1924
Jan. 24.
Feb. 14.

IN THE MATTER OF THE INCOME WAR TAX ACT, 1917, AND AMENDMENTS

IN RE SALARY OF LIEUTENANT-GOVERNORS

Revenue—Salaries—Deductions—Income War Tax Act, 1917, as amended by 13-14 Geo. V, c. 52—Voluntary expenses

The appellant declared his income as Lieutenant-Governor to be $....... and claimed a deduction therefrom of $........ expended for social entertainments, claiming that the latter amount was properly deductable as having been necessarily laid out for the purpose of earning the income.

Held that the expenses claimed as a deduction herein were not "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" within the meaning of Sec. 8, ss. "*a*" of the Income War Tax Act, 1917, as amended by 13-14 Geo. V, c. 52.

2. That the disbursements that must be made to earn profits are those in connection with unascertained incomes, unlike a case of salary, where disbursements are made at the discretion and will of the taxpayer.

(1) (1797) 7 T.R. 268 (D. & E.).

3. That the true meaning of the section in question is, that in a "trade or commercial or financial or other business or calling," before the amount upon which the tax is to be levied is ascertained, the amounts expended to earn the same must be deducted. But it is otherwise in the case where a person is in receipt of an annual salary from any office or employment—an amount which is duly ascertained and capable of computation, and which constitutes of itself a net income.
4. That there is no legal obligation upon a Lieutenant-Governor, flowing from his appointment as such, to entertain socially; and no implied contract exists between him and the Crown, by reason of his appointment and the taking of the oath of office, from which flows any obligation with respect to expenditures for social entertainments. Such expenditures are voluntary, and the failure to so entertain could not be a cause for removal or dismissal.

This was an appeal from the taxation by the Crown of the salary of a Lieutenant-Governor.

The appeal was heard before the Honourable Mr. Justice Audette on the 24th day of January, 1924, at Ottawa, the appellant and the Crown being represented by counsel.

The facts are stated above and in the Reasons for Judgment.

AUDETTE J., on February 14, 1924, delivered the following judgment.

This is an appeal,—under the provisions of secs. 15 et seq. of *The Income War Tax*, 1917, as more specifically amended by sec. 7 of 13-14 Geo. V, ch. 52,—from the assessment, for the year ending 31st December, 1920, of that part of the Appellant's income dealing with his salary as Lieutenant-Governor * * * .

By section 58 of The British North America Act, 1867, it is provided that for each province there shall be an *officer,* styled the Lieutenant-Governor, appointed by the Governor General in Council by Instrument under the Great Seal of Canada, and by section 59 thereof it is enacted that the Lieutenant-Governor holds office during pleasure of the Governor General. By sec. 3 of Ch. 4, R.S.C., 1906, the salary of such officer, as appointed for the province of * * * , is fixed at the annual sum of * * * .

In making the return of his income for the year, * * * the appellant declared his salary at * * * and claimed a deduction therefrom of the sum of * * * expended for social entertainments, the particulars of such expendi-

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ture appearing in his letter to the Minister * * *. He claims he should not be assessed on the gross salary but on the net after having deducted the above amount which he alleges was necessarily laid out for the purpose of earning the income, outside of his living expenses.

It was further contended at bar that when the oath of office is taken, the officer administering the same hands to the incumbent in office a copy of the Instructions filed as Exhibit No. 1, and that a contractual obligation results from this oath of office and these instructions taken together for the discharge and performance of the several duties attached to the position.

It may also be casually mentioned that beside his salary, which is paid by the Dominion Government, the Lieutenant-Governor under the provisions of the provincial statute, is given, without charge of rent, by the provincial government, residence, with all the grounds, outbuildings and premises known as Government House property. He is further provided with the furnishing of the house, repairs, the salaries of a private secretary, head gardener, caretaker, etc., etc.

Dealing with the first contention, it becomes primarily necessary to ascertain what constitutes "Income" under Sec. 3 of the Assessment Act.

The word "income" "means the annual *net profit or* gain or gratuity, *whether ascertained and capable of* computation as being wages, salary or other fixed amount or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, etc."

Therefore the income or annual net profit of a taxable citizen may be classified under two heads,—the ascertained and the unascertained incomes. Within the former would fall wages, salary and other fixed amounts, as in the present case; and in the latter would come all of those incomes that have to be ascertained under various calculation, such as fees or emoluments, and the profits derived from a trade or commercial business, after deducting the expenses of carrying on the same.

Subsec. 8 of sec. 3, as amended by 13-14 Geo. V, ch. 52 reads as follows:

(8) In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of—

(*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income,

Much stress was laid by the appellant upon this section, contending that under its provisions expenditures for social entertainment should be deducted from his salary, before he could be said to receive any net profit therefrom.

It is quite obvious that this section does not apply to a case of this kind. The disbursements that must be made to earn profit are those in connection with unascertained incomes, unlike a case of salary, where disbursements are made at the discretion and the will of the taxpayer,—and after all are not these disbursements measured by the hospitable disposition of each Lieutenant-Governor, and are they not freely and voluntarily incurred and so not enforceable by law.

