ENACTMENT OF A DEDUCTION RULE REGARDING TRAVEL BETWEEN WORKPLACES OR INCOME PRODUCING ACTIVITIES CAN LEAD TO ERRORS

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Section 25-100 of the Income Tax Assessment Act 1997 (Cth) was introduced in response to the Full High Court decision in Federal Commissioner of Taxation v Payne. The High Court held that expenditure on travel between two unrelated income producing activities does not satisfy the general deduction section (s 8-1). Section 25-100 confers a deduction for expenditure on travel between unrelated income producing activities. The section contains an exception where the travel is to or from the taxpayer’s residence. This ‘internal exception’ can cause confusion. Indeed, at least one commentator has suggested that the residence exception in s 25-100 puts in jeopardy the deductibility of expenditure on travel to or from the taxpayer’s residence where the deduction is obtained under the general deduction section. The case law establishes a number of categories where the general deduction section does provide a deduction for travel expenditure even though the taxpayer is travelling to or from their home. This article critically examines the proposition that the internal residence exception in s 25-100 puts in doubt deductibility of relevant travel provided by the general deduction section. In this regard, the article examines the background to the introduction of s 25-100, the case law under the general deduction section on travel to and from the taxpayer’s residence and the central concepts in s 25-100.

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1. INTRODUCTION

Section 25-100 of the *Income Tax Assessment Act 1997* (Cth) (‘the ITAA 1997’) was inserted into Australia’s income tax law as a response to the Full High Court decision in *Federal Commissioner of Taxation v Payne*.\(^1\) The majority in *Payne’s Case* held that expenditure on travel between two unrelated income producing activities (workplaces) does not meet the requirements of the first positive limb in the general deduction provision (s 8-1(1) of the ITAA 1997). The purpose of s 25-100 is to provide deductions for travel between two unrelated ‘workplaces’. However, the section contains some exceptions to the deductibility of travel between unrelated workplaces (for example, a place where the taxpayer resides is not treated as a workplace).\(^2\) It is these ‘internal’ exceptions that can create uncertainty or confusion. For example, the reference to the place where a person resides in one of the internal exceptions\(^3\) raises the possibility that the rule embodied in this exception should also be transported to the general deduction provision. Alternatively, the possibility also arises that s 25-100 provides the rules that govern most areas of an employee’s travel, to the exclusion of the general deduction section. Indeed, suggestions along these lines have been made by at least one tax commentator.\(^4\)

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\(^1\) (2001) 202 CLR 93.
\(^2\) Section 25-100(3) of the ITAA 1997.
\(^3\) Section 25-100(3) of the ITAA 1997.
\(^4\) See Philip Burgess, ‘Deducting Travelling Expenses: Still a Payne in the Posterior’ (2004) 33(4) *Australian Tax Review* 239, 243, 244, 245. The article of Burgess contains comments such as: (1) ‘Aircraft and watercraft are not mentioned [in the explanatory memorandum as examples of transport costs covered by s 25-100], but presumably a latter day Dr Garrett [taxpayer in *Garrett v Federal Commissioner of Taxation* 82 ATC 4060] could claim the costs of operating his aircraft under s 25-100’; (2) ‘At a stroke the tax law (probably unintentionally) has denied all persons who work from home the cost of travel to their first job of the day’; (3) ‘One example [where s 8-1 may still provide a deduction] might be a taxpayer with a home base claiming the first and last journeys of the day under s 8-1 rather than s 25-100, though it is likely that a court would conclude that s 25-100 was intended
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The main focus of this article is on the internal exception relating to travel between the taxpayer’s residence and an income producing activity. This is where errors of interpretation can occur, and where the proper role of s 25-100 must be ascertained. However, the article necessarily includes an examination of other aspects of s 25-100 and the relationship between s 25-100 and the other deduction provision relevant to expenditure on travel between workplaces, namely, s 8-1. Aside from this introduction and the conclusion, the article is in three Parts. Part 2 provides a summary of the case law on the deductibility of expenditure on travel between workplaces or income producing locations, and on travel to or from a place where the taxpayer resides.

Unless relevant to the analysis of issues in this article, other problematic aspects of s 25-100 of the ITAA 1997 will not be examined. For example, it is unclear what the role or function of s 25-100(4) is, or at least, whether it has a significant role. This subsection states that travel between two places will not be travel between workplaces where the activity at the first place has ceased. If the job or activity at the first place has ceased, it is hard to see how travel between the first and the second place could satisfy the positive requirement in s 25-100(2) that the taxpayer was engaged in activities of producing assessable income at the first place before travelling to the second place. However, as a result of the definition of travel between workplaces, namely, the taxpayer engaged in activities at the first place before travelling to the second place, it might be that s 25-100(4) only has a role on the day a taxpayer ceases their first job. This would include circumstances where the taxpayer finishes a job (first job) for the last time, and travels on the same day to a continuing second job, or the taxpayer is commencing a new job on the same day as finishing their first job. Paragraph 2.22 of the explanatory memorandum to the Tax Laws Amendment (2004 Measures No 1) Bill 2004 (Cth), the Bill that introduced s 25-100, supports this analysis. It is submitted that the analysis of Julie Cassidy, Concise Income Tax (4th ed, 2007) 325–6 regarding s 25-100(4) cannot be correct. The author seems to contemplate that s 25-100(4) prevents deductibility for travel expenditure where a taxpayer finishes work for a day at one income activity (first income activity) and then travels to the other income activity even though the taxpayer will be returning to the first income activity the following day (ie first income activity has not ceased, only activity of the taxpayer for the day has ceased).
Statements made in Australian Taxation Office (‘ATO’) rulings are also referred to. This background is required in order to properly understand the role of s 25-100. Part 3 provides descriptive background to the introduction of s 25-100 (for example, extracts from the explanatory memorandum to the relevant Bill), and the text of s 25-100.

Part 4 discusses s 25-100 and attempts to discern whether the section is a deduction conferral provision, a deduction denial provision or a mixture of the two. Section 4 also discusses whether s 25-100, or part of s 25-100, can amount to an exclusive code in regard to certain travel expenditure (for example, travel from and to the taxpayer’s residence, all travel expenditure related to workplaces). An exclusive code has the effect of ousting other deduction sections of the income tax from operating on given transactions. The overall conclusion is that while there are some problematic issues with s 25-100, the scope of operation of the section and its relationship with the general deduction section is fairly clear. In particular, s 25-100 does not operate to deny taxpayers deductions for travel expenditure that is otherwise available under the general deduction section.

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6 See the recent Full High Court decision of Federal Commissioner of Taxation v McNeil (2007) 233 ALR 1, 10–12 for a discussion of the exclusive code or complete code argument in the context of receipts obtained by shareholders from companies.
2. CASE LAW ON EXPENDITURE ON TRAVEL BETWEEN TWO LOCATIONS OF THE ONE INCOME PRODUCING ACTIVITY, TRAVEL BETWEEN UNRELATED INCOME PRODUCING ACTIVITIES AND TRAVEL FROM HOME TO AN INCOME PRODUCING LOCATION

2.1 Travel Expenditure between Two Locations of the One Income Producing Activity

Expenses on travel between two locations of the one income producing activity will meet the requirements of the first positive limb of the general deduction section, and will not fall within the exclusionary private or domestic limb. The reasoning is that such travel is part of the operations by which the taxpayer earns his or her income, or it is part of the performance of the income activity. Another way of putting it is to say that such expenditure is travel on work, rather than travel to or from work. It will be a question of fact as to whether the locations between which the travel occurred are part of the one income producing activity.

7 It is fairly clear that these are the categories of travel that have been established under the case law, and to some extent, confirmed by s 25-100 of the ITAA 1997. Further, reference will also be made to various ATO rulings. It will be appreciated that the ‘exception cases’ in Part 2.3 of this article could also be categorised under the principle in Part 2.1. This outline and discussion is required to facilitate the discussion in Part 4 of the article.

8 Section 8-1(1)(a) of the ITAA 1997.

9 Section 8-1(2)(b) of the ITAA 1997.

10 Lunney v Federal Commissioner of Taxation (1957) 100 CLR 478, 500; Federal Commissioner of Taxation v Collings 76 ATC 4254, 4267; Federal Commissioner of Taxation v Payne 99 ATC 4391, 4392 (Hill J), 4400 (Sackville and Hely JJ). The ATO also accepts this as a correct statement of the law: see, eg, Taxation Ruling TR 98/6 [23], [150]–[151]; Taxation Ruling TR 98/14 [22], [107]–[108].

11 It is suggested that the following considerations would be relevant to the question as to whether two activities are one income producing activity, or whether they are two separate income producing activities: (1) skills and knowledge used to carry on
2.2 Travel Expenditure between Unrelated Income Producing Activities Where Neither Location Is the Taxpayer’s Residence

It was almost universally accepted that travel expenditure between two unrelated income producing locations was deductible under the general deduction section. The reasoning is set out in the following passages of Sackville and Hely JJ in the Full Federal Court decision of Federal Commissioner of Taxation v Payne:

[A] taxpayer travelling from one place of business or employment, at which he or she derives assessable income, to another such place, in order to conduct activities from which he or she will derive assessable income, ordinarily is … ‘travelling on his [or her] work, as distinct from travelling to his [or her] work’. The taxpayer’s work requires his or her attendance at each place. It does not matter that ‘the work’ is for different employers, or involves one or more businesses, or spans different occupations.

