BETWEEN:

JOSEPH A. COOPER,..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE, ... RESPONDENT.

1948
Sept. 7
1949
June 8

Revenue—Income tax—Income War Tax Act, R.S.C. 1927, C. 97, s. 6(1) (a) —"Income"—"Net" profit or gain or gratuity—"Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"—Annual fees paid by employee to union or alliance deductible from paid salary.

Held: That an employee bound to pay dues and assessments to an alliance which provides his job is entitled to deduct from his income such payments for purposes of income tax, and it is immaterial whether such expenditure is prescribed by the charter or by-laws of a society or by a contract or agreement between the employer and a union. (*Bond* v. *Minister of National Revenue* (1946) Ex. C.R. 577 followed).

APPEAL under the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Angers at Winnipeg.

Clifford W. Brock, K.C. for appellant.

C. B. Philp, K.C. for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

ANGERS J. now (June 8, 1949) delivered the following judgment:

This is an appeal, under the provisions of sections 58 and following of the Income War Tax Act, 1917, and amendments thereto, from the assessment of the appellant dated March 7, 1947, in respect of income tax for the taxation year 1945.

The facts may be summarized briefly as follows.

The appellant is a moving picture machine operator, commonly known as a projectionist, and carries on his occupation at the City of Winnipeg, in the Province of Manitoba; his income, as defined in the Income War Tax Act, is derived from the salary which he earns in his occupation as a moving picture machine operator.

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During the taxation year ending December 31, 1945, and for several years prior thereto the appellant was employed in his occupation as moving picture machine operator by Famous Players Canadian Corporation Limited in one of the theatres operated by it in the City of Winnipeg and he received his salary for services rendered in his said occupation.

Famous Players Canadian Corporation Limited is a corporation organized under the laws of the Dominion of Canada and it operates a chain of moving picture theatres throughout Canada, in various cities and towns, including several theatres in the City of Winnipeg.

On April 15, 1942, an agreement was made between Famous Players Canadian Corporation Limited, as owner or lessor of, among others, the Capitol, Metropolitan, Gaiety, Uptown, Tivoli and Crescent theatres in Winnipeg, thereinafter referred to as the party of the first part, and Winnipeg Local 299 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, thereinafter referred to as the party of the second part, whereby it was agreed that the party of the first part would employ only moving picture machine operators supplied by the party of the second part, who are in good standing with the latter. A copy of this agreement, which remained in full force and effect and was the one existing between the parties during the taxation year 1945, was filed as exhibit 3.

The constitution and by-laws of the Motion Picture Projectionists, Winnipeg Local 299, adopted November 24, 1940, a copy whereof was marked as exhibit 1, stipulate that all dues of the Union shall be payable three months in advance and that they shall be declared in arrears on the first meeting day of the month following the date on which they are declared due: article 6, section 2.

I deem it apposite to make a brief recapitulation of the evidence. The only witnesses heard on behalf of the appellant is the appellant himself and Edward Louis Barr, projectionist and secretary of Local 299. No evidence was adduced for the respondent.

Joseph A. Cooper, the appellant, of the City of Winnipeg, who described himself as motion picture projectionist for

the last thirty-seven years and a member of Winnipeg Motion Picture Projectionists Local 299, of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, hereinafter called the Union for brevity's sake, testified that during the whole of the year 1945 he was a member of that Local and was employed by the Capitol theatre, Winnipeg.

He declared that the Capitol theatre is owned by Famous Players Canadian Corporation Limited and that his salary as a projectionist was $50 a week. He produced as exhibit 1 a copy of the Constitution and By-laws of the Motion Picture Projectionists, Winnipeg, Local No. 299 appearing to have been adopted on November 24, 1940, as exhibit 2 the Constitution and By-laws (39th edition), effective July 27, 1946, of the Union, as exhibit 3 a copy of the agreement dated April 15, 1942, between Famous Players Canadian Corporation Limited, owners or lessors of, among others, the Capitol theatre, Winnipeg, and Winnipeg Local 299 of the Union, and as exhibit 4 the membership card of the appellant for the season 1945-46.

Cooper stated that there is no other Capitol theatre in Winnipeg than the one by whom he was employed. He asserted that under the Constitution and By-laws exhibit 1 he paid as a member of the local union 299 his dues and assessments during the year 1945. He declared categorically that he could not become a member of Local 299 without being a member of the parent organization, to wit the Union. He swore that in order to hold his job he had to pay his dues and assessments as levied by the Union. It seems to me convenient to quote a passage of the witness' testimony (p. 7):

Q. By holding your job you mean that the position you held at the time in question with Famous Players at the Capitol Theatre?