What that section means is that in " a trade or commercial or financial or other business or calling," before the amount upon which the tax is to be levied is ascertained, the amounts expended to earn the same must be deducted. But it is otherwise in the case where a person received an annual salary from any office or employment—an amount which is duly ascertained and capable of computation, and which constitutes of itself a net income. One cannot apply to the office of the Lieutenant-Governor the ordinary business principles whereby the expenditure to earn profits must be deducted from the taxable amount.

The question or policy of spending for social purposes is of a personal character and in no way affected by any legal obligation. No action can lie to enforce the same.

The generous hospitality with which the present appellant entertains is of itself a commendable thing and reflects much lustre upon the office he holds; but I fail to find either within the spirit or the language of the Act any ground for holding that it comes under the expression "disbursements or expenses *wholly, exclusively* and *necessarily* laid out or expended for the purpose of earning the income." (Section 3 of the Act of 1923.) The Tax is entirely a creature of the Statute. If the person sought to be taxed

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comes within the letter of the law, he must be taxed however great the hardship may appear to be to the judicial mind. When accepting office the appellant knew what duties were cast upon him; having taken office he can no more claim these deductions than he could, outside of the Act, take any action against his employer to recoup himself of his expenses for such social entertainments. All offices carry with them certain detriments as well as remuneration. There is no law to force such expenses and none to justify these deductions. They are not enforceable by law either way.

Much as these expenditures for carrying on levees, social entertainments and dispensing a dignified and liberal hospitality which absorb so large a portion of the salary may be considered as incidental to the office of Lieutenant-Governor, assisted by the ladies of his household, just as valid an argument could be made for the relief of cabinet ministers, indeed of all persons to whom social distinction and rank is accorded. Todd's Parliamentary Government in the Colonies, 2nd ed., p. 32.

The provisions of sec. 3 of the Act of 1923, like the English Act, do not affirmatively state what disbursements and expenses may be deducted. They furnish mere negative information and in the result it can be said that such disbursements and expenses can be deducted only when connected with and incidental to the trade or commercial business itself.

Dealing with the second contention of the appellant which is based on an implied contract between the Crown and the Lieutenant-Governor as flowing from his oath of office, and the instructions supplied to him, as to his duties to be performed which are part social, I must find that such a proposition does not rest on sound legal principles. There was no concensus between the parties in respect of the matters in question herein from which could flow any obligations with respect to this expenditure for social entertainment attached to the office by custom and tradition.

The failure of the Lieutenant-Governor to entertain could not be a cause for removal or dismissal.

A public officer entitled to salary takes office *cum onere* and the legislature may attach additional duties to an

office, without increasing the salary. The principle, and its derivative, being that salary of an officer is not resting on a contract,—it does not grow out of a contract between the officer and the State. The salary belongs to the officer, as an incident to his office and he is entitled to it, not by force of any contract, but because the law attaches it to the office. The incumbent may die or resign and his place is filled, and the salary earned by another person. The right to compensation grows out of the rendition of the services (1), and not out of any contract between the government and the officer, Throop, Public Officers, pp. 19, 430.

It appears in exhibit No. 1 from a despatch dated 7th November, 1872, with reference to the question asked by Sir Hastings Boyle, and submitted by Lord Lisgar to Lord Kimberlay, namely: "Whether the Lieutenant-Governors are supposed to be acting on behalf of the Queen," that "While the Lieutenant-Governors from the nature of their appointment represent on ordinary occasions the Dominion Government, there are nevertheless occasions (such as the opening or closing of a session of the provincial legislature, the celebration of Her Majesty's birthday, the holding of a levee, etc.) on which they should be deemed to be acting directly on behalf of His Majesty, etc."

It is true this is not a claim for exemption but only one for deduction, but from a perusal of the Act, it appears by sec. 5 thereof, that the total "income" of the Governor General is exempt from taxation. It may well be that the Lieutenant-Governors of our provinces who hold office and discharge duties similar in character, though lesser in degree than those performed by the Governor General, are equally entitled to have their salaries—not their income—exempted from the liability imposed by the Income Tax Act, and all the more so as the salary has been the same since confederation notwithstanding the notorious increased cost of

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(1) *Strong* v. *Woodifield,* (1906) A.C. 448, at p. 452; 5 T.C. 215, at p. 219; *Clerical, Medical & General Life Ass. Soc.* v. *Carter,* 2 T.C. 437, at p. 442; *Cook* v. *Knott,* (1887) 2 T.C. 246; *Revell* v. *Directors of Elworthy Bros. Co. Ltd.,* 3 T.C. 12; *Bowers* v. *Harding,* (1891) 3 T.C. 22.

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living, and has been really reduced by the Taxing Act. This, however, is a matter for Parliament to consider, and beyond the province of a court of justice, and I leave it with the cursory observations I have made: See Lord Carnarvon's Despatch, 8th April, 1875—Exhibit No. 1.

Therefore, for the reasons above mentioned, I have come to the conclusion to dismiss the appeal.

Judgment accordingly.