…

Where travel is between places from which income is derived, for the purpose of deriving income from activities conducted at those sources, there is the contemporaneity between expenditure and income earning activity which is implicit in the notion of ‘in the course of’ gaining or producing the assessable income. Moreover, the expenditure has a substantial business character. If the purpose of the travel is exclusively to go from one income producing activity to

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each activity; (2) location(s) where activities are carried on; (3) identity of payer of taxpayer’s income; (4) whether the type of products or services dealt with are similar or identical; and (5) whether the accounting records for each activity are separate or not. The factors set out at para 45 in Taxation Ruling TR 2001/4 provide useful guidance in determining whether activities amount to separate and distinct businesses. Taxation Ruling TR 2001/4 deals with the issue of identifying a business in the context of the loss-quarantining rules in div 35 of the ITAA 1997.
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another, it is difficult to see how the essential character of the expenditure is other than a business or working expense.\textsuperscript{12}

The deductibility of such expenditure was reaffirmed by the ATO in *Taxation Ruling IT 2199*. In that ruling, the ATO said:

Claims for income tax deductions for expenses incurred in travelling directly between two places of employment, two places of business or a place of employment and a place of business should be allowed where the taxpayer does not live at either of the places and the travel has been undertaken for the purpose of enabling the taxpayer to engage in income producing activities.\textsuperscript{13}

The ATO’s approach was confirmed in a series of occupation-based rulings.\textsuperscript{14}

2.2.1 Payne’s Case

Perhaps in light of the size of the expenditure and the fact that the taxpayer resided at one of the income producing locations, the ATO effectively challenged this deductibility view in *Payne’s Case*.\textsuperscript{15} In *Payne’s Case*, the taxpayer lived with his family on a rural property in northern New South Wales. He carried on the business of deer farming on the property. The taxpayer was also an international airline pilot employed by a major commercial airline (Qantas). The

\textsuperscript{12} 99 ATC 4391, 4400 (citation omitted). It is worth noting that the minority judgment written by Hill J in the Full Federal Court rejected the proposition that travel expenditure between two unrelated income producing locations was deductible under the general deduction section: ibid 4393–4. J Block (Senior Member) also rejected the proposition when *Payne’s Case* came before the Administrative Appeals Tribunal: *Case 26/97* 97 ATC 296.

\textsuperscript{13} Paragraph 4 of *Taxation Ruling IT 2199*.

\textsuperscript{14} See, eg, paras 23, 149 of *Taxation Ruling TR 98/6* (real estate industry employees); paras 22, 115–6 of *Taxation Ruling TR 98/14* (employee journalists).

\textsuperscript{15} The expenses involved for the respective years were: 1991 ($2092); 1992 ($2988); 1993 ($5337); and 1994 ($5093). The high income level of the taxpayer may have provided another reason for the ATO challenge: Burgess, above n 4, 241.
taxpayer’s employment was based at Sydney airport. The airport was some 550 kilometres from the farming property. The taxpayer incurred travel expenditure between his farming property and the airport. The expenses were predominantly for car, bus and train travel. It was generally accepted by the Administrative Appeals Tribunal that the taxpayer was working on farm business activities just prior to leaving to travel to his employment at the airport.\(^\text{16}\) And, the taxpayer claimed that he attended to farming activities immediately upon arriving at the property when returning from the airport.\(^\text{17}\)

The majority of the Full High Court held that expenses incurred in travelling between two places of unrelated income derivation (ie two separate income producing activities) were not deductible.\(^\text{18}\) The reasoning was that the expenditure was not incurred in the course of either activity. To put it another way, neither income producing activity provided the occasion for the outgoing.\(^\text{19}\) Indeed, the majority stated that these expenses were no different from expenses of travelling from home to work.\(^\text{20}\) It is worth pointing out that the deduction denial decision of the majority of the Full High Court in Payne’s Case did not rest in any way on the fact that the taxpayer resided at one of the places that he was travelling between (ie the farm property). Indeed, this was not even raised as an issue in the majority judgment.

\(^\text{16}\) Case 26/97 97 ATC 296, 299.
\(^\text{17}\) Ibid. It was clear that the taxpayer wanted to stress to the Tribunal that he was working on farm activities prior to departing for the airport, and immediately on returning from the airport. The aim appears to have been to show that the trips from and to the farming property could not be viewed as trips from and to a home or residence. If viewed as trips from and to a home, it would have been unlikely for the expenditure to have fallen within the [then] widely accepted principle of deductibility for travel between two unrelated income producing activities.
\(^\text{19}\) Ibid 100–2 (Gleeson CJ, Kirby and Hayne JJ).
\(^\text{20}\) Ibid 102 (Gleeson CJ, Kirby and Hayne JJ).
2.3 Travel Expenditure from or to the Taxpayer’s Residence

The majority decision of the Full High Court in *Lunney v Federal Commissioner of Taxation* is authority for the proposition that travel from home to the place of work and travel home from the place of work does not satisfy either positive limb under the general deduction section and is therefore not deductible.21 It would also appear that such expenditure would fall within the exclusionary private or domestic limb.22 This decision has been acted on by taxpayers and the ATO, and has received wide judicial acceptance.23

However, a series of ‘exceptions’ to the normal, travel to and from home to work principle or rule, has emerged in the cases. It does not matter whether these cases are seen as exceptions to the normal rule, or that they are examples where the normal rule does not apply. The effect is the same, namely, taxpayers obtaining deductions for travel expenditure where the travel commences or finishes at the place where the taxpayer resides. A brief statement of the facts in the leading cases illustrating a particular principle or exception to the normal rule is set out below. A particular exception set out in an ATO ruling is also stated.

2.3.1 Federal Commissioner of Taxation v Collings24

The taxpayer was employed as a computer consultant. The taxpayer’s employer was planning to implement a major conversion of its computer facilities for the benefit of its customers. In order to

21 (1957) 100 CLR 478, 500 (Williams, Kitto and Taylor JJ).
22 Ibid 500–1 (Williams, Kitto and Taylor JJ).
23 The principle was restated by the majority (Gleeson CJ, Kirby and Hayne JJ) in *Federal Commissioner of Taxation v Payne* (2001) 202 CLR 93, 100–1. The minority (Gaudron and Gummow JJ) also accepted this proposition in the context of travel between a sole place of work and a residence: ibid 110–14.
24 76 ATC 4254.
facilitate the conversion, the taxpayer had acquired special knowledge regarding the proposed conversion through training in the United States. The taxpayer’s normal hours of work were from 8:30 am to 5:30 pm on weekdays. However, she was on call for 24 hours of the day and on weekends for the purpose of ‘reviving the computer’ should it break down. For this purpose, she had to be contactable even when she was not at home (for example, when she was visiting friends or at the cinema). To facilitate the diagnosis and correction of computer faults while at home, she was provided with a portable terminal that connected to the work computer through the telephone line. On receiving a call for assistance from work, she would attempt to diagnose the problem and fix it from home. If she could not fix the problem over the phone, or over the terminal installed at home, she would travel by car to the workplace and address the problem. The court held that the travel expenses from home to the place of work (employer’s premises), outside of the normal everyday journey, were deductible. The return journey to her home was also deductible. The reasoning was that, while on call, the taxpayer had a special assignment. This meant that at the time of receiving a call from work, she had commenced her duties of having responsibility for fixing the computer, so that when she travelled to the work location, she was completing an aspect of the work.\(^{25}\) Put another way, she was travelling on work, and not to work.\(^{26}\)

2.3.2 Federal Commissioner of Taxation v Wiener\(^{27}\)

The taxpayer was a primary school teacher. She was engaged in a pilot scheme involving the teaching of foreign languages to students at a number of schools in a district of Perth. To fulfil her obligations, the taxpayer was required to teach at four to five schools on the one day. It was not practical to commute between these schools by public

\(^{25}\) Ibid 4262, 4267–8.
\(^{26}\) Ibid 4267.
\(^{27}\) 78 ATC 4006.
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transport. Accordingly, the taxpayer used her car to travel between the schools. Her employer paid her a car allowance for use of her car, which was included in her assessable income. The ATO allowed the taxpayer a deduction for travel between the schools.\(^{28}\) However, the ATO disallowed her deduction claim for travel from her home to the first school and from the last school to her home at the end of the day. The court held that these travel expenses were deductible. The nature of her job made it necessary that transport was at her disposal throughout the day. Indeed, the taxpayer’s job was inherently itinerant and that she could be said to be travelling in the performance of her duties from the moment of leaving home to the moment of her return there.\(^{29}\)

2.3.3 Federal Commissioner of Taxation v Vogt\(^{30}\)

The taxpayer was a professional musician who played the acoustic bass and the electric bass, both of which have associated amplifying equipment. The taxpayer was an employee of the Marrickville RSL and the Daly Wilson Big Band. With both employers, it was a term of his employment to provide his own instruments, and he was to bring them to performances and rehearsals. The taxpayer kept his instruments and the associated equipment at his residence because it was essential to practice on them, and because it was the only practicable place to keep them (i.e. there were generally no facilities for keeping any of the instruments or equipment at other places where he worked or rehearsed). The instruments and equipment were bulky. The taxpayer used a motor vehicle to transport his instruments and equipment, and himself, from his residence to the various places where he worked. Because of their bulk, use of a motor vehicle was the only practical way of transporting the instruments and equipment. The court held

\(^{28}\) Ibid 4008.
\(^{29}\) Ibid 4010.
\(^{30}\) 75 ATC 4073.
that the motor vehicle expenses for travel between the taxpayer’s home and the places where he performed, and the return trip, satisfied the requirements of the general deduction section. Importantly, Waddell J said: ‘[I]n a practical sense, the expenditure should be attributed to the carriage of the taxpayer’s instruments rather than to his travel to the places of performance.’

2.3.4 Federal Commissioner of Taxation v Ballesty

The taxpayer was employed full-time as a purchasing officer for a leagues club (ie a recreation or social club). The taxpayer was also a professional footballer (rugby league) and played for the related rugby league team on a part-time basis. He was paid a specific amount per match depending on whether the team won, drew or lost. The taxpayer was bound to perform to the best of his abilities for the club. The taxpayer travelled by car to his full-time job. On the two or three nights he trained with the club, he would travel by car directly from his full-time job to the training venue. After training, he would drive home. On match days, he would drive from home to the ground where the team was playing, both for home and away matches. He would drive home after the match. For both matches and training, the taxpayer would carry a bag that contained his playing and training gear. The bag weighed between 12lbs to 15lbs for matches, and between 15lbs to 20lbs for training. The bag was around twice as heavy after a match, or after a training session due to the dampness of the clothing. The ATO allowed deductions for: (1) travel expenses between the full-time job and the training venue; and (2) travel expenses from home to the ground, and return, on match days where the team was playing an away game (i.e. ground of opposing team).

