Vancouver 1969
Oct. 10
Oct. 21

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

E. ROSS HENRY .... RESPONDENT.

Income tax—Professional practice—Anaesthetist's services rendered at hospital—Billing done at downtown office—Travel by car between home and hospital—Whether expense deductible—Income Tax Act, s. 12(1)(a) and (h).

An anaesthetist who practised exclusively at a hospital in Victoria had a home in the city and an office downtown where accounts were made out and mailed to patients.

Held, the expense of driving his car between his home and the hospital was not an expense of his practice so as to be deductible under s. 12(1)(*a*) of the *Income Tax Act,* but was a personal and living expense within the meaning of s. 12(1)(*h*) and therefore barred from deduction.

Cumming v. M.N.R. [1968] 1 Ex C.R. 425; *Owen v. Pook* [1969] 2 W.L.R. 775 (H.L.), distinguished; *Royal Trust Co. v. M.N.R.* [1956-60] Ex. C.R. 70, referred to.

APPEAL from Tax Appeal Board.

T. E. Jackson for appellant.

G. F. Jones for respondent.

SHEPPARD D.J.:—This appeal is by the Minister of National Revenue on the issue whether or not the respondent, an anaesthetist, should be allowed for the year 1965 automobile expenses for two round trips each day from his home to the Royal Jubilee Hospital in Victoria, B.C.

The facts follow:

The respondent is a duly qualified medical practitioner who confined his practice to that of an anaesthetist, which practice he carried on as one of a group. During the taxation year 1965 the respondent had a house at 2025 Lansdowne Road where he lived with his wife and two daughters, at a distance of about one and one-half miles from the Royal Jubilee Hospital. The respondent also had an office at 1207 Douglas Street which was occupied by a group of anaesthetists including the respondent. There they kept their records and had a secretary employed to send out their accounts. The respondent had two automobiles, one for his wife and the other for himself and in respect of the latter the claim for expenses arises.

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By agreement dated 6th June, 1961 between the Royal Jubilee Hospital of the first part and the group of anaesthetists, including the respondent, of the second part, the parties agreed as follows: that the group would supply at all times anaesthetic services required by the hospital; that the services were to be rendered in the hospital and the group were to have the exclusive right to administer such services; that any such services by one of the group outside of the hospital would be only with the written consent of the hospital; that all accounts were to be rendered to the patient and the hospital was not to be liable. Following the agreement the respondent confined his practice to supplying his services at the hospital and although he did supply anaesthesia for some dentists, those are not here relevant. No patients were received at the respondent's office or at his home.

The routine of his practice so far as relevant was as follows. At 7:30 a.m. he left his house in Lansdowne Road for the hospital. At 7:45 a.m. the operations commenced at the hospital and continued to three, five or six o'clock in the afternoon. The respondent then returned to his house for dinner and in the evening would return to the hospital to find out from the operating schedule for the next day the operations which he would attend. He would also visit at the hospital the patients to be operated on the next day and would return to his house after 1½ to 2 hours. The operations at the hospital were on the basis of a five day week, Monday to Friday inclusive. The respondent might be called for consultations at any time if a particular patient went into shock but generally during the weekends would only be required for emergency operations. All facilities which he required were provided by the hospital. At the hospital there were a locker for his clothes, lounge, desk, reference library; the equipment used for anaesthetics was likewise provided by the hospital and was the property of the hospital.

The respondent visited his office on Douglas Street once or twice a week. There he had no medical books and no patients came there. At the office the records including cards in the form Ex. R3 were kept, and there accounts were typed by the secretary and sent to patients as instructed by the respondent. For each patient a card (Ex. R3) was filled out by the respondent. The first four items

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being headed respectively, name of the patient, address, responsible person, occupation, were obtained from the hospital chart. The items headed surgeon, and nature of the operation, might be obtained by the respondent from the chart or from actual observation. The items headed anaesthetic, time and anaesthetist were filled in by the respondent from his own knowledge learned at the hospital. The amount of the item of charge for the anaesthetic was obtained from the Medical Association schedule. From the particulars on the card the secretary would make up the respondent's account at the office and would mail it to the patient.

The Minister made an assessment for the taxation year 1965 disallowing the expenses here in question. On appeal by the respondent to the Tax Appeal Board those expenses were allowed, then followed the appeal to this court. The parties have here admitted (Ex. A1) that the total mileage travelled for the calendar year by the automobile in question were 5,180 miles rather than 6,218. The Minister has allowed the respondent

96 return trips between the hospital and the office (4 5 miles)	432
299 emergency return trips between home and the hospital (3 miles)	897
Notional additional mileage	400
Total business miles	1,729

and has conceded that the allowance therefor of $651.63 should be increased by $128.62 to the sum of $780.25. The issue on this appeal is restricted to whether or not the respondent may deduct an allowance for automobile expenses for two trips daily between the respondent's home and the hospital. The respondent here contends that he should be allowed an additional mileage for 730 round trips from his house to the hospital, each of three miles, making a total of 2,190 miles, and that this allowance should be made under Section 12(1)(*a*) of the Income Tax Act which reads in part:

> Except to the extent that it was made or incurred by the tax-payer for the purpose of gaining or producing income from property or a business of the tax-payer.

