



**Walker and Commissioner of Taxation (Taxation) [2017] AATA 324 (14
March 2017)**

Division: TAXATION & COMMERCIAL DIVISION

File Number: **2016/0267 and 2016/0268**

Re: **Glen Walker**

APPLICANT

And **Commissioner of Taxation**

RESPONDENT

DECISION

Tribunal: **Deputy President I R Molloy**

Date: **14 March 2017**

Place: **Brisbane**

The objection decision under review is affirmed.

.....[Sgd].....

Deputy President I R Molloy

CATCHWORDS

TAXATION – income tax – allowable deductions – general deduction - whether outgoings incurred in the course of deriving assessable income - work-related expenses – travel between different work locations - whether itinerant worker - farm worker- objection decision affirmed

LEGISLATION

Income Tax Assessment Act 1997 (Cth) ss 8-1, 25.100, 51.

CASES

Commissioner of Taxation v Genys (1987) 17 FCR 495.

Commissioner of Taxation v Payne (2001) 202 CLR 93.

Hill & Commissioner of Taxation [2016] AATA 514.

Horton v Young [1972] Ch 157.

Lunney v Federal Commissioner of Taxation (1958) 100 CLR 478.

Roads and Traffic Authority of New South Wales v Federal Commissioner of Taxation (1993) 43 FCR 223.

Ronpibon Tin NL & Tongkah Compound NL v Federal Commissioner of Taxation (1949) 78 CLR 47.

Taxation v Wiener 78 ATC 4006; (1978) 8 ATR 335.

SECONDARY MATERIALS

Taxation Ruling TR 95/34

REASONS FOR DECISION

Deputy President I R Molloy

14 March 2017

INTRODUCTION

1. Mr Walker applies for review of an objection decision dated 12 November 2015. The decision relates to deductions claimed in his taxation returns for the income years ending 30 June 2013 and 30 June 2014.
2. Mr Walker claimed deductions in respect of meals, groceries, accommodation, his motor vehicle and caravan, and mobile phone and internet services.
3. Following an audit of Mr Walker's tax affairs, the Commissioner disallowed the deductions, issued amended assessments, and imposed penalties for failing to take reasonable care.
4. An objection was disallowed in respect of the deductions. I am informed that the penalties were dealt with separately and have been remitted. As to the deductions, for the reasons set out below, I think the objection decision should be affirmed.

ISSUES

5. Mr Walker makes two principal submissions.
6. The first is that he is an itinerant farm worker, that travel is an inherent part of his work, and consequently he is entitled to deductions for his travel, accommodation, meals, and groceries while on circuit.
7. Secondly, if he is found not to be an itinerant worker, then Mr Walker claims that meals and accommodation expenses are deductible on the basis that he is living away from home on a temporary basis for work purposes, and travel expenses are deductible in respect of travel between work-places.
8. The phone and internet expenses are claimed on the basis that they were incurred for work purposes, including to check when successive employers would be ready for Mr Walker to start work.

FACTS

9. Mr Walker provided written¹ and oral evidence. I found Mr Walker to be an honest witness. There were some inaccuracies in what he had to say, for example, in respect of distances or figures, and in some of his documentation including log books. I do not consider there was any intention to mislead.
10. Mr Walker is a farm worker or farm supervisor. He was at all relevant times a PAYG taxpayer. He gave his address as a home on the Sunshine Coast where his mother-in-law lives and owned by his brother-in-law. It is Mr Walker's postal address and where he is enrolled as a voter.
11. He and his wife have general use of the home and exclusive use of two rooms when they are there. They use one of the rooms to store their furniture. They do not pay any rent or board but help out with maintenance.
12. Mr Walker grew up on a farm. He has had his own farms, and has managed farms, mainly strawberry farms. In 2012 he found there was a need for good farm supervisors, in particular to help farmers supervise their foreign workers.
13. In 2012 Mr Walker applied for and obtained a position with Benyenda Citrus located near Gayndah. He did not look for work on or near the Sunshine Coast at the time. He acknowledges that he probably could have found work there in the strawberry season which is from May to November. He wanted to get away from strawberries, however, to gain experience in other areas and learn about other lines of produce.
14. At Benyenda Citrus the produce was mandarins, and Mr Walker worked as a sorter and supervisor. He then moved on to employment at a farm near Bowen, run by Craxcorp, where the produce was mini capsicums. He then found work through an acquaintance at Wrenco Produce at Stanthorpe. The crops at Wrenco were strawberries, Brussel sprouts and broccolini.