The travel expenses in contention were: (1) travel from the training venue to home after training; and (2) travel from home to the

31 Ibid 4078.
32 77 ATC 4181.
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home ground, and return, on match days where the team was playing. Waddell J allowed both expenses. Two bases were suggested. First, as a matter of practical necessity, the taxpayer was required by the terms of his contract to travel by motor vehicle to and from training, and to and from matches in order to fulfil his obligation to be in the position to play football to the best of his ability.\(^{33}\) Secondly, the taxpayer’s home was regarded as a base of operations in regard to his income producing activity of being a professional footballer.\(^{34}\)

2.3.5 Garrett v Federal Commissioner of Taxation\(^ {35}\)

The taxpayer resided on a property with his wife and children at Greenthorpe in New South Wales. The taxpayer was a consulting physician in allergies. He carried on his medical practice(s) at the following locations in regard to the relevant income year:

- two and a half days per week at Caringbah, a Sydney suburb. The taxpayer would stay in the small flat attached to the surgery;
- district hospital at Mudgee on demand, which was eight times for the year;
- district hospital at Condobolin on demand, which was eight times for the year;

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\(^{33}\) Ibid 4184.

\(^{34}\) Ibid 4184–5. The issue of travel from home to the full-time job on the two or three days when he trained was not discussed in the case. However, on the reasoning of Waddell J, it is hard to see why this is not deductible. On the reasoning of Waddell J, it is submitted that the deductibility of the travel between the full-time job and the training venue, which the ATO allowed, cannot be put on the basis that the taxpayer was travelling directly between two locations where unrelated income producing activities were carried on.

\(^{35}\) 82 ATC 4060.
district hospital at Cowra on demand, which was about 40 times for the year; and

emergency semi-general practice at Greenthorpe, at which he saw two patients per week.

The practices at Mudgee, Condobolin and Cowra generated around 35 percent of the taxpayer’s medical income. Some of this work was weekend work. The taxpayer used an aircraft to travel to and from the various practices. It appears that most of the aircraft travel involved travel from Greenthorpe to the various practice locations, and return to Greenthorpe (for example, from Greenthorpe to Bankstown airport (near Caringbah) and return to Greenthorpe, Greenthorpe to Mudgee and return to Greenthorpe). However, there did appear to be a small amount of travel between the practices (for example, Bankstown to Mudgee and then to Greenthorpe). The aircraft was also used to transport vaccines from his Sydney (Caringbah) practice to the other practices. (The vaccines most probably were transported to Greenthorpe first and then from there to the other practices). It was necessary to transport vaccines under refrigerated conditions and this could not have been conveniently done with other forms of transport. The taxpayer’s country practices had developed in response to requests from medical practitioners in the areas. The taxpayer believed that this expansion of his practice would not have been possible if it were necessary to rely on transport other than aircraft.

The taxpayer also conducted pastoral activities as a farmer and grazier on the property at Greenthorpe. This activity was a legitimate business (for example, income from the sale of wheat was $52,660 for the relevant income year). The aircraft was also used in regard to the farming business (for example, to inspect stock). Taking account of the demands of the taxpayer’s medical practice(s), the farming business could not have been properly managed by him if he did not
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have the aircraft. The farm use of the aircraft was only around 3 percent compared to 97 percent use for the medical practice(s).\(^\text{36}\) The taxpayer incurred expenses associated with the operation of the aircraft (for example, lease expenses, fuel). The court allowed a deduction under the general deduction section for all of the expenses associated with use of the aircraft.

2.3.6 Miscellaneous Taxation Ruling MT 2027

In this ruling, the ATO sets out another situation where travel expenses from home will meet the requirements of the general deduction section.\(^\text{37}\) The situation contemplated is where an employee travels from home to a client’s premises and then on to the employee’s regular place of work, and visiting clients is within the ordinary course of the employee’s duties. In these circumstances, and provided three conditions are satisfied, the ATO states that the travel from home to the client’s premises is deductible. Those three conditions are:

- the employee has a regular place of employment to which he or she travels habitually;
- in the performance of his or her duties as an employee, travel is undertaken to an alternative destination which is not itself a regular place of employment (ie this approach would not apply, for example, to a plant operator who ordinarily travels directly to

\(^{36}\) The 97 percent use for the medical practice(s) includes use of the aircraft for training and licence renewal (total of seven percent). On an appropriate attribution basis, some of this usage could be attributed to the farm.

\(^{37}\) It is worth noting that Miscellaneous Taxation Ruling MT 2027 deals with the distinction between private use and income producing use of cars for the purposes of the car fringe benefits tax rules under the Fringe Benefits Tax Assessment Act 1986 (Cth). However, the ATO states that the question of determining income producing use (business) of a car is the same as asking whether car travel expenses would have been deductible under the general deduction section if they had been incurred by the employee: paras 11–12 of Miscellaneous Taxation Ruling MT 2027.
the job site rather than calling first at the depot or to an employee of a consultancy firm who is placed on assignment for a period with a client firm); and

- the journey is undertaken to a location at which the employee performs substantial employment duties.  

2.4 Comment on the Exception Cases

In all of the above ‘cases’, the taxpayer did obtain a deduction under the general deduction provision for expenses of travel from and to the place where the taxpayer resided. Indeed, the reasoning and the principles supporting deductibility in most of the above cases or circumstances have been accepted by tax tribunals and by the ATO.

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38 Paragraph 34 of Miscellaneous Taxation Ruling MT 2027. The principles at para 34 also apply to a journey from a client’s premises to the employee’s home at the end of a working day: ibid para 35. The position set out in para 34 of the ruling has been confirmed by the ATO in binding rulings: see, eg, paras 29, 239–40 of Taxation Ruling TR 1999/10 (Members of Parliament); paras 2, 109–10 of Taxation Ruling TR 98/14 (employee journalists).

39 Section 51(1) of the Income Tax Assessment Act 1936 (Cth) (‘the ITAA 1936’). The general deduction section is now s 8-1 of the ITAA 1997. It is generally accepted that the jurisprudence on s 51(1) of the ITAA 1936 is equally applicable to s 8-1 of the ITAA 1997. See, eg, Federal Commissioner of Taxation v Jones 2002 ATC 4135, 4136; Federal Commissioner of Taxation v Firth 2002 ATC 4346, 4348; Hart v Federal Commissioner of Taxation 2002 ATC 4608, 4610 (Full Federal Court); Puzey v Federal Commissioner of Taxation 2002 ATC 4853, 4861 (Lee J); Puzey v Federal Commissioner of Taxation 2003 ATC 4782, 4783 (Full Federal Court); Macquarie Finance Ltd v Federal Commissioner of Taxation 2004 ATC 4866, 4876; Vance v Federal Commissioner of Taxation 2005 ATC 4808, 4812.

40 As discussed in Part 2.4.3 below, the decision in Federal Commissioner of Taxation v Vogt 75 ATC 4073 can be put on the basis of expenditure on freight or cartage of equipment, rather than the cost of a taxpayer’s travel.

41 See, eg, Federal Commissioner of Taxation v Genys 87 ATC 4875; Case 43/94 94 ATC 387; Gaydon v Federal Commissioner of Taxation 98 ATC 2328, in regard to the principle in Federal Commissioner of Taxation v Collings 76 ATC 4254.
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Putting aside Federal Commissioner of Taxation v Vogt, Federal Commissioner of Taxation v Ballesty and Garrett v Federal Commissioner of Taxation for the moment, in all of the above cases or circumstances the basis for deductibility of the travel was due to the relationship between the travel and the taxpayer’s ‘one’ income activity. In other words, in none of the cases or circumstances above was the deductibility of the travel put on the basis of travel between two unrelated income producing activities. A brief perusal of the facts in Federal Commissioner of Taxation v Collings, Federal Commissioner of Taxation v Wiener and Miscellaneous Taxation Ruling MT 2027 indicates that the taxpayer only had one income producing activity. In all three circumstances, that activity was an employment.

2.4.1 Federal Commissioner of Taxation v Ballesty

Federal Commissioner of Taxation v Genys 87 ATC 4875; Kerry v Federal Commissioner of Taxation 98 ATC 2295; Gaydon v Federal Commissioner of Taxation 98 ATC 2328, in regard to the principle in Federal Commissioner of Taxation v Wiener 78 ATC 4006; Case U29 87 ATC 229; Case Z22 92 ATC 230; Case 77/94 94 ATC 140; Case 43/94 94 ATC 387; Case 59/94 94 ATC 501; Scott v Federal Commissioner of Taxation 77 ATC 4181.

42 See, eg, paras 21(a)(ii), 21(c) of Taxation Ruling IT 112; Taxation Ruling IT 113; paras 56–62 of Taxation Ruling TR 95/34, in regard to the principle in Federal Commissioner of Taxation v Collings 76 ATC 4254; para 21(e) of Taxation Ruling IT 112; paras 7–9, 16–55 of Taxation Ruling TR 95/34, in regard to the principle in Federal Commissioner of Taxation v Wiener 78 ATC 4006; para 21(b) of Taxation Ruling IT 112; paras 23, 138–141 of Taxation Ruling TR 95/19 (applied in Crestani v Federal Commissioner of Taxation 98 ATC 2219); paras 63–71 of Taxation Ruling TR 95/34, in regard to the principle in Federal Commissioner of Taxation v Vogt 75 ATC 4073; para 21(d) of Taxation Ruling IT 112, in regard to the principle in Federal Commissioner of Taxation v Ballesty 77 ATC 4181.

43 Given the rationale for the decision in Federal Commissioner of Taxation v Vogt 75 ATC 4073, it will be dealt with in Part 2.4.3 below.
Even though some of the travel allowed as a deduction by the ATO in *Federal Commissioner of Taxation v Ballesty* was between two unrelated income producing activities (ie from full-time job to training venue), it is submitted that the deductibility of such travel was not put on the basis of travel between two unrelated income producing activities. Waddell J stated, firstly, that as a matter of practical necessity, the taxpayer was required by the terms of his contract to travel by motor vehicle to and from training, and to and from matches in order to fulfil his obligation to be in the position to play football to the best of his ability. Secondly, the taxpayer’s home was regarded as his base of operations in regard to his income producing activity of being a professional footballer. Admittedly, Waddell J was not addressing travel expenses from the full-time job to the training venue as the ATO had allowed the deduction for these. However, it is hard to see why the bases put forward by his Honour do not encompass the travel from the full-time job to the training venue. After all, the travel from the full-time job to the training venue is just completing the journey to the training venue that commenced at the taxpayer’s base of operations earlier in the day. Further, it would be anomalous to not put travel from the base of operations to the training venue on the same basis as travel from the training venue back to the base of operations, the latter of which was expressly held to be deductible by Waddell J. Accordingly, even if the general deduction section did provide a deduction for travel between two unrelated income producing activities at the time of *Federal Commissioner of Taxation v Ballesty* (something the ATO and others believed to be the case) there was another basis to support the deduction. Importantly, that basis involved a taxpayer with one income producing activity, namely, being a professional footballer.