A. That is correct.

Q. What standing does it give you by paying your dues? Is there an expression in the Union that you are in some kind of standing by paying dues?

A. Yes, I am in good standing with the organization, and therefore allowed the privileges and rights that the Local bestows on its members.

Q. What would happen in regard to your membership on your failure to pay dues in the Local Union?

A. I would be suspended or expelled and removed from the job I was holding.

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In cross-examination Cooper said that he had been employed by the employer for whom he worked in 1945 since the year 1928 and that he joined the Union on October 31, 1915.

Edward Louis Barr, projectionist, of the City of Winnipeg and secretary of Local 299, testified that the appellant is a member of that Local and that he was in 1945. Looking at exhibit 4 Barr said it is the membership card for 1945-46, which shows the amounts paid by the appellant to Local 299. He explained that the payment of dues as a member of the Local keeps the member in good standing and renders him able to stay on his job.

Asked what would happen if a member failed to pay his dues to the Local, Barr replied that he would be fined and expelled. He asserted that in 1945 Cooper was employed by the Capitol Theatre, Winnipeg, and that the latter was under contract with Local 299 with regard to projectionists.

Section 1 of article 5 of the Constitution and By-laws of the Motion Picture Projectionists (exhibit 1) stipulates as follows:

> An applicant for resident membership or reinstatement must be a holder of a valid Projectionist license issued under "The Amustment (Amusement) Act". He shall be of good moral character and reputation.

Sections 1 and 2 of article 6 of the same Constitution and By-laws, regarding dues and assessments, provide:

> The dues of this union shall be:
>
> employed members $6.75 quarterly
>
> unemployed members $5 55 quarterly.
>
> All dues shall be payable three months in advance. Dues shall be declared in "arrears" on the first meeting day of the month following the date on which they are declared due.

Section 13 of article 21 of the Constitution and By-laws of International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (exhibit 2) entitled "Forfeiture of Membership", enacts:

> Membership in this Alliance may be forfeited for non-payment of dues, by expulsion, for failure to apply for membership-at-large on the dissolution of a local union as provided in Section 25 of Article Nineteen of this Constitution, and in such other manner as is in this constitution and By-laws provided. No member of this Alliance shall be expelled or suspended, save for non-payment of dues and failure to apply for

membership-at-large upon the dissolution of a local union, unless such member has been accorded a fair trial in the manner set forth in Article Sixteen of this Constitution.

The first paragraph of the contract (exhibit 3) reads thus:

> The Party of the First Part agrees to employ only Moving Picture Machine Operators supplied by the Party of the Second Part, and who are in good standing, and remaining so, with the Party of the Second Part.

This clause clearly means that the owners or lessors of the Capitol theatre, namely Famous Players Canadian Corporation Limited, agreed with the Winnipeg Local 299 that they will only employ moving picture machine operators of said local who are in good standing and remaining so.

In his return for the year ended December 31, 1945, Cooper deducted from his salary ($2,805.81) the sum of $35 for disbursements wholly, exclusively and necessarily laid out for the purpose of earning his income. In a notice of assessment, which appears to have been mailed to him on March 7, 1947, the said sum of $35 was disallowed. On March 22, 1947, the appellant served a notice of appeal upon the Minister of National Revenue in compliance with section 58 of the Income War Tax Act, in which he stated that he is a projectionist employed by a theatre in the City of Winnipeg and that, in order to maintain his position as such, he is compelled to belong to the Motion Picture Projectionists, Local 299, of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada and to pay dues to such Union. The appellant further stated that, if he refused or neglected to pay such dues, he would be unable to hold any position as a projectionist or work at his occupation and that he would be expelled from such Union.

As reasons for his appeal the appellant submitted:

(*a*) that the appellant is compelled to pay to the Union the sum of $3.10 per month for dues and the sum of $14.39, as set out in the assessment notice bearing date the 7th day of March, A.D. 1947, is the amount of taxation on such dues;

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(b) that the sum of $37.20 paid by the appellant to the said Union for dues for the year 1946 was a proper expense and a proper deduction before the salary of the appellant became subject to income taxation;

(c) that the expenditure so made by the appellant to the said Union was considered by him and by all the members of the Union as obligatory in order to maintain their position as projectionists and to work at their occupations as such projectionists.