¹ Exhibits 3, Applicant's statement of facts, issues and contentions, and Exhibit 4, Applicant's schedule of work.

15. Mr Walker worked for these three employers in each of the two years under consideration. He has worked for the same employers at the same three locations in subsequent years. His periods of employment in the relevant years were as follows:

Benyenda Citrus	7 July to 30 July 2012	23 days
Craxcorp	1 August to 16 November 2012	108 days
Wrenco Produce	23 November 2012 to 17 March 2013	114 days
Benyenda Citrus	2 April to 13 May 2013	41 days
Craxcorp	14 May to 10 November 2013	180 days
Wrenco Produce	31 December 2013 to 2 May 2014	122 days
Craxcorp	3 May to 30 June 2014	58 days

16. At Benyenda Citrus, Mr Walker worked on each occasion as a sorter and supervisor.
17. When he first worked for Craxcorp he was assigned to the shed. His duties included packing and sorting produce, and stacking pallets. On subsequent occasions at Craxcorp he supervised the pickers, oversaw quality assurance, and performed some packing. Craxcorp has two farms. Mr Walker was required to provide his own transport to travel between the farms, a distance of about two kilometres.
18. At Wrenco Mr Walker had a variety of duties including shed supervisor, part-time patch supervisor, and fork-lift driver. Wrenco also had two farms. Strawberries and broccolini were grown on one farm, and Brussel sprouts, broccolini and some strawberries on the other. Unlike the Sunshine Coast, where the strawberry season is in the winter, the Stanthorpe season is usually from November to May. Mr Walker was required to drive his own vehicle between the two Wrenco properties, although not every day. The properties, he said, were at least eight kilometres apart.
19. Mr Walker's wife accompanied him and worked as a packer for the same employers at the same time as Mr Walker. Mr and Mrs Walker travelled to each of the three locations by motor vehicle towing a caravan. Whilst working at these locations Mr Walker and his wife

lived in the caravan. The caravan was parked at a caravan park or, at Stanthorpe, on Wrenco's property.

20. Generally Mr and Mrs Walker would travel directly from one employment location to the next. Occasionally, once or perhaps twice a year, they returned to the Sunshine Coast for a holiday. On one occasion they travelled to the Gold Coast for a holiday.
21. Mr Walker initially obtained employment with Benyenda Citrus by calling an "employment mob" in the area. He sought work at subsequent locations as the current work was coming to an end.
22. Generally Mr Walker's work came to an end when the particular season finished. On at least one occasion, when working for Benyenda, he left when there was still work available. This was to take up employment with Craxcorp where there was a greater need for his services.
23. An expectation developed between Mr Walker and his three employers that work would be available for him at about the same time each year, and that he would be there to carry it out.
24. Mr Walker claimed deductions included his travel expenses while on circuit as he described it. These included the expense of travelling to the work locations at Gayndah, Bowen and Stanthorpe, travel as necessary between a caravan park and the work-place, travel between different farms at each location, and going to and from town for food and other supplies.
25. He also claimed deductions for his accommodation, food and groceries while on circuit. He did not claim for occasional private travel, or for what he regarded as private expenditure. He claimed mobile phone and internet expenses which he considered work-related, particularly in finding or arranging future employment.
26. Mr and Mrs Walker apportioned the overall expenditure between themselves and each claimed deductions. Mr Walker's claimed deductions for the relevant years are set out in

his objection². In relation to the income year ending 30 June 2013, he claimed \$15,773 as follows:

Deduction	Amount
Meals and groceries	\$5,952
Accommodation	\$3,033
Caravan costs	\$2,464
Incidentals	\$144
Motor Vehicle	\$3,700
Mobile Phone & Internet	\$480

27. In relation to the income year ending 30 June 2014, Mr Walker claimed \$15,008, comprised of the following:

Deduction	Amount
Meals and groceries	\$6,968
Accommodation	\$2,440
Caravan costs	\$2,500
Motor Vehicle	\$3,800
Mobile Phone & Internet	\$100

Itinerancy

28. Section 8-1 of the *Income Tax Assessment Act 1997* ("ITAA") provides relevantly:

- (1) You can **deduct** from your assessable income any loss or outgoing to the extent that:
- (a) it is incurred in gaining or producing your assessable income; ...
- (2) However, you cannot deduct a loss or outgoing under this section to the extent that:
- (a) it is a loss or outgoing of capital, or of a capital nature; or

² Exhibit 1, T7, pages 210, 221.

(b) it is a loss or outgoing of a private or domestic nature; ...

(3) A loss or outgoing that you can deduct under this section is called a **general deduction**.

29. To come within s 8-1(1) of the ITAA there must be a sufficient nexus between the expenditure and the taxpayer's income producing activities.³

30. In *Federal Commissioner of Taxation v Payne*⁴, the High Court, referring to *Lunney v FCT*⁵ ("Lunney"), said (emphasis in the original):

The principle which had to be applied in that case, and must be applied in this, is one which limits the allowance of a deduction for outgoings to those outgoings that are incurred in the course of deriving assessable income. It is a principle which excludes outgoings which, although incurred for the purpose of deriving assessable income, are not incurred in the course of doing so.

31. *Lunney* involved two taxpayers who each claimed as deductible the expenses of travelling from their homes to their respective places of work. Mr Lunney was a ship's joiner who travelled from his home at Narraweena to his place of employment at Darling Harbour, Sydney. Mr Hayley was a dentist with his own practice, and travelled from his home in Strathfield to his surgery at Macquarie Street, Sydney. The majority of the High Court found that the expenses incurred by each of the taxpayers in travelling between home and work were not deductible. In a joint judgment Williams, Kitto and Taylor JJ said⁶:

The question whether the fares which were paid by the appellants are deductible under s. 51 should not and, indeed, cannot be solved simply by a process of reasoning which asserts that because expenditure on fares from a taxpayer's residence to his place of employment or place of business is necessary if assessable income is to be derived, such expenditure must be regarded as "incidental and relevant" to the derivation of such income. No doubt both of the propositions involved in this contention may, in a limited sense, be conceded but it by no means follows that, in the words of the section, such expenditure is "incurred

³ *Ronpibon Tin NL v FCT* (1949) 78 CLR 47.

⁴ (2001) 202 CLR 93, per Gleeson CJ, Kirby and Hayne JJ at [16].

⁵ (1958) 100 CLR 478.

⁶ *Ibid*, at page 498.

in gaining or producing the assessable income” or “necessarily incurred in carrying on a business for the purpose of gaining or producing such income”. It is, of course, beyond question that unless an employee attends his place of employment he will not derive assessable income and, in one sense, he makes the journey to his place of employment in order that he may earn his income. But to say that expenditure on fares is a prerequisite to the earning of a taxpayer’s income is not to say that such expenditure is incurred in or in the course of gaining or producing his income. Whether or not it should be so characterised depends upon considerations which are concerned more with the essential character of the expenditure itself than with the fact that unless it is incurred an employee or a person pursuing a professional practice will not even begin to engage in those activities from which their respective incomes are derived.