### 2.4.2 Garrett v Federal Commissioner of Taxation

Even though the taxpayer in *Garrett v Federal Commissioner of Taxation* provided his medical services at various locations in New South Wales (for example, Mudgee, Caringbah in Sydney), for present purposes let us accept that he only had one business of being
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a medical practitioner or consulting physician. The taxpayer also operated a farming business on the property at which he resided, which is a business unrelated to the medical business. At no stage was the deductibility of any of the aircraft travel put on the basis that the taxpayer was travelling between his medical business (for example, Mudgee location) and his farming business. The question then becomes, on what basis was the deductibility of the aircraft travel put?44

Most of the travel expenditure that related to medical services seemed to involve travel from the property at Greenthorpe to one of the medical practices, or locations where the taxpayer practised, and return travel to Greenthorpe. One question that arises is whether each location at which he practised was a separate income producing activity? If the answer to that question is no, what was the location of the one income producing activity that the taxpayer carried on? Further, could some of the locations have been one income producing activity? And perhaps, one of the locations was a separate activity?

Even though there is a shortage of factual details, and a shortage of precise analysis of the issue, Lusher J made the following findings of fact:

the taxpayer resided at Greenthorpe with his family, a place where he carried on two businesses, one that of medical practice, the other that of farming and grazing. At Caringbah, Sydney, he carried on the practice of medical practitioner and had a small flat attached to the surgery which he used whilst in Sydney during the week, which was two, sometimes two and a half days a week. Varying other periods were spent at the other country practices. … I also accept that the taxpayer accepted work where it was offered and that the work load

44 Though the aircraft was used in part (around three percent of use) for the farming and grazing business, the focus of Lusher J’s reasoning on the deductibility issue is on the use of the aircraft for the provision of medical services.
was seasonal and sometimes involved week-end work in some centres and that the aircraft as a means of transport was necessary in the circumstances to enable him to carry on the various businesses in the manner described and to earn the income derived. 45

From there his Honour said:

I find as a fact that the expenditure was incurred in travel between different places on business for the purpose of gaining and producing income. … The essential character of the expenditure was that it was a part of the operations by which he earned his income, and was essential to the performance of them, there being no other practical or reasonable way of transporting himself and his vaccines. 46

If all of the medical practices were aspects of one business, and that one business was carried on from the taxpayer’s property at Greenthorpe, all the aircraft travel proceeding from Greenthorpe to each practice location must be seen as travel that is related to the one business or income producing activity (ie travel on that one business). This means that the deductibility of this travel cannot be put on the basis of travel between two unrelated income producing activities. Unfortunately, Lusher J’s comments give a hint that the practice carried on at Caringbah was a separate income producing activity to the practices at the country towns. The reference to carrying on the practice as a medical practitioner at Caringbah provides support for this. Further, the reference to ‘various businesses’ also supports this.

On the other hand, there is a statement earlier in his Honour’s judgment that supports the one business conclusion. His Honour had said: ‘On the medical side, the applicant is a consulting physician in allergies and he practised and treated patients in Sydney and certain

45 Garrett v Federal Commissioner of Taxation 82 ATC 4060, 4064–5.
46 Ibid 4065.
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country towns. If the Caringbah practice was a general medical practice, rather than a practice in allergies only, there is some basis for arguing that the Caringbah practice is not an aspect of the taxpayer’s medical business. If the Caringbah practice was in allergies only, then the conclusion that the taxpayer was carrying on one medical business only is hard to resist. The reason is that there would be identity in the type of patients the taxpayer was seeing at all his practices, as it was fairly clear that the practices at Mudgee, Condobolin and Cowra dealt with patients with allergies. The fact the taxpayer transported vaccines in the aircraft from Sydney to his country practices, most probably via his ‘home’, also supports the one business conclusion as this indicates the need to use similar treatments at the various practices. Even if the Caringbah practice was general in nature (ie taxpayer saw patients other than those with allergies), there is still an argument that he only had one medical business. The practical need to transport the vaccines from Sydney to the country practices by use of the aircraft provides the connecting factor between the practices.

It is submitted that the practices at each country centre cannot be viewed as separate income producing activities. First, the taxpayer’s visits to each centre were all on a demand basis. Second, the number of visits to the Mudgee and Condobolin centres respectively was only eight for the income year. Third, it appears that the taxpayer operated from the district hospital at each centre, rather than his own surgery. Fourth, the taxpayer was also using the same expertise and the same vaccines at each centre. In these circumstances, each location can properly be viewed as a place where the taxpayer carried on one aspect of his income producing activity of providing specialist medical services (ie treatment of allergies) to country centres. Accordingly, even if the Caringbah practice is a separate or stand alone income producing activity, the services provided to the

48 Ibid.
country centres are one income producing activity. Therefore the aircraft travel from Greenthorpe to each centre, and back again to Greenthorpe, cannot be viewed as travel between unrelated income producing activities.49

2.4.3 Federal Commissioner of Taxation v Vogt: Transport of Equipment

The travel expenses in Federal Commissioner of Taxation v Vogt can properly be characterised as a cost of transporting equipment, rather than a cost of transporting the taxpayer; in other words, the expenditure is on freight or cartage. This is the way the case has been viewed by tax tribunals50 and the ATO.51 In this sense, the principle coming out of Federal Commissioner of Taxation v Vogt is not really relevant to a discussion of travel expenses of a taxpayer.

49 The careful analysis of Garrett v Federal Commissioner of Taxation 82 ATC 4060 by J Block (Senior Member) in Case 26/97 97 ATC 296, 313–14 (Payne’s Case in the Administrative Appeals Tribunal) also reached the conclusion that the taxpayer in Garrett v Federal Commissioner of Taxation 82 ATC 4060 was only carrying on one income producing activity in regard to the provision of medical services.

50 See Garrett v Federal Commissioner of Taxation 82 ATC 4060, 4063; Case U29 87 ATC 229, 233; Case Z22 92 ATC 230, 234; Case 7/94 94 ATC 140, 145; Case 43/94 94 ATC 387, 391–2; Scott v Federal Commissioner of Taxation (No 3) 2002 ATC 2243, 2245–6.

51 See para 21(b)(ii) of Taxation Ruling IT 112; para 204 of Taxation Ruling TR 95/13; paras 23, 138–41 of Taxation Ruling TR 95/19; paras 63–71 of Taxation Ruling TR 95/34.
3. TREASURER’S ANNOUNCEMENT IN RESPONSE TO PAYNE’S CASE, TEXT OF SECTION 25-100 OF THE ITAA 1997 AND THE EXPLANATORY MEMORANDUM TO SECTION 25-100

3.1 Treasurer’s Announcement in Response to Payne’s Case

On 8 October 2001, eight months after the Full High Court decision in Payne’s Case, the Federal Treasurer, Peter Costello, announced that:

The Government will amend the income tax legislation concerning the deductibility of expenses incurred by taxpayers in travelling between two places of unrelated income earning activity.

Legislative amendment is required as a result of the High Court’s decision earlier this year in Commissioner of Taxation v Payne. The Commissioner took action because the pilot’s expenses were for travel between his farming property where he lived and also had a business, and the airport where he worked.

In finding that the expenses were not related to deriving income from either activity, the court upheld the Commissioner’s view but on broader grounds.

The amendment is necessary to maintain deductibility for relevant expenses incurred in travelling between two places of unrelated income earning activity, to accord with the Commissioner’s long held views as expressed in published rulings and TaxPack. For example, the amendment will retain deductibility for expenses of travelling directly from one job to a second job, and also for expenses of travelling from the usual workplace to an alternative workplace and between the alternative workplace and home.\textsuperscript{52}

\textsuperscript{52} Treasurer, ‘Deductibility of Travel Expenses’ (Press Release, 8 October 2001).
3.2 Text of Section 25-100 and Related Definitions

Section 25-100 was introduced to have effect for expenditure incurred in regard to the 2001–02 income year, and subsequent income years. The section reads:

When a deduction is allowed

(1) If you are an individual, you can deduct a *transport expense to the extent that it is incurred in your *travel between workplaces.

Travel between workplaces

(2) Your travel between workplaces is travel directly between 2 places, to the extent that:
   (a) while you were at the first place, you were:
      (i) engaged in activities to gain or produce your assessable income; or
      (ii) engaged in activities in the course of carrying on a *business for the purpose of gaining or producing your assessable income; and
   (b) the purpose of your travel to the second place was to:
      (i) engage in activities to gain or produce your assessable income; or
      (ii) engage in activities in the course of carrying on a business for the purpose of gaining or producing your assessable income;
      and you engaged in those activities while you were at the second place.

(3) Travel between 2 places is not travel between workplaces if one of the places you are travelling between is a place at which you reside.

(4) Travel between 2 places is not travel between workplaces if, at the time of your travel to the second place:
   (a) the arrangement under which you gained or produced assessable income at the first place has ceased; or
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(b) the *business in respect of which you are engaged in activities at the first place has ceased.

No deduction for capital expenditure

(5) You cannot deduct expenditure under subsection (1) to the extent that the expenditure is capital, or of a capital nature.

A ‘transport expense’ is defined in s 900-220(3) of the ITAA 1997. It reads:

A transport expense is a loss or outgoing to do with transport, including the decline in value of a *depreciating asset used in connection with the transport, but not including a loss or outgoing for accommodation or for food or drink, or expenditure incidental to transport.

The term ‘transport’ is not defined in the legislation. It would take on its ordinary meaning. The accepted meaning is to carry or convey from one place to another or a system of conveying passengers or freight. 53 Importantly, all forms of transport are included there being no indication of a limitation in s 900-220(3).