On August 18, 1947, the Minister affirmed the assessment and notified the appellant of his decision in accordance with section 59 of the Act. On September 15, 1947, the appellant, dissatisfied with the decision of the Minister, mailed to the latter a notice of dissatisfaction expressing the desire that his appeal be set down for trial and stating that, in addition to the facts and reasons set forth in the notice of appeal, he relies upon the following facts and reasons, which may be summarized as follows:

the taxpayer is a moving picture machine operator, what is commonly referred to as a projectionist, and resides in the City of Winnipeg;

the taxpayer's income is derived from the salary which he earns as a moving picture machine operator;

during the whole of the year ending December 31, 1945, the taxpayer was employed as moving picture machine operator by Famous Players Canadian Corporation Limited in one of its theatres in the City of Winnipeg and received a salary for services rendered in said occupation, the amount whereof is set forth in the taxpayer's return;

by an agreement in writing between Famous Players Canadian Corporation Limited and Winnipeg Local 299 of the Union it was agreed that Famous Players Canadian Corporation Limited would employ only moving picture machine operators supplied by the Union, who are in good standing and remaining so;

the said agreement was in full force and effect during the whole of the taxation year 1945;

the laws of the province of Manitoba provided that no person can follow the occupation of a projectionist without a course of instruction and a license and the taxpayer was duly licensed under the laws of the said province;

under the by-laws, rules and regulations of the said Union a member thereof, in order to be in good standing, must pay the dues and assessments levied by the Union; the dues and assessments so levied for the taxation year 1945 amounted to the sum of $3.10 per month or a total of $37.50, which were duly paid by the taxpayer and the latter remained a member in good standing of the Union during the said taxation year;

the expenditure by the taxpayer and by all members of the Union is obligatory in order to maintain their employment as projectionists or moving picture machine operators;

if the taxpayer had not paid his said dues or assessments to the Union he would not have been able to keep his employment with the said Corporation and to earn his salary;

the said dues and assessments are expenses wholly, exclusively and necessarily laid out or expended by the taxpayer for the purpose of earning the income within the meaning of paragraph (*a*) of subsection 1 of section 6 of the Income War Tax Act; the said sum of $37.50 paid by the taxpayer is a proper deduction for his income and is not taxable under the said Act.

In his reply to the notice of dissatisfaction the Minister denies the allegations in the notice of appeal and the notice of dissatisfaction, insofar as incompatible with the statements contained in his decision, and affirms the assessment as levied.

The case is governed by paragraph (*a*) of subsection 1 of section 6 of The Income War Tax Act. The relevant part of section 6 reads thus:

> 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;

Under its contract with the Winnipeg Local 299 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Famous Players Canadian Corporation Limited, as owner or lessor of the Capitol Theatre of Winnipeg, was bound to employ only moving picture machine operators supplied by the said local, being in good standing with the said Union. As previously noted, in

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order to be in good standing a member must have paid dues and assessments payable under the by-laws and constitution of the Union. It is the dues and assessments levied by the Union for the taxation year 1945 for which the appellant claimed exemption. The evidence discloses clearly that, if Cooper had not paid these dues and assessments, he would not have obtained his employment as projectionist or moving picture machine operator at the Capitol theatre.

Counsel for appellant relied on the decision of the President of this Court in *Bond* v. *Minister of National Revenue* (1). The facts in that case were briefly as follows. Bond was employed as counsel by the City of Winnipeg on a fixed salary. His duties were mainly those of a barrister but he also performed certain solicitor duties. To be entitled to practise he had to pay annual fees to the Law Society of Manitoba. The non-payment of such fees would bring about suspension from practice and striking off the roll.

The headnote fairly comprehensive contains, among others, the following statements:

2. That the making of an expenditure cannot by itself serve the purpose of earning the income but it may enable the maker of it to earn it and thus be a working expense and part of the process of earning the income, and, therefore, be made for the purpose of earning it.