32. Mr Walker’s expenses in respect of his travel to take up employment at his various employment locations are not allowable deductions according to the principle in *Lunney*. Nor are his travel expenses between his caravan and his work-place. These are expenses incurred for the purpose of deriving income but not in the course of doing so. Less still would there be an entitlement to deduct his travel expenses to and from town for supplies.
33. Travel at Mr Walker’s own expense between a single employer’s separate farms, during and in the course of his duties, are in a different category. So too may be travel from one employment location to another to take up employment with a different employer. These matters aside, however, Mr Walker’s travel expenses could not on the *Lunney* principle be regarded as justifiable deductions.
34. On Mr Walker’s behalf, however, it is said that his travel expenses may be claimed because he is an itinerant worker. This exception was canvassed by the Federal Court in *Federal Commissioner of Taxation v Genys*⁷ (“*Genys*”), where Northrop J said that an exception to the principle in *Lunney* “is where the taxpayer travels between home and shifting places of work, that is, an itinerant occupation.”
35. In *Genys* the taxpayer was a registered nurse who used an employment agency to seek relief work with various hospitals. She was not continuously employed by any one

⁷ (1987) 17 FCR 495.

hospital. When a hospital was in need of additional staff they contacted the agency which would then contact the taxpayer. Each engagement undertaken by the taxpayer constituted a separate employment contract.

36. The Federal Court in *Genys* held that the taxpayer's employment was not itinerant. The taxpayer was not required to travel between two places of work after the commencement of her duties. She merely travelled to work and home again. In reaching his conclusion, Northrop J quoted from the decision of Brightman J in *Horton v Young*⁸:

...where a person has no fixed place or places at which he carries on his trade or profession but moves continually from one place to another, at each of which he consecutively exercises his trade or profession on a purely temporary basis and then departs, his trade or profession being in that sense of an itinerant nature, the travelling expenses of that person between his home and the places where from time to time he happens to be exercising his trade or profession will normally be, and are in the case before me, wholly and exclusively laid out or expended for the purposes of that trade or profession. I have used the adverb 'normally' because every case must to some extent depend on its own facts.

37. Another case which considered itinerancy, and upon which Mr Walker places reliance, is *Federal Commissioner of Taxation v Wiener*⁹ ("Wiener"), a decision of the Supreme Court of Western Australia. There a teacher was required to attend four to five schools each day. Smith J said¹⁰:

'...that travel was a fundamental part of the taxpayer's work, is not open to challenge. Viewed objectively, it does not seem to me to be open to question that the taxpayer would not have been able to perform her duties without the use of her motor vehicle.

...it was a necessary element of the employment that on those working days transport be available at whichever school the taxpayer commenced her teaching duties and that transport remained at her disposal throughout each of those days.'

38. Mr Walker also relies on *Taxation Ruling TR 95/34* which provides guidelines for establishing whether an employee is carrying on itinerant work, and discusses the tax

⁸ [1972] Ch 157 at page 164.

⁹ 78 ATC 4006; (1978) 8 ATR 335.

¹⁰ Ibid, ATC at 4010; ATR at 339.

treatment of transport expenses incurred by employees carrying out itinerant work claimed under the then subsection 51(1) of the *ITAA*.¹¹

39. According to *TR 95/34* the following characteristics have emerged from the cases as being indicators of itinerancy:

- a) travel is a fundamental part of the employee's work;
- b) the existence of a 'web' of work places in the employee's regular employment, that is, the employee has no fixed place of work;
- c) the employee continually travels from one work site to another. An employee must regularly work at more than one work site before returning to his or her usual place of residence;
- d) other factors that may indicate itinerancy (to a lesser degree) include:
 - (i) the employee has a degree of uncertainty of location in his or her employment (that is, no long term plan and no regular pattern exists);
 - (ii) the employee's home constitutes a base of operations;
 - (iii) the employee has to carry bulky equipment from home to different work sites (paragraphs 63 to 71 below);
 - (iv) the employer provides an allowance in recognition of the employee's need to travel continually between different work sites (paragraphs 72 to 75 below).