The term ‘business’ is defined to include any profession, trade, employment, vocation or calling, but does not include occupation as an employee. 54 Given the inclusive nature of the definition, the principles developed in the case law will provide guidance on whether an activity is a business. 55

54 Definition of ‘business’ in s 995-1(1) of the ITAA 1997.
55 Most of the principles that are relevant to the question as to when an activity amounts to a business are conveniently collected in Taxation Ruling TR 97/11.
3.3 Explanatory Memorandum to Section 25-100

The amendments introducing s 25-100 were contained in sch 2 to the Tax Laws Amendment (2004 Measures No 1) Bill 2004 (Cth). The following contains extracts from the explanatory memorandum accompanying sch 2 to the Bill that are relevant to the issue at hand:56

In the decision known as Payne’s case (Commissioner of Taxation v Payne [2001] HCA 3), the High Court held that expenses incurred in travelling between two places of unrelated income-earning activity were not deductible under the general deduction provisions. The Court held that the expenses were not incurred in the course of earning income from either activity but rather incurred in the interval between the two activities.

This decision overturned a long-standing interpretation of the income tax law, expressed in published taxation rulings and TaxPack, that expenses incurred in travelling directly between two places of unrelated income-earning activity were deductible under the general deduction provisions, where the taxpayer did not live at either of the places and the travel was undertaken for the purpose of enabling the taxpayer to engage in income-producing activities.

For example, a deduction had been allowed for the cost of travelling directly between two places of employment, such as travel directly from a full-time job during the day to a part-time job in the evening.

…

The provision [s 25-100] ensures that the deductibility of expenses incurred in travelling directly between two places of unrelated income-earning activity, where the taxpayer does not reside at either place and the travel is undertaken for the purpose of engaging in

56 Explanatory Memorandum, Tax Laws Amendment (2004 Measures No 1) Bill 2004 (Cth) [2.3]–[2.10].
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income-earning activities, is maintained, consistent with published taxation rulings and TaxPack.

…

This amendment does not affect the deductibility of expenses incurred in the course of earning assessable income. Such expenses continue to be deductible under the general deduction provisions.

Comparison of key features of new law and current law

<table>
<thead>
<tr>
<th>New law</th>
<th>Current law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transport expenses incurred in travelling directly between workplaces are deductible.</td>
<td>Expenses incurred in travelling between two places of unrelated income-earning activity are not deductible.</td>
</tr>
</tbody>
</table>

4. SCOPE OF OPERATION OF SECTION 25-100, RELATIONSHIP WITH THE GENERAL DEDUCTION SECTION AND DEDUCTION DENIAL SECTIONS

Some may read s 25-100 and conclude that all travel costs from a place where one resides, or to a place where one resides, are now denied deductibility because of s 25-100(3). For example, the deductibility of the travel expenses in cases like those set out in Part 2.3 of this article (for example, Federal Commissioner of Taxation v Collings; Federal Commissioner of Taxation v Wiener; Garrett v Federal Commissioner of Taxation) may be in jeopardy because of s 25-100(3). After all, in all those cases, the taxpayer was
travelling to or from the place at which he or she resided.\textsuperscript{57} It is submitted that this deduction denial analysis is incorrect.

\section*{4.1 Broad Character of Section 25-100}

Section 25-100 should be characterised as a ‘deduction conferral section’, or as some would call it, a specific deduction section.\textsuperscript{58} Section 25-100 is designed to provide deductions in circumstances where the income tax law did not provide a deduction before the introduction of the section.\textsuperscript{59} In the cases or circumstances referred to in Part 2.3 of this article, the taxpayer does not require the assistance of a specific deduction conferral section as the taxpayer is already obtaining deductions under the general deduction section.

The history behind the introduction of s 25-100 supports the deduction conferral section analysis. It was introduced to overcome the perceived effect of the decision of the Full High Court in \textit{Federal Commissioner of Taxation v Payne}, not necessarily the decision itself.\textsuperscript{60} This is the overwhelming tenor of the Treasurer’s press release in response to the decision in \textit{Payne’s Case}, and the explanatory memorandum accompanying the Bill that introduced

\begin{itemize}
\item \textsuperscript{57} See Burgess, above n 4, 243–5. See n 4 above for particular statements made in the Burgess article.
\item \textsuperscript{58} See R Woellner et al, \textit{Australian Taxation Law} (17\textsuperscript{th} ed, 2006) [11.635]; F Gilders et al, \textit{Understanding Taxation Law: An Interactive Approach} (2\textsuperscript{nd} ed, 2004) [8.5], [9.1], [9.2]. Indeed, s 8-5(3) of the ITAA 1997 refers to a ‘specific deduction’.
\item \textsuperscript{59} The overwhelming tenor of the Treasurer’s press release in response to the decision in \textit{Payne’s Case}, and the explanatory memorandum accompanying the Bill that introduced s 25-100, support this analysis: see discussion in Parts 3.1 and 3.3, above.
\item \textsuperscript{60} One commentator has claimed that it was promised that the decision in \textit{Federal Commissioner of Taxation v Payne} (2001) 202 CLR 93 would be statutorily reversed: Cassidy, above n 5, 325. To the author’s knowledge, no such promise was ever made on behalf of the government. Certainly, the Treasurer’s press release announcing the enactment of a deduction conferral section (what became s 25-100) did not contain such a promise: Treasurer, above n 52.
\end{itemize}
s 25-100. In *Payne’s Case*, the majority of the Full High Court held that expenses in travelling between two places of unrelated income derivation (i.e., two separate income producing activities) were not deductible. The reasoning was that the expenditure was not incurred in the course of either activity. Or, to put it another way, neither income producing activity provided the occasion for the outgoing.

The application of the principle as stated in *Payne’s Case* would deny deductions to taxpayers travelling between two unrelated income producing locations. For example, the deduction conclusions in the following cases or circumstances would not stand if *Payne’s Case* provided the only rule in regard to such expenditures:

- **Case B9**: A taxpayer travelling from the place where he conducted a business of prefabricating and welding light ironwork during the day to his place of employment at night (10:30 pm to 7:00 am) where he was employed as a fitter.

- **Case 76**: A taxpayer travelling from the place where he conducted a garage and service station business in partnership to his farming operation which he owned and where he supervised the work of his farm manager and gave whatever assistance he could.

- **Case 59**: A taxpayer travelling at the end of the working day from the place where he was an employee accountant to a university where he was a part-time lecturer two nights per week.

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61 See discussion in Parts 3.1 and 3.3, above.
63 *Case B9* 70 ATC 42.
64 It should be noted that the taxpayer in *Case B9* 70 ATC 42 did reside at the place at which he conducted his business.
65 *Case 76* (1950) 1 CTBR (NS) 329.
66 *Case 59* (1952) 2 CTBR (NS) 321.
• *Case T96:* taxpayer travelling from the place where he was an employee forestry officer to his father’s rural property where the taxpayer had responsibility for the baling and cartage of hay and for growing the pea crop.

• ATO example(s): taxpayer travels from her acting job for a production company to her regular job as a sales assistant.68

Accordingly, s 25-100 is designed to provide deductions in the circumstances listed above because, on the basis of *Payne’s Case*, deductions would not be available under the general deduction section. The fact that the conclusion in *Payne’s Case* would not be different even if the facts occurred after the introduction of s 25-100 (ie no deduction) does not undermine the above. Given that the taxpayer in *Payne’s Case* resided at one of the two places he was travelling between, s 25-100(3) will have the effect of denying access to the deduction that would otherwise be available because of ss 25-100(1), (2).69

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67 *Case T96* 86 ATC 1158.
68 Paragraphs 25, 184–5 of *Taxation Ruling TR 95/20*. The same approach has been taken in other occupation-based rulings issued by the ATO (see, eg, paras 23, 143–4 of *Taxation Ruling TR 95/14* (teachers); paras 23, 154–5 of *Taxation Ruling TR 95/15* (nurses); paras 24, 235–6 of *Taxation Ruling TR 95/17* (defence force employees)).
69 Subject to the comment below, if the facts in *Case B9* 70 ATC 42 arose today, the taxpayer would also be denied a deduction. On the basis of *Payne’s Case*, a deduction would not be available under the general deduction section. Secondly, as the travel was from the place at which the taxpayer conducted his business and resided, s 25-100(3) would prevent a deduction under s 25-100. It should be noted that:

On occasions he [taxpayer] might leave home a little early and on his way to work inspect a job to quote on it and on other occasions he would take finished work on the trailer with him when proceeding to his employment and go direct from his work to the job where this finished work had to be erected. *Case B9* 70 ATC 42, 44. It is fairly clear that this travel expenditure would be deductible under the general deduction section on the basis of the principles set out
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The location of s 25-100 in the ITAA 1997 also supports the conclusion that the section is merely a deduction conferral section. Section 25-100 is located in Division 25. Division 25 contains provisions that, for the most part, confer deductions on taxpayers in circumstances where the expenditure would not be deductible under the general deduction provision (for example, s 25-5: payment to a tax agent for preparing the taxpayer’s income tax return will not, for most taxpayers, satisfy the general deduction section; s 25-25: borrowing expenses for most taxpayers will be a capital outgoing, and therefore not deductible under the general deduction section; s 25-60: expenses incurred in contesting an election for membership of an Australian Parliament will not be deductible under the general deduction provision because the expenditure is merely one to obtain an income producing activity).

It is true that some provisions in Division 25 provide deductions for expenses that would in any event satisfy the general deduction provision. The repair section provides one example: s 25-10. The bad debts section (s 25-35), and the section dealing with a loss on a profit-making undertaking or plan (s 25-40) may also provide examples. In spite of this, the predominant function of the provisions in Division 25 is to provide deductions where they might not otherwise be available.

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in Parts 2.1 and 2.3 above (ie the travel involved is necessary because of the taxpayer’s business operations conducted from his ‘home’).

70 See the comments of Hill J in Bartlett v Federal Commissioner of Taxation 2003 ATC 4962, 4974.

71 The reason is that the costs of borrowing the money (for example, loan establishment fee, property valuation fee) take their character from the character of the borrowing or the character of the outgoing the borrowed funds are used for, or both. For most taxpayers, this will involve a capital outgoing (ie purchase of a structural or capital asset).