3. That the payment by a practising lawyer to his law society of his annual practising fees or an obligatory annual assessment is not a disbursement or expense "not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" and is not excluded as a deduction from his remuneration by section 6 (*a*) of the Act

I deem it convenient to quote a brief excerpt from the judgment, which I consider pertinent (p. 585):

Section 6 (*a*) is an excluding section. It prohibits the deduction of disbursements or expenses "not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income". Can it reasonably be said that the amount paid by the appellant to the Law Society falls within the exclusion of the section? I do not think so The appellant had to pay this amount in 1943 in order to be entitled to practise law in that year. It was an annual practising fee. If he did not pay it he would be suspended and then struck off the rolls Any attempt on his part thereafter to perform his duties would be contrary to law and constitute an offence for which he would be subject to a penalty and also to an injunction preventing him from continuing his attempt at practice. The payment of the amount was, therefore, necessary to the lawful and continuous performance of his duties and the earning of the income. Moreover, I think it was inherent in the contractual relationship between

(1) (1946) Ex. C.R. 577.

the appellant and the City of Winnipeg that he should continue to be a lawyer in good standing since his duties could not be performed without such standing. The maintenance of good standing was essential to the valid performance of his contract without which he could not earn the income. In my view, he had to pay the fees to earn the income and could not do so without paying them.

After stating that the expenditure was an annual one which the appellant could not escape and that "it constituted a working expense as part of the process of earning the income", the learned judge added (p. 586):

> In my view, the payment by a practising lawyer to his law society of his annual practising fees or an obligatory annual assessment is not a disbursement or expense "not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" and is not excluded as a deduction from his remuneration by section 6 (*a*) of the Act.

I do not believe it expedient to deal with the English decisions, since the law in England differs from ours.

In support of his contention that paragraph (*a*) of subsection 1 of section 6 is applicable herein and that the dues and assessments paid by the appellant cannot be deducted from his income as not being disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income, counsel for respondent referred to the judgments in *Siscoe Gold Mines Limited* v. *Minister of National Revenue* (1); *Montreal Coke and Manufacturing Co.* v. *Minister of National Revenue* (2); *Wales* v. *Graham* (3); *Simpson* v. *Tate* (4); *Mahaffy* v. *Minister of National Revenue* (5); *In re Salary of Lieutenant-Governors* (6); *Young* v. *C.N.R.* (7). I think it appropriate to review these cases succinctly.

In the case of *Siscoe Gold Mines Limited* v. *Minister of National Revenue* (*supra*) the facts were briefly as follows. The appellant carried on the business of gold mining. Appeals from income tax assessments for the years 1929, 1931, 1932, 1933, 1935, 1936 and 1937 were brought because certain expenses and disbursements made by it were disallowed as deductions from the income. Some of these consisted of legal expenses incurred in defending actions in which attacks were launched against the company's title to its mining property or in which claims were made arising

(1) (1945) Ex. C.R. 257.
(2) (1944) A.C. 126.
(3) (1941) 24 Rep. of Tax Cases, 75.
(4) (1925) 9 Rep. of Tax Cases, 314.
(5) (1946) Ex. C.R. 18.
(6) (1931) Ex. C.R. 232.
(7) (1931) 1 D.L.R. 645.

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out of transactions connected with its financing arrangements. Other expenditures disallowed related to mining claims. The appellant had entered into an agreement whereby it had an option to buy such claims and the the right to do exploration, development and diamond drilling thereon. After making certain payments and doing considerable diamond drilling the appellant decided not to take up the option. Two other disbursements, one to one of its directors and the other in connection with the distribution of medals, were also disallowed. It was held by the President:

That legal expenses incurred by a taxpayer in maintaining the title to his property or protecting his income when earned, or in connection with the financing of his business are not expenditures directly related to the earning of his income and are not allowed as deductions in computing the gain or profit to be assessed. *Minister of National Revenue* v. *Dominion Natural Gas Co. Ltd.* (1941) S.C.R. 19 and *Montreal Coke and Manufacturing Co.* v. *Minister of National Revenue* (1944) A.C. 130 followed.

In the cases of *Montreal Coke and Manufacturing Co. and Minister of National Revenue* (*supra*) and *Montreal Light Heat & Power Consolidated and Minister of National Revenue* (*supra*) the facts may be summed up as follows. The appellants which had issued bonds, redeemable before maturity at a premium and payable both as to principal and interest at the bondholder's option in currency other than Canadian dollars, with a view to reducing their interest charges redeemed the bonds before maturity and reborrowed at lower rates of interest and on less onerous conditions as to payment. The expenses incurred in effecting those changes included the payment of premium on redemption, disbursements on account of exchange, discount to underwriters overlapping of interest payments, printing and other incidental expenses. On a claim by appellants that the expenditure had been incurred wholly, exclusively and necessarily for the purpose of earning income—by increasing their profits by the reduction of the annual interest payments—and was, accordingly, deductible for the purpose of assessment to income tax, it was held by the Judicial Committee of the Privy Council affirming the judgments of the Supreme Court of Canada:

That expenditure, to be deductible, must be directly related to the earning of income from the trade or business conducted; that the

businesses of the appellants were not to engage in financial operations and expenditure incurred in relation to the financing of their businesses was not laid out for the purpose of earning income in their businesses within the statutory meaning; and, accordingly, that under s. 6 (*a*) of the Income War Tax Act, 1927, that expenditure was not an allowable deduction.