40. It was submitted that Mr Walker meets the requirements of itinerancy because:

- (1) He has a regular web of workplaces to which he travels.
- (2) Travel is a fundamental part of his work because he must move with the seasons.
- (3) He maintains a home base on the Sunshine Coast where he is on the electoral rolls, stores personal affects, and from which he has his mail redirected.
- (4) While working he lives in rough temporary accommodation.

¹¹ Paragraphs 1 & 2.

- (5) He generally travels to more than one work location before he returns home to the Sunshine Coast.

41. Particular reliance was placed on two examples in *TR 95/34*¹²:

43. Example: Valerie is a fruit picker. She does not have a regular circuit, but organises her next job before completing the work at the current farm. Valerie normally works and lives at many properties before returning home, remaining at each farm for two to three weeks. Valerie is engaged in itinerant employment because:

- (a) her employment has a web of work places; and*
- (b) there is continual travel from one farm to another before returning to her normal place of residence.*

55. Example: Ian is a shearer who has agreements with various property owners and therefore travels on a circuit to the same farms each year returning home only periodically. When he finishes work at a property, he travels directly to the next property on his circuit. Although there is no uncertainty in Ian's employment pattern, his work is considered itinerant. This is because:

- (a) travel is a fundamental part of his work;*
- (b) his work structure displays a 'web' of workplaces; and*
- (c) he continually moves from one place of work to another before returning home.*

42. In determining whether a person is an itinerant worker it is necessary to look at the individual circumstances.¹³ A taxpayer engaged in seasonal work, in this case farm work, performed at different locations either for the same or different employers, may or may not be an itinerant worker. I am not satisfied that Mr Walker's circumstances do satisfy the requirement of itinerant work. This finding is not dependent on any one fact or circumstance, but on a number of matters.

43. I do not think any of Mr Walker's transport expenses, as currently under consideration, arose from the nature of his work, so that they could be considered to be incurred in the performance of his duties. Obviously he had to travel to Gayndah, Bowen and Stanthorpe to undertake work on a daily basis in or near those towns. However, his travel to those locations, from the Sunshine Coast or elsewhere, was not a requirement of his employer, or of his employment, but a product of his choice to work, as he said, in other locations

¹² At paragraphs 43 & 55 respectively.

¹³ See, for example, *Hill & Commissioner of Taxation* [2016] AATA 514, [50]-[54].

and obtain experience and skills with a variety of produce. Such travel was not a fundamental part of his work.

44. As it happens a routine or pattern of work has developed. Mr Walker has settled on three locations, within different parts of Queensland, which he refers to as his circuit. Initially there was some uncertainty where he would be working but that was soon settled. Each work location may be regarded, including in the years under consideration, as a regular or fixed place of employment.
45. It is true that Mr Walker's first engagement at Benyenda Citrus was only for a few weeks. Otherwise, however, his employment at each location has been longer, regularly for three or four months, and in one case six months, amounting I think to his having fixed places of employment.
46. I do not think the home on the Sunshine Coast has ever formed a base of operations. Mr Walker and his wife were there in 2012 when he first sought employment elsewhere. Otherwise the Sunshine Coast home has been little more than a location for Mr Walker and his wife to visit occasionally on holiday. The fact that it serves as his postal address, and is where he is enrolled as an elector, do not in my view advance his case.
47. Taking all the circumstances into account, including the arguments advanced on Mr Walker's behalf, I find that he was not an itinerant worker. Consequently his case does not fall outside the principle in *Lunney*, and he is not entitled to the travel expenses he claims as an itinerant worker. That includes, of course, the expenses of travel between his caravan and his work-places, or into town for supplies.
48. It follows that Mr Walker's other claimed deductions, made in reliance on a finding that he was an itinerant worker, must also be disallowed. They included his accommodation expenses, and the bulk of his living expenses, other than those expenses when he was on holiday.
49. It is another matter whether or to what extent these claims would have been allowed, even if I had found Mr Walker to be an itinerant worker. There is no need, however, to consider these matters further in view of my finding that Mr Walker was not an itinerant worker.