72 Vance v Federal Commissioner of Taxation 2005 ATC 4808; Federal Commissioner of Taxation v Maddalena 71 ATC 4161, 4163.
Further support for the conclusion that s 25-100 is a deduction conferral section comes from the failure to locate any of the terms of s 25-100 in Division 26 of the ITAA 1997. Division 26 contains a number of deduction denial sections. The clear statement at the beginning of each section stating that: ‘You cannot deduct under this Act …’ provides the basis for this. Division 26 contains a number of provisions that operate to deny taxpayers deductions in circumstances where the expenditure would satisfy the provisions of the general deduction section (for example, s 26-35: inflated payments above ‘market value’ to a relative for services rendered; s 26-54: broadly, loss or outgoing in relation to the conduct of an illegal activity).\footnote{Federal Commissioner of Taxation v La Rosa 2003 ATC 4510.} It is true that some of the expenditures dealt with in Division 26 may not satisfy the general deduction provision in any event. The fine and penalty section (s 26-5) may provide an example.\footnote{See, eg, Mayne Nickless Ltd v Federal Commissioner of Taxation 84 ATC 4458; Madad Pty Ltd v Federal Commissioner of Taxation 84 ATC 4739.} The section dealing with costs of maintaining a spouse or child under 16 (s 26-40) may provide another example. In spite of this, the predominant function of the provisions in Division 26 is to deny deductions where they might otherwise be available.

Finally, s 25-100(5) does not make s 25-100 a deduction denial provision in the sense contemplated here. Section 25-100(5) denies a deduction under s 25-100(1) where the expenditure is of a capital nature. It is hard to imagine many travelling expenses concerning the transport of a person being of a capital nature.\footnote{Given the short-term advantage associated with the transport of a person to a location, it is hard to see how such expenditure can be capital on the basis of the revenue–capital guidelines set out by Dixon J in Associated Newspapers Ltd v Federal Commissioner of Taxation (1938) 61 CLR 337, 363. In particular, the primary advantage from travel expenditure is the presence of the person at the destination location. This is a short-term advantage because the person would usually be required to expend further money travelling to the location the following day, or on a subsequent day.} However, s 25-100(5) only provides for denial under s 25-100(1). It does not contain
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the formula used in sections in Division 26, namely, ‘You cannot
deduct under this Act …’.

4.2 Wording of Section 25-100

The comments in Part 4.1 above are general in nature in the
sense that they ‘only’ rely on the location of s 25-100 in the ITAA
1997, and the history behind the introduction of s 25-100. This may
not be enough to support the submission in this article that s 25-
100(3) does not take away a deduction otherwise available under the
general deduction section where a taxpayer is travelling to or from
the place where they reside (for example, facts analogous to those in
the cases and circumstances mentioned in Part 2.3 above). In the end,
the interpretation of the actual words in s 25-100 will have to have the
effect asserted here.

In summary, s 25-100(1) states that an individual can deduct a
transport expense to the extent it is incurred in the individual’s
‘travel between workplaces’. This is the subsection in s 25-100 that
provides the deduction. Section 25-100(2) sets out the definition of
‘travel between workplaces’. In summary, it reads:

travel between workplaces is travel directly between two places, to
the extent that while you were at the first place, you were engaged in
activities to produce assessable income or engaging in a business and
the purpose of travelling to the second place was to engage in
activities to produce assessable income or to engage in a business.

Section 25-100(3) provides an exception to the definition of
‘travel between workplaces’, which is the central concept in s 25-
100(1). Section 25-100(1) confers or gives the deduction. The
words: ‘You can deduct’ provide the basis for this. Section 25-100(3)

76 Section 25-100(4) of the ITAA 1997 also provides an exception to the definition
of ‘travel between workplaces’. Section 25-100(4) is referred to later in this article.
The section was also discussed briefly at n 5, above.
states that if one of the places you are travelling between is a place where you reside (live), the travel is not ‘travel between workplaces’. Accordingly, all that s 25-100(3) does is provide an exception to a definition. It does no more than this. It makes no reference to any other section in the income tax legislation, let alone the general deduction section. Even on the most generous reading, it does not purport to deny a deduction for travel expenses, or any expense, under another section of the income tax legislation. Further, the definition of ‘travel between workplaces’, the central concept in s 25-100(1), has no legislative role under the general deduction section. In light of this, and subject to the exclusive code arguments in Part 4.3 below, it is impossible to see how s 25-100 can have an application to the facts in cases like those set out in Part 2.3 above where the general deduction section was in issue.

4.3 Section 25-100 Is an Exclusive Code for Travel Expenses Related to Workplaces or for Travel Expenses to or from the Place Where the Taxpayer Resides

The only way for s 25-100(3) to effectively operate to deny deductions for the expenses in the cases or circumstances mentioned in Part 2.3 above is if the income tax legislation can be interpreted so that s 25-100 contains an exclusive code for the deductibility of any travel expenses incurred by individuals where the taxpayer is proceeding from their residence to their workplace, or from their workplace to their residence. Alternatively, the deduction denial would also be achieved if s 25-100 contained an exclusive code for any travel related to individuals’ ‘workplaces’. It may be that s 25-100 does provide an exclusive code for certain travel expenses, but that the range of situations envisaged is too narrow to cover the ground in the cases or circumstances set out in Part 2.3 above.77

77 While discussing the relationship between the general deduction section and s 25-100, Burgess appears to make a brief reference to an exclusive code argument for
DEDUCTION RULE REGARDING TRAVEL

An exclusive code means that the relevant provision(s), in this case s 25-100, are the only source of rules that deal with the subject matter at hand. This means other deduction conferral sections in the income tax legislation, including the general deduction section, would be ousted. Usually, the legislature will provide an express indication that a deduction provision is an exclusive code.\textsuperscript{78} However, this is not always the case so that an exclusive code conclusion may be discerned even where the legislation is ‘silent’.\textsuperscript{79} Accordingly, the fact that s 25-100 does not contain an express rule dealing with an exclusive code issue does not necessarily preclude the provision from being an exclusive code for certain travel expenses.

There are probably three forms that the exclusive code argument can take. They are that s 25-100 is:

- an exclusive code for all travel expenses incurred by an individual that are related to the workplace;\textsuperscript{80}
- an exclusive code for travel expenses incurred by an individual where the travel is from or to the taxpayer’s residence; or
- an exclusive code for expenses incurred by an individual on travel between unrelated income producing activities that do not involve passive income.

\textsuperscript{78} ITAA 1936 s 82AAR(1) (superannuation contributions for eligible employees only deductible under subdiv AA of div 3 of pt III of the ITAA 1936).

\textsuperscript{79} Australia & New Zealand Banking Group Ltd v Federal Commissioner of Taxation 93 ATC 4238, 4271–80 supports this contention (the old depreciable plant provisions were an exclusive code for deductions in regard to the purchase, holding and disposal of luxury motor vehicles even though there was no express rule stating this).

\textsuperscript{80} The word ‘workplace’ implies an employment situation. It is clear though that s 25-100 involves, at least, a place of business.
Even though there is some overlap in issues, each is discussed in turn.

4.3.1 An Exclusive Code for All Travel Expenses Incurred by an Individual That Are Related to the Workplace

If this were the position, s 25-100, through s 25-100(3) because of the travel being from or to the taxpayer’s residence, would deny deductions for travel expenditure in the cases and circumstances listed in Part 2.3 above. In short, this exclusive code argument cannot be sustained. There are two main reasons.

First, the type of travel dealt with in s 25-100 casts considerable doubt on the exclusive code argument asserted here. There is a very strong argument that s 25-100 only deals with travel expenses between two unrelated income producing activities. That is, the section does not deal with travel expenses associated with one income producing activity (ie travel to do with one workplace). In regard to the facts in the cases and circumstances mentioned in Part 2.3 above, the travel of all the taxpayers involved was not between two unrelated income producing activities. The travel expenses were associated with one income producing activity. The history of s 25-100, and the background to the introduction of s 25-100 supports this view (ie the section confers deductions in situations where the reasoning in Payne’s Case denies deductions to taxpayers for travel between two unrelated income producing activities). Further, it is submitted that the wording of s 25-100 supports this view.

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81 Note the possible, but unlikely, explanation of Garrett v Federal Commissioner of Taxation 82 ATC 4060 in Part 2.4.2 that the case did involve some travel between unrelated income producing activities.

82 This is the overwhelming tenor of the Treasurer’s press release in response to the decision in Payne’s Case, and the explanatory memorandum accompanying the Bill that introduced s 25-100 supports this analysis: see the discussion in Parts 3.1 and 3.3, above.
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Travel between workplaces is the key to s 25-100. Briefly put, s 25-100(2) makes a distinction between an activity to gain assessable income and a business. An activity to gain assessable income that is not a business clearly covers an employment, or work of an independent contractor that falls short of being a business. Section 25-100(2) contemplates the following combinations of travel:

- travel from a place where the taxpayer engages in an activity to gain assessable income (the first place) to another place where the taxpayer engages in an activity to gain assessable income (the second place);

- travel from a place where the taxpayer engages in an activity to gain assessable income (the first place) to another place where the taxpayer engages in a business (the second place);

- travel from a place where the taxpayer engages in a business (the first place) to another place where the taxpayer engages in an activity to gain assessable income (the second place); and

- travel from a place where the taxpayer engages in a business (the first place) to another place where the taxpayer engages in a business (the second place).

Importantly, the purpose of the travel to the second place must be to engage in the relevant activities there. The question is whether these combinations are limited to travel ‘between’ unrelated income producing activities, or do the combinations contemplate travel ‘on’ one income producing activity? It is conceded that the above

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83 The ‘services rendered’ aspect of s 15-2(1) of the ITAA 1997 (the old s 26(e) of the ITAA 1936) may provide an example of an independent contractor situation that falls short of being a business. The issue of income from property will be discussed in Part 4.3.2, below.
wording can accommodate travel on one income producing activity (for example, employment activity at the first place and the same employment activity at the second place). The use of the word ‘place’ supports this. The fact that s 25-100(2) contemplates the combinations of travel from an ‘employment to an employment’, and from a ‘business to a business’, arguably also supports this. The comment in the Treasurer’s press release that: ‘For example, the amendment will retain deductibility … for expenses of travelling from the usual workplace to an alternative workplace’ arguably provides some support for this view.\textsuperscript{84} On the other hand, this statement cannot be given too much weight because it is followed by the statement that ‘the amendment will retain deductibility for expenses of travelling … between the alternative workplace and home.’ In light of s 25-100(3), this statement cannot be correct.