The respondent contends that the allowance comes within that section on the ground that his house was a base of his operations as an anaesthetist, within *Cumming v. M.N.R.* [1968] 1, Ex. C.R. 425 in that the den at the respondent's

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house was used for the purpose of filling out cards later taken to the respondent's office and from which cards the secretary there typed out the respondent's accounts and kept the cards amongst the records.

In the *Cumming* case (supra) a doctor carried on practice exclusively as an anaesthetist at Ottawa Civic Hospital. The administrative functions of his practice, such as billing, were carried out at his home about half a mile from the hospital and the learned judge allowed the expenses of using his automobile to travel between his home and the hospital.

There Thurlow J. stated at page 437 "It was, however, admitted in the course of argument that the appellant conducted part of his practice at his home, that the nature of the business was such that the bookkeeping and financial activities had to be carried on at a location different from that where the patients were treated and that there were no office facilities available to him at the hospital where he might have carried out this part of his business".

At page 438, "In my opinion the base of the appellant's practice, if there was any one place that could be called its base, was his home".

And at page 440, "All such expenses, in my view, fall within the exception to section 12(1)(*a*) and are properly deductible and none of them in my opinion can properly be classed as personal or living expenses within the prohibition of section 12(1)(*h*)".

Hence the question here is whether or not the home of the respondent, 2025 Lansdowne Road, was a base of this respondent's operations as in the *Cumming* case.

On the facts it would appear that the house was not a base of operations of this respondent for the following reasons:

1. The agreement of the 6th June, 1961 provides that all the anaesthetic services would be performed in the hospital and not elsewhere except with the written consent of the hospital. Writing may have been waived in favour of an oral permission but that is here irrelevant. In any event, no patients were treated at the house in question and all services for which charges were made were performed within the limits of the hospital.

2. The information contained in the card shows that none of that information was obtained at his house. The first items were obtained from the hospital chart, further items from the knowledge of the respondent in attending the operation and the charges were those fixed by the Medical Association. Therefore no information on the card was necessarily filled out at the house and it was from this card that the secretary made the account charged to the patient.
3. This respondent had an office which alone distinguishes the *Cumming* case. All records were kept at the office and the account was made out there and which office the respondent visited only once or twice a week but on those occasions he would deliver to the secretary the card from which she would make out the account to mail to the patient.
4. The respondent stated that at the conclusion of the day's operation—around three, five or six o'clock p.m., he returned home to dinner, therefore he returned to his house not as a base of his operations nor for the purpose of completing cards.

The work of the respondent at the hospital and not at his house was the basis for the charge to the patient. There was nothing that required the respondent to perform any part of those services at his house: in fact he was precluded from rendering anaesthetics elsewhere than in the hospital without the consent of the hospital. Further the respondent could fill out the card at the hospital or at his office; there was nothing which required his filling out a card at his house and if so done was entirely a matter of his own convenience. In returning to his house for dinner the respondent regarded the house as a home, not as a base of his professional operations. Hence both objectively and subjectively the house was a home and not a base of professional operations.

The respondent has cited *Owen v. Pook* (Inspector of Taxes) [1969] 2 W.L. R.775, (H.L.) but that case is distinguishable in that the taxpayer had two bases of operation namely the hospital and also his house if he were telephoned by the hospital to remain on call. Lord Guest at p. 782 stated, "There are two places where his duty is performed, the hospital and his telephone in his consulting

room. ... The travelling expenses were in my view necessarily incurred in the performance of the duties of his office".

Lord Wilberforce at p. 787 stated:

> What is required is proof, to the satisfaction of the fact finding commissioners, that the tax-payer in a real sense in respect of the office or employment in question, had two places of work, and that the expenses were incurred in travelling from one to the other in the performance of his duties. In my opinion Dr. Owen has satisfied this requirement.

At page 788:

> A finding that the expenses necessarily arise from this duality appears to me legitimate and the undemonstrated possibility that a nearer practioner might have been selected to be irrelevant.

The expenses of the automobile trips between the respondent's house and the hospital are excluded for the reason stated in *Royal Trust Co. v. M.N.R.* [1956-60,] Ex. C.R. 70 by Thorson P. at p. 83 as follows:

> The essential limitation in the exception expressed in section 12(1)(*a*) is that the outlay or expense should have been made by the taxpayer for the purpose of gaining or producing income from the business. It is the purpose of the outlay or expense that is emphasized but the purpose must be that of gaining or producing income from the business in which the taxpayer is engaged.

The obligation to pay for an anaesthetic and the respondent's corresponding right to receive payment vest upon the respondent administering the anaesthetic to the patient. There is no evidence that the obligation and corresponding right were subject to a condition precedent of vesting only if the respondent fill out a card at his home and not elsewhere or that the respondent travel from his home to the hospital by automobile. Further the expense of living at 2025 Lansdowne Road and of travelling therefrom to the hospital where the respondent carried on his professional services are excluded by section 12(1)(*h*) of the *Income Tax Act* which precludes deductions for "personal and living expenses of the taxpayer".

In conclusion the home of the respondent at 2025 Lansdowne Road, Victoria, B.C. was not a base of the operation of his profession and the expenses in question, namely the two daily trips between his home and the hospital, are not to be deducted from his income. The assessment will be referred back to the Minister to allow the additional sum of $128.62, otherwise the appeal is allowed with costs payable by the respondent to the appellant.