View of the courts below that the deductions claimed also fell to be disallowed as being payments "on account of capital" within s. 6 (*b*) of the Act, not dissented from.

In *re Wales* (*Inspector of Taxes*) v. *Graham* (*supra*) the report shows that the respondent was until his retirement a divisional engineer to the London County Council, that candidates for such positions had to be corporate members of the Institution of Civil Engineers or hold other approved qualifications and that the retention of membership of the Institution was dependent upon payment of an annual subscription. On appeal against an assessment to Income Tax under Schedule E. for 1939-40 in an amount which included his salary to the date of retirement, the respondent contended that the proportion of his annual subscription to the Institution applicable to the period April 6 to July 6, 1939, should be allowed as a deduction from the assessment. The Crown contended that the amount claimed was not money expended wholly, exclusively and necessarily in the performance of respondent's duties; that it was not sufficient to show that the expense was necessarily incurred to secure or retain preferment in the office.

It was held by the High Court of Justice, King's Bench Division, that the respondent was not entitled to the deduction claimed.

In re *Simpson* (*Inspector of Taxes*) v. *Tate* (*supra*) the headnote, sufficiently clear and exact, is thus worded:

A County Medical Officer claimed to deduct his subscriptions to certain professional societies in the computation of his liability to Income Tax under Schedule E in respect of his salary. It was not a condition of his employment that he should be a member of these societies, but such membership is customary for County Medical Officers.

The Special Commissioners, on appeal, allowed the deductions sought.

Held, that the subscriptions in question were not expenses wholly, exclusively and necessarily incurred in the performance of the duties of the office of County Medical Officer, and that they were accordingly not admissible deductions in computing his liability to Income Tax.

In the matter of *Mahaffy and Minister of National Revenue* (*supra*) the appellant, a resident of Calgary, Province of Alberta, received as a member of the Legislative Assembly of the said province which meets at Edmonton

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the sum of $2,000 as an allowance. In his income tax return for 1941 he deducted certain disbursements incurred for living expenses in Edmonton while in attendance at legislative sessions and for travelling expenses from Calgary to Edmonton and return for week-ends during the session. These deductions were disallowed and an appeal was entered. It was held by Cameron J.:

That the deductions claimed are not travelling expenses within the meaning of s. 5.1 (*f*) of the Income War Tax Act.

2 That such expenses are not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income of Appellant and are not deductible.

3. That the expenses incurred by Appellant are not personal and living expenses within the meaning of s. 6.1 (*f*) of the Income War Tax Act.

I may say with deference that the decisions in the above five cases appear to me well founded. On the other hand, I think that they differ essentially from the case at bar. In neither of those cases the sums claimed as deductions from the income represent disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income.

Another case cited by counsel for respondent is *Young* v. *C.N.R.* (*supra*) which does not seem to me to have any pertinence.

I see no difference, for the purpose of income tax, between a member of the bar who is required to make an expenditure in order to be authorized to carry on his profession and a projectionist or, in fact, any other worker, who is bound to pay dues and assessments to form part of a local of an alliance which provides the jobs. Whether the expenditure be prescribed by the charter or by-laws of a law society or by a contract or agreement between the employer and a union seems to me immaterial. In each of these alternatives the lawyer or the projectionist has to pay a fee to be authorized to carry on his profession or trade. If the appellant had not remained a member in good standing of Winnipeg Local 299 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, he would not have obtained a position as a projectionist at the Capitol Theatre in Winnipeg or at any other moving picture theatre.

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After a careful examination of the evidence, written and oral, and an attentive perusal of the arguments by counsel and of the precedents, I have reached the conclusion that the appellant is entitled to deduct the sum of $35 from his income.

The appeal will therefore be allowed and the assessment in question set aside.

The appellant will be entitled to his costs against the respondent.

Judgment accordingly.