting the GHILQLWLRQ RI RUGLQDU\ LQFRPH LV XGAMMICAL ZKHQ PHDQ¹⁰⁴ μ UHLWHUD¹⁰⁵ μ UHQDEED¹⁰⁶ μ UHL¹⁰⁷ of the text commonly referred to by judges when considering the general principles of statutory construction.¹⁰⁷ When these textual formulae are adopted it seems to be implicitly assumed that the ordinary, natural or literal meaning is immediately apparent or readily accessed, for example by reference to dictionaries.¹⁰⁸

7KH ILUVW SDUW RI 6LU)UHGHULFN -RUGDQ \uparrow V VWDWH identifying the meaning of non-technical language. In the same way that linguistic philosophy accepted that rules governing the linguistic meaning could be revealed by analysis, Sir Frederick indicated that language usage and concepts need to be in order to arrive at the meaning of natural language terms. Forms of receipt are μ FRPSUHGHG¹⁰⁹ ZWKLR \uparrow UG μ LQFRPH \uparrow VXJJHVWLQJ WKDV UHYHDOHG E\ H[DPLQLQJ WKH LQQHU ORJLF RI μ LQFRPH EH UHYHDOHG E\ H[DPLQLQJ μ RUGLQDU\ FRQFHSWV DO stating that LGHQWLILFDWLRQ RI WKH IRUPV RI UHFHLSW F both semantic analysis of the word and conventional analysis of the use of the word. The preceding overview of linguistic philosophy indicates that this part of Sir)UHGHULFN embodies a potentially irresolvable conflict between competing semantic and pragmatic accounts of the foundation of linguistic meaning.

6LU)UHGHULFN \uparrow V UHIHUHQFH WR LGHQWLILQJ μ SULQ clear whether the SULQFLSOHV DOVR DUH μ FRPSUHKHQGHG ZLV DUH WR EH IRXQG E\ H[DPLQLQJ WKH VRFLDO SUDFWLF WR EH WUHDWHG DV LQFRPH \uparrow GRHV QRW DVVLVW L contemplated by Sir H GHULFN -RUGDQ \uparrow V VWDWHPHQW EHFDXVH evident on the surface of ordinary language usage or it could be referring to norms that lie hidden beneath surface usage in circumstances where the usage does not necessarily reflect those

dLIILFXOW WR VHH KRZ μSULQFLSOHV¶ FDQ EH DFFRPF which things have an essence that is defined in terms of necessary and sufficient criteria. If a receipt has a form of a kind that warrants its inclusion under the category of FRPH ¶ because its essence corresponds with the essence of income, a realist would reject the SURSRVLWLRQ WKDW WKH SDUWLFXODU DPRXQW FDQQ override the essential nature of the receipt. This suggests that Sir Ke cannot have meant to adopt some version of philosophical realism when referring to forms of receipt.

,I 6LU)UHGHULFN¶V UHIHUHQFH WR μIRUPV RI UHFHLS also does not refer to philosophical realism, what are rules governing identification RI WKH UHOHYDQW IRUPV" \$QG KRZ GR μSULQFLSOHV¶ could principles affect the types of form comprehended within the concept of income? 7KHVH DVSHFWV RI 6LU)UHGHULFN¶V VWDWHPHQW UH

Moreover, his Honour did not elaborate upon the reasons for adopting this dual forms/principles inquiry. However, adopting the convention of interpreting statements in their best possible light, it is reasonable to speculate that his Honour had the benefit of undertaking a preliminary cull of forms of receipt that could never satisfy the concept of income described by the principles considered in the second stage of the inquiry. For example, the relatively blunt instrument of assessing form receipts could enable a judge to quickly dispose of many cases without recourse to the second stage identification and application of principles. If a gains concept of income were to be extracted from ordinary concepts and usages, benefiting from the provision of infrastructure could be considered to be a gain. However, exclusion of such benefits

CJ departed from that simplistic account of natural language meaning by suggesting that analysis of ordinary concepts and usages and ordinary parlance would reveal the forms of income receipt and principles to be applied in ~~other~~ arising receipts as income.

\$OWKR XJK μLQFRPH¶ ZDV WR EH HODERUDWHG E\ DQD
CJ, the ordinariness of the language elements subjected to judicial analysis promoty

decision in *Stone*¹²² This absence of precision appears to have allowed some judges to adopt a range of approaches to the concept of ordinariness which underpinned

GLIIHUHQW DSSURDFKHV WR WKH PHDQLQJ RI μLQFRPH μFRPPHUFLO¶ FRQFHSW RI LQFRPH FRXOG EH DGRSV particular receipt¹²³ while a gains concept of income can also be considered to

μRUGLQDU¶¹²⁴

5.9.1 Dictionary definitions

The Shorter Oxford English Dictionary¹ defines the term "deduction" as "the act of deducting; the amount deducted; the sum subtracted from a total." The Shorter Oxford English Dictionary also indicates two relevant senses in which the term "deduction" is used: "the act of deducting" and "the amount deducted." Together, it is plausible that the term "deduction" in the context of the Internal Revenue Code refers to the amount deducted from a total.

applicable for those who subscribe to philosophical realism¹³¹ because the definition may identify the necessary and sufficient criteria that must exist in reality (the real essence of the thing) or they may identify the necessary and sufficient criteria that must be satisfied by convention.¹³²

The classical theory of concepts resonates with legal rule formalism.¹³³ According to rule formalism, the meaning of a legal concept (such as income) is identified having rHJDUG WR LWV VHW RI GHILQLWLRQDO UXOHV DQG WK RI WKH μIDFW SDWWHUQ¶ FRPSULVLQJ RXU VHQRU\ S H[DPLQDWLRQ 2QH FDQ WKHQ PHFKDQLF EDW OS DGWHWHUQ corresponds to the definitional rules of the concept.