Travel, accommodation and other expenses

50. It submitted on behalf of Mr Walker that if he is found not to be an itinerant worker, then he is entitled to claim deductions for meals and accommodation while living away from home on a temporary basis for work purposes, based on the decision of the Federal Court in *Roads and Traffic Authority of New South Wales v Federal Commissioner of Taxation*¹⁴. In that case Hill J said¹⁵:

Where a taxpayer is required by his employer, and for the purposes of his employer, to reside, for periods at a time, away from home and at the work site, and that employee incurs expenditure for the cost of sustenance, or indeed other necessary expenditure which, if the taxpayer had been living at home, would clearly be private expenditure, the circumstance in which the expenditure is incurred, that is to say, the occasion of the outgoing operates to stamp that outgoing as having a business or employment related character.

...

[E]ach of the persons deemed hypothetically to have incurred the expenditure are employees. They are not carrying on their own business ... they are required, as an incident of their employment, by their employer and for the purposes of the employer to live close by their work site for relatively short periods of time. No question arises of their choosing to live in these places. Each of the persons in question has a permanent house in which he lives when not in camp. None of the employees spend inordinate periods of time in the camps so that the camp becomes their home. Their house is retained and the employees in question travel home at weekends. They do not remain in the camps. The costs in question here are an incident of the employment.

51. Mr Walker's circumstances are clearly distinguishable from that of employees who in the course of their employment are compelled, by their employer, and not by choice, to spend money on accommodation and other expenses. It was Mr Walker's choice to live and work where he did.
52. I do not accept that Mr Walker was living away from a permanent home if that means the home where his mother-in-law lives on the Sunshine Coast. I think home for him was his caravan. Even if the Sunshine Coast property was his home, I do not think his absences

¹⁴ (1993) 43 FCR 223.

¹⁵ *Ibid*, at page 240.

could be described as short-term, or in any way coming within what Hill J was describing in the *Road and Traffic Authority* case.

53. Mr Walker claimed the expenses of travel between work locations, relying on s 25.100 of the *ITAA*:

Travel between workplaces

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*
(b) *the * business in respect of which you 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.*

54. Mr Walker's travel between different work locations does not fall within this provision. At the time of his travel to what can be described as the second place, the arrangement under which he gained assessable at the first place had ceased.

55. It is not sufficient, as he submits, that he had a non-binding understanding with the employer from the first place that he would be re-employed, or that he would be available for further work, at some later date.
56. Before the Tribunal Mr Walker said he had to travel at his own expense between his employers' different farms whilst employed by Craxcorp and Wrenco. These are travel expenses that could qualify under the general principle as outgoings incurred in gaining income. The evidence, however, was vague.
57. There was insufficient differentiation between this travel and, for example, Mr Walker's travel between his caravan and work, or to and from town for supplies. The travel between different farms whilst working for Craxcorp and Wrenco was not regular. When it did occur it was sometimes in the course of performance of Mr Walker's duties, but on other occasions it was for personal reasons, such as to pick up his wife. I am unable to determine what deductions would be justified.
58. I am not satisfied that the telephone and internet expenses are outgoings that can be claimed as deductions. The evidence satisfies me that they were occasioned by the need to arrange employment but not in the course of gaining assessable income.

CONCLUSION

59. The objection decision under review is affirmed.

I certify that the preceding 59 (fifty-nine) paragraphs are a true copy of the reasons for the decision herein of Deputy President I R Molloy

.....[Sgd].....

Associate

Dated: 14 March 2017

Dates of hearing:	19 December 2016, & 20 December 2016
Advocate for the Applicant:	Ms Julia Hartman
Counsel for the Respondent:	Mr Vincent Brennan
Solicitor for the Respondent:	Ms C. Davies ATO – Review and Dispute Resolution Group