However, the overwhelming focus of s 25-100(2) is directed at travel between two unrelated income producing activities. The reference to the purpose of the travel to the second place is consistent with the description in the most authoritative case,\textsuperscript{85} and the descriptions in ATO rulings,\textsuperscript{86} where travel is a necessary prerequisite to income production. Further, the reference to purpose of the travel is consistent with putting the taxpayer in a position from which income producing activities can be commenced.\textsuperscript{87} The description of purpose, the failure to also include words like ‘in the course of’ coupled with adoption of the term, ‘to engage in activities’ implies that the taxpayer is not engaged in an assessable income

\textsuperscript{84} Treasurer, above n 52.
\textsuperscript{85} Federal Commissioner of Taxation v Payne 99 ATC 4391, 4400 (Sackville and Hely JJ).
\textsuperscript{86} See, eg, paras 3–4 of Taxation Ruling IT 2199; para 2 of Taxation Determination TD 96/42; para 1 of Taxation Determination TD 96/43.
\textsuperscript{87} Lunney v Federal Commissioner of Taxation (1957) 100 CLR 478, 499–500 (Williams, Kitto and Taylor JJ). See also the use of the term purpose in Lodge v Federal Commissioner of Taxation (1972) 128 CLR 171, 176 to describe the situation where the expenditure puts the taxpayer in the position from which he or she can commence to produce assessable income.
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activity (or business) at the time of travelling. If the taxpayer was travelling between places or locations of the one income producing activity, it is not appropriate to talk in terms of the purpose of the travel, as the taxpayer would already be engaged in the activity (ie travel on work). The case law is clear that such travel would be an aspect of the one activity.\(^{88}\) In any event, the purpose of the taxpayer in incurring an expense is generally not a criterion of deductibility under the general deduction section.\(^{89}\) Accordingly, the use of the term purpose in s 25-100(2) to describe the relevant travel is not consistent with that travel being on the one income producing activity. In this regard, the legislature cannot be taken to be ignorant of the state of the tax law at the time of enacting a remedial provision, or a provision dealing with a particular mischief. Section 25-100 is clearly a remedial provision.

It is submitted that it is impossible to reconcile the ‘one income producing activity’ analysis with the terms of s 25-100(4). There may be a problem ascertaining the precise role of s 25-100(4), but this should not affect the analysis for present purposes.\(^{90}\) Section 25-100(4) states that travel between two places will not be travel between workplaces if at the time of travelling to the second place, the activity or business at the first place has ceased. The section clearly contemplates the cessation of an activity or business at the first place, and the pursuit or continuation of an activity or business at the second place. In regard to the one income producing activity analysis, the question becomes, how can one income producing activity both cease and continue at the same or the one time?

\(^{88}\) Lunney v Federal Commissioner of Taxation (1957) 100 CLR 478, 500; Federal Commissioner of Taxation v Collings 76 ATC 4254, 4267; Federal Commissioner of Taxation v Payne 99 ATC 4391, 4392 (Hill J), 4400 (Sackville and Hely JJ). The ATO also accepts this as a correct statement of the law: see, eg, paras 23, 150–1 of Taxation Ruling TR 98/6; paras 22, 107–8 of Taxation Ruling TR 98/14.

\(^{89}\) See Spassked Pty Ltd v Federal Commissioner of Taxation 2003 ATC 5099, 5118–21 and the authorities cited.

\(^{90}\) See the discussion in n 5, above.
Of course, this is not possible, unless of course s 25-100(4) is focused on part of an activity or business. However, there is nothing in the terms of s 25-100 to support this. On the other hand, where unrelated income producing activities or businesses are carried on at the first and second place, it is clear that an activity or business at the first place can cease, and at the same time, the activity or business at the second place continues to be carried on.\textsuperscript{91}

Second, even though an express statement of an exclusive code is not required, if s 25-100 is an exclusive code, it effectively takes away deductions for expenditure that were previously deductible (eg the cases and circumstances mentioned in Part 2.3 above) because the departure point (and return point) for the travel was where the taxpayer resided. It is submitted that a fairly strong indication of this intent is required. This is especially the case when the overwhelming character of s 25-100 is that it is remedial, or beneficial legislation; beneficial to taxpayers. The only time that s 25-100 expressly refers to the denial of a deduction is in s 25-100(5). However, s 25-100(5) only excludes deductibility of capital expenditure from the deduction conferral aspect of s 25-100, namely, s 25-100(1). One would have thought that if the legislature intended an exclusive code for s 25-100 along the lines suggested here, this would have been the appropriate location to state the exclusion of other deduction sections. After all, the legislature (drafter) had their mind on deduction denial at that stage. The fact that one of the deduction conferral sections in Division 25, namely, s 25-75(4), contains an exclusive code rule supports the conclusion that s 25-100 does not contain an exclusive code rule of the type suggested here. The fact that other deduction conferral sections in Division 25 deal with the issue of the relationship between the relevant section and

\textsuperscript{91} When discussing the cessation of activity point in s 25-100(4), the explanatory memorandum accompanying the Bill that introduced s 25-100 only uses an example where two separate income producing activities are involved: Explanatory Memorandum, Tax Laws Amendment (2004 Measures No 1) Bill 2004 (Cth) [2.5].
other deduction provisions also damages the exclusive code argument.\textsuperscript{92}

The above provides strong support for the conclusion that s 25-100 is not an exclusive code for travel related to workplaces per se. Indeed, it is strongly arguable that s 25-100 has no area of operation in regard to travel that relates to one income producing activity pursued by taxpayers. In this regard, the general deduction section provides the rules for deductibility of such expenditure.\textsuperscript{93}

\textbf{4.3.2 An Exclusive Code for Travel Expenses Incurred by an Individual Where the Travel Is from or to the Taxpayer’s Residence}

In \textit{Federal Commissioner of Taxation v Green},\textsuperscript{94} the taxpayer, who lived in Brisbane, obtained his income from various activities, including the rental of five properties he owned in North Queensland (four in Townsville and one in Cairns). The taxpayer employed an accountant in Townsville who, amongst other things, supervised his Townsville properties. The taxpayer travelled from his Brisbane home to North Queensland once per year to, amongst other things, inspect and generally supervise his properties. The Full High Court held that the expenditure on travelling from Brisbane to North Queensland to supervise or inspect the properties was deductible under the general deduction section.\textsuperscript{95} No clear finding was made as to whether the taxpayer’s activities of renting his five properties

\textsuperscript{92} See ITAA 1997 ss 25-55 (payments to associations), 25-85 (cost of holding a debt interest), 25-105 (medical protection payment).

\textsuperscript{93} The following statement appears in the explanatory memorandum accompanying the Bill that introduced s 25-100: ‘A deduction for expenses incurred in travelling between a workplace and a residence may be allowable under the general deduction provisions in certain circumstances.’ See Explanatory Memorandum, Tax Laws Amendment (2004 Measures No 1) Bill 2004 (Cth) [2.26].

\textsuperscript{94} \textit{Federal Commissioner of Taxation v Green} (1950) 81 CLR 313.

\textsuperscript{95} Ibid 319.
amounted to a business, or whether it was merely obtaining passive income from property.\textsuperscript{96}

The exclusive code argument suggested here cannot be sustained. Again, the main reason is that it takes away deductions previously available. However, the significance of this exclusive code proposition is that deductions would also be denied for travel expenditure associated with obtaining ‘income from property’. The reason is that many taxpayers who obtain income from their rental properties would be travelling to their properties from their home (and returning to their home) in order to inspect the property. This would attract the exclusion in s 25-100(3). It is submitted that a large proportion of rental property owners would travel from their home to make their regular inspection of their rental property or properties. Where a purported exclusive code for deductibility of a particular expenditure is to preclude a large number of taxpayers from accessing an established deduction, that fact alone tends to militate against the exclusive code conclusion. Indeed, it is submitted that this could not have been the intent behind s 25-100 and it is very unlikely that Parliament could have intended that property owners who travel from their full-time job to their rental property directly are entitled to deductions, whereas those taxpayers that depart from their home are not entitled to deductions. Further, taxpayers with properties at a distance from their home (for example, interstate) are even more likely to be disentitled because such taxpayers would normally depart from their home.\textsuperscript{97}

In any event, there is considerable doubt that a taxpayer obtaining passive property income can even fall within the positive aspects of s 25-100. There is no doubt that there are many property owners (couples) who own one or two properties for rental. These

\textsuperscript{96} Ibid. The considerations outlined in \textit{Federal Commissioner of Taxation v McDonald} 87 ATC 4541, 4549–52 will be relevant to the issue.

\textsuperscript{97} The facts in \textit{Federal Commissioner of Taxation v Green} (1950) 81 CLR 313 provide an example of this.
people will not be carrying on a business of obtaining rent.\textsuperscript{98} Sections 25-100(1) and (2) use the term workplace. A workplace is usually used to describe an employment situation, an independent contractor situation or a business. The idea is that some personal exertion is involved. The term is generally not appropriate to the receipt of passive income as no personal exertion, or only incidental personal exertion, is involved in the earning of income. However, this may be irrelevant as the term ‘travel between workplaces’ is a defined term. Sections 25-100(2)(a)(i) and (b)(i) use the term ‘activities to gain or produce assessable income’. On a literal reading, this is broad enough to encompass passive property income.

In spite of the broad wording of ss 25-100(2)(a)(i) and (b)(i), it is submitted that s 25-100(2) requires taxpayers to make a substantial contribution, or at least, more than an incidental contribution to the production of the relevant assessable income. The basis for this assertion is the term ‘engage in activities’ in s 25-100(2). It is difficult to see how the mere receipt at home of an income and expenditure statement and a property condition report from a real estate agent can amount to engaging in activities to produce assessable income at home. At its strongest, the description of management or supervision of an income producing property would best describe such activities. ‘Management’ was the term used by the Full High Court in \textit{Green v Federal Commissioner of Taxation}.\textsuperscript{99} The term ‘engaging in activities’ is not readily seen as appropriate to passive property income because there are few activities that need to be engaged in to produce such income. The term activity, as noted earlier, is more appropriate to personal exertion or personal effort. Similarly, while the location of the taxpayer’s rental property can be

\textsuperscript{98} See \textit{Federal Commissioner of Taxation v McDonald} 87 ATC 4541 for a discussion of the considerations to take account of in distinguishing between the receipt of passive property income and the carrying on of a business. The discussion in that case is in the context of the definition of a ‘partnership’ under the income tax law.