Although classical theories of concepts were the predominant paradigm for concepts until the latter half of the twentieth century,¹³⁴ they have been subjected to considerable criticism in contemporary philosophy and cognitive psychology upon several grounds.¹³⁵ One limitation is that it is extremely difficult to identify a concept that satisfies the classical focus upon definitional rules that comprehensively specify necessary and sufficient conditions for their application.¹³⁶ A second difficulty is that the classical theory implies that all members of a class would be identified with more or less equivalent speed because of the binary nature of determining whether each of the necessary and sufficient conditions were respectively satisfied. However, experimental data indicates that this is not the case because individuals exhibit μW\SLFDOLW\ HIIHFWV¶ LQ SURFHVV LQSOHW¶ HFDSBOLFDW readily identified to fall wW KLQ D FRQFHSW WKDQ μGLIILFXOW¶ FD

One explanation for these typicality effects is that the definitional rules comprising concepts may be fuzzy. With respect to the concept of income, the High Court appears to have accepted that this is the case.¹³⁷ In *Artis, WKH PDMRU LW\¶ V MRLQW MXC* to acknowledge that a criterial approach to identifying the concept of income was not discernible in the income tax case law:

There is a difficulty in making good absolute propositions in this field. In *Federal Commissioner of Taxation v Montgomery, Gaudron, Gummow, Kirby and Hayne JJ* recognised that income is often (but not always) a product of

¹³¹ See the discussion in section 4.1.1 above.

¹³² A point noted, for example, by Edouard Machery, *Doing Without Concepts* (Oxford University Press, 2009) 78. Thus, the classical theory of concepts is not describing a universal thing of the kind of a Platonic

exploitation of capital; income is often (but not always) recurrent or periodical; receipts from carrying on a business are mostly (but not always) income.¹³⁸

By contrast, the High Court in *Montgomery* appeared to adopt a criterial approach in identifying the concept of the class of all inquiries into the meaning of income by specifying the essential nature of such inquiries.¹³⁹ However, the vagaries of Sir

6 R ZKHQ FRQVLGHULQJ ZKHWKHU DQ DPRXQW LV μ RU suggests that if the receipt matches my exemplars of income in respects (beneficially received, etc) but does not match other properties of my exemplars (ie receipt is irregular) then I apply a function (multiplicative, for example) in weighing whether the receipt is income. In the absence of express consideration of this function, it is possible for different judges and others to apply different functions in resolving a particular case, a process loosely described as determining the weight to be given to particular facts.

The unspecified application of this function underpinned the reservations regarding analogical reasoning application of an exemplar concept of concepts expressed by the majority in *Montgomery*.⁰ gET Q Q q 0.00001 1 (in)(e)-327(a 220.1()-2v [(e 0 (mini

DUH WUHDWHG VLP¹⁶³LTU, for example, artificial and accidental domains may be separated upon the principle of differentiating those things that have been created intentionally from those that arose without deliberate action. Accidental inventions may pose a challenge for this neat categorisation, but ~~the~~ ~~is~~ ~~that~~ the theory theory envisages a metatheoretical structure within which concepts (possibly comprising minitheories) will be organised.

In the context of the income tax, ~~the~~ ~~theory~~ ~~theory~~ of income could be grounded upon some concept of justice. Benefit theory¹⁶⁴ and gains theory¹⁶⁵ are alternate options that

5.9.8 Is there an ordinary concept of a concept

The preceding overview of different concepts ~~concepts~~ indicates that there is considerable difficulty in identifying those concepts which are ordinary, in the sense of widely used or attested.

, I μZLGHO\ XVHG RU DWWHVWHG¶ LV XQGHUVRRG WR possible that KH VHW LGHQWLILHG E\ WKH ODEHO μRUGLQDU no concept of a concept is preferred. Rather, it is possible that different ideas of concepts are applied by different people and in different contexts. However, I suggest that it is appropriate to adopt the interpretative presumption against meaningless statutory words E\ SURFHGLQJ XSRQ WKH EDVLV WKDW μZLGHO\ XVH concept of a concept is preferred. Rather, widely used can be understood to mean μFRP RQO\ IRXQG LQ XVDJH¶ 7KXV JLYHQ WKDW DW OH concepts described here are commonly accepted to be found in common usage, the OHJLVODWLYH UHIHUUHQFH WR μRUGLQDU\ FRQFHSWV¶

However, proceeding on ~~th~~ basis does not resolve the difficulty of identifying ordinary concepts because the ordinary concept of a concept could include all manner of theories of concepts. If so, a judge must extract a concept of income after considering a multitude of possibly incomparable, ordinary concepts of income, and that choice is not guided by any principle expressed in the legislation or the case law.

6. CONCLUSION

In *Montgomery v. British Columbia* (2014), the High Court (as a 5-4 majority) identified the statement of Sir Frederick Jordan as the essential nature of the inquiry into the meaning of income and that this statement was not a matter of ritual incantation. In doing so, the High Court juxtaposed ritual incantation with analysis, implying that statutory meaning is an object that can be discovered by analysis of the relevant statutory text in accordance with orthodox principles of statutory interpretation.

Despite this legalist depiction of the objective discovery of law, the meaning of the subsection 6(1) (".0\$.)