\textsuperscript{99} \textit{Federal Commissioner of Taxation v Green} (1950) 81 CLR 313, 319.
seen as a place, it is difficult to conclude that conducting a visual inspection of that property involves engagement in activities to produce assessable income. The production of assessable income flows from the fact of ownership; the fact that a lease agreement was signed and that the tenant continues in occupation of the property and pays the rent. Section 25-100 seems to contemplate a substantial connection between the presence of the taxpayer at a place to which travel occurs, and the production of assessable income at the place. This is not the case with passive rental property income. Indeed, the production of assessable income can continue uninterrupted without the taxpayer’s ‘engagement’, and without incurring any travel expenditure. It is also worth noting that in all the examples (seven) set out in the explanatory memorandum accompanying the Bill that introduced s 25-100, not one example includes the receipt of passive property income. Further, when summarising the meaning of a ‘workplace’, the explanatory memorandum makes reference to an individual that ‘earns’ assessable income: (a) as an employee; (b) in a capacity other than as an employee; and (c) by carrying on a business.\(^{100}\)

The cessation of activity point made in regard to s 25-100(4) in Part 4.3.1 above is also relevant in regard to passive property income. That is, it is impossible to reconcile the ‘one income producing activity’ analysis, for present purposes, the rental of a property that is ‘managed and supervised’ from home, with the terms of s 25-100(4). In other words, for example, it is not possible to cease managing and supervising a rental property, and to continue to own and obtain rent from that property at the same or the one time.

In *Payne’s Case*, the travel was between an employment and a business. There was no passive income location involved. Of course, it cannot be assumed that a remedial section introduced into

\(^{100}\) Explanatory Memorandum, Tax Laws Amendment (2004 Measures No 1) Bill 2004 (Cth) [2.16].
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legislation in response to a court decision only deals with the topic dealt with in the court decision. The legislature may have taken the opportunity to deal with other related matters through the amendment. However, perusal of the Treasurer’s press release and the explanatory memorandum to s 25-100 tends to support the claim that the legislature did not have in mind travel in relation to passive income situations.\footnote{Even though the discussion here has focused on passive rental income, the same problematic issues arise in regard to passive income from other investments: see, eg, Taxation Ruling IT 39.}

The above provides strong support for the conclusion that s 25-100 is not an exclusive code for expenses of travel from and to the taxpayer’s residence. Indeed, it is strongly arguable that s 25-100 has no area of operation in regard to travel that relates to the production of passive rental income. In this regard, the general deduction section provides the rules for deductibility of such expenditure.\footnote{Certainly, the ATO does not give any hint or indication that s 25-100 operates to deny property income earners deductions for their travel expenses to inspect their rental properties: see Australian Taxation Office, Rental Properties 2006 (2006). See also para 5 of Taxation Determination TD 96/43. Note that this taxation determination predates s 25-100 of the ITAA 1997.}

4.3.3 An Exclusive Code for Expenses Incurred by an Individual on Travel between Unrelated Income Producing Activities That Do Not Involve Passive Income

While it is not necessary to reach a final conclusion on this assertion, this exclusive code argument has considerable merit. Some of the reasons have been set out in the course of the discussion in Parts 4.3.1 and 4.3.2 above. In summary, they are:

- the case that led to the enactment of s 25-100 (Payne’s Case) involved travel between an employment and a business;
if s 25-100 is applied to travel on one income producing activity, many taxpayers will have deductions that are well-established taken away;\(^\text{103}\)

section 25-100 is a remedial or beneficial legislative provision (deduction conferral provision), and not a deduction denial provision; and

the terms of s 25-100 do not appear to deal with travel on one income producing activity.

\(^{103}\) Cassidy, above n 5, 325–6 asserts that because of s 25-100(4), s 25-100 only provides deductions for travel where:

the two places [are] linked by either the one employment arrangement or business. Where the activities at the two places are unrelated, the activities at the first place will have ceased when the taxpayer travelled to the second place. Thus, if, as in *Federal Commissioner of Taxation v Payne* (2001) 2001 ATC 4027, the taxpayer completes his employment activities (as a pilot in that case) and then travels to business premises (deer farm in that case), s 25-100(1) cannot be utilised. The section will only benefit travel between offices in a multi-location business or employment scenario.

It is submitted Cassidy’s analysis cannot be correct. First, the analysis is completely inconsistent with the Treasurer’s press release and the examples in the explanatory memorandum introducing s 25-100. The overwhelming focus of these two documents is on travel between two unrelated income producing activities. Second, travel between locations of the one employment or business already attracted a deduction under the general deduction section (see Part 2.1, above). Why would Parliament want to enact a deduction conferral section for expenditure that already attracted a deduction, and where that deductibility was well-established (ie no element of uncertainty)? The intention of ‘providing’ deductions for travel between locations of the one employment or business ought not be attributed to Parliament. Third, on a technical level, Cassidy appears to have substituted the term ‘activities for a day’, for the terms ‘arrangement’ or ‘business’ in s 25-100(4). On Cassidy’s analysis, when an employee completes his or her duties for the day, or where a business operator closes down the business for the day, we have a cessation contemplated by s 25-100(4). The term arrangement or business transcends the end of a working day. An arrangement or business is focusing on an income source. Accordingly, ceasing one’s employment duties for a day does not mean that the employment arrangement has ceased. Nor does closing down the business for the night only to reopen the following day amount to a cessation of business.
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In addition, a couple of extra points are worth making briefly. Further support for the view that s 25-100 is an exclusive code of the type asserted here flows from the fact that the legislature appears to have dealt fairly comprehensively with all the issues that are relevant to the type of travel involved. It is true that the legislature could have been clearer on whether travel to do with passive property income was contemplated by the section, instead of leaving room for debate.

First, the legislature, obviously cognisant of the problems in the cases, expressly dealt with the issue where a taxpayer conducted a business or an income producing activity at their residence. In such a case, s 25-100(3) will preclude deductions for travel expenditure from or to such a ‘residence’ or ‘business’. This approach avoids the difficult question as to whether the taxpayer was leaving from their ‘home’ or their ‘business’ or ‘income activity’ to go to their other activity, or whether the taxpayer was returning to their ‘home’ or their ‘business’ or ‘income activity’ from their other activity. Some may argue that this ‘exclusion’ of deductibility of certain travel gives s 25-100 a deduction denial role. This assertion would be correct if the law is as it was prior to the Full High Court decision in Payne’s Case, because there were some taxpayers obtaining deductions for travel from their ‘home business’ to another activity. However, the law under the general deduction section is as stated in Payne’s Case in the Full High Court. This means no taxpayer would be getting a deduction for travel from their ‘home business’ to another activity. Therefore, s 25-100 has no deduction denial role in the area of travel from or to the ‘home’.

Second, the legislature has also expressly dealt with the ‘directness’ of the travel between the two income producing activities. It is submitted that the sense in which directness is used

104 See, eg, Case B9 70 ATC 42. It is worth pointing out that in Case F43 74 ATC 245, 248; Case N35 81 ATC 186, 187; Case N44 81 ATC 216, 219 the Board of Review declined to follow the decision in Case B9 70 ATC 42.
here is that the travel must not be interrupted or delayed in order to pursue a task or objective that is not to do with getting to the second place. It will be interesting to see whether the execution of a minor task requiring a short interruption infringes the directness requirement.\textsuperscript{105} The fact that the meaning of direct cannot be stated with certainty at this stage does not undermine the exclusive code argument asserted here. This ‘uncertainty’ is just part of the impreciseness of language requiring judicial clarification. Again, those asserting a deduction denial role for this aspect of s 25-100 on the basis that the ‘old law’ may have permitted a ‘stopover’ on the way to the second income activity are met with the argument outlined above in regard to travel from or to the ‘home business’.

Third, and even though not strongly asserted, the fact that s 25-100 contains its own capital exclusion provides some support for the exclusive code argument. The reasoning is that the capital exclusion would seem to complete all the known structural aspects associated with the deductibility of expenditure under our income tax. That is, the rest of s 25-100 clearly deals with: (1) contemporaneity; (2) relevance to certain types of assessable income production; and (3) relevance to the production of exempt income, by non-inclusion.\textsuperscript{106}

The fact that the legislature identified, in broad terms, the form of transport that qualifies under s 25-100 is neutral on the exclusive code argument.\textsuperscript{107}

\textsuperscript{105} The explanatory memorandum accompanying the Bill that introduced s 25-100 gives the examples of a taxpayer stopping to go shopping and a taxpayer stopping for a meal as situations where the ‘direct’ requirement will not be satisfied: Explanatory Memorandum, Tax Laws Amendment (2004 Measures No 1) Bill 2004 (Cth) [2.19].
\textsuperscript{106} As expected, or by necessity, s 25-100 of the ITAA 1997 contains its own timing rule, namely, ‘incurred’.
\textsuperscript{107} See the discussion in Part 3.2 above, for an outline of the meaning of ‘transport expense’.
In conclusion, if s 25-100 was taking away deductions for certain expenditure that were previously available, the exclusive code argument asserted here has less force. However, as noted above, this is not the case. Further, the strength of the exclusive code argument asserted here serves to undermine any role for s 25-100 in regard to travel related to one income producing activity.

5. CONCLUSION

Section 25-100 can be characterised as a deduction conferral section. No aspect of s 25-100 can be viewed as a deduction denial section. Given the background to the treatment of travel expenses between unrelated income producing activities, s 25-100 is remedial legislation or beneficial legislation; beneficial to taxpayers. While the ‘internal’ exclusion in s 25-100 concerning travel to or from the taxpayer’s residence does raise issues of interpretation, the section does not provide an exclusive code in regard to travel from or to the taxpayer’s residence. Further, this internal exclusion does not operate to deny deductions for travel related to one income producing activity. This article has emphasised that s 25-100 must be read in context and with an appreciation of the case law background under the general deduction section. When this is done, the better view is that the role of s 25-100 is to regulate the deductibility of travel expenses between unrelated income producing activities.