BETWEEN: 1943

MAURICE SAMSON ..... APPELLANT; Feb. 17. Feb. 27.

AND

MINISTER OF NATIONAL REVENUE.. RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, secs, 3, 5 (j), 6 (a) and 6 (f)—"Income"—"Net" profit or gain—"Ascertained" and "Unascertained"—Test of taxability of annual gain or profit or gratuity—Deductions—Statutory allowances—Appeal allowed.

Appellant was appointed as Hides and Leather Administrator of the War-time Prices and Trade Board by an Order in Council deriving its authority from the War Measures Act, under the provisions of which he was to receive a salary of one dollar per annum and his actual transportation expenses and a living allowance of twenty dollars per diem while absent from his place of residence in connection with his duties

The appellant was assessed for income tax purposes on the amount of such allowances received by him less a deduction of two dollars per day. This assessment was affirmed by the Minister of National Revenue from whose decision an appeal was taken to this Court

Held: That the allowances received by appellant were not "income" as defined by the Income War Tax Act.

2 That under the Income War Tax Act income is not necessarily net income and therefore taxable under the Act merely because it is of a fixed amount: nor does the Act preclude the possibility of deductions from fixed incomes in order to determine the taxable amount thereof.

3 That the test of taxability of an annual gain or profit or gratuity is not whether it is "ascertained" or "unascertained" but whether it is "net". *In re Salary of Lieutenant Governors* (1931) Ex. C.R. 232, commented upon.

1943

MAURICE SAMSON v. MINISTER OF NATIONAL REVENUE.

4. That where a statute or its equivalent, having the same legislative authority as the taxing statute, has made it clear that allowances authorized by it are made for purposes other than those of gain or profit or gratuity to the recipient, such allowances are not taxable income and do not become such because the amount thereof is fixed; where the amount of the allowance is authorized for expenses, the fixed amount is to be regarded as the amount of expenses beyond which no reimbursement is authorized.

APPEAL under the provisions of the Income War Tax Act from the decision of the Minister of National Revenue.

The appeal was heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

L. A. Forsyth, K.C. and *C. S. Richardson* for appellant.

H. H. Stikeman for respondent.

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

THE PRESIDENT, now (February 27, 1943) delivered the following judgment:

The appellant in this case is a chartered accountant whose place of residence is in the City of Quebec. By Order in Council P.C. 2975, dated October 3, 1939, and made on the recommendation of the Minister of Labour on the advice of the Wartime Prices and Trade Board, he was appointed as Hides and Leather Administrator of the Wartime Prices and Trade Board. The operative part of the Order in Council sets out his duties as follows:

(1) That the appointment of Maurice Samson, Esquire, of the City of Quebec, as Hides and Leather Administrator be approved; and that he be responsible, in co-operation with the industries concerned and under the direction of the Board, for the conduct of negotiations with the United Kingdom Leather Controller, for arranging for supplies of hides and leather to be imported into Canada, for supervision of the purchase, shipment, delivery and allocation of hides and leather, whether domestic or imported, and for such other duties as may be assigned to him by the Board.

It also contained the following provisions with regard to the payments to be made to him:

(2) That the recommendation of the Wartime Prices and Trade Board that the said Maurice Samson shall receive a salary of one dollar per annum and his actual transportation expenses and a living allowance of twenty dollars per diem while absent from his place of residence in connection with the duties aforesaid, be approved.

The issue in this appeal is whether the said amounts of $20 per diem received by the appellant are taxable as

income under the provisions of the Income War Tax Act, R.S.C., 1927, chap. 97, as amended, either in whole or in part.

The facts are not in dispute. During the income tax year ending December 31, 1939, the appellant spent 24 days away from his place of residence in Quebec in connection with his duties as Hides and Leather Administrator, and received therefor the sum of $480; similarly, during the income tax year ending December 31, 1940, he spent 73½ days for which he received the sum of $1,470. The appellant did not include any sums in respect of these allowances in his return for the 1939 income tax year but, on the direction of the income tax authorities, he did include them all in his return for the 1940 income tax year. In that return he included the sum of $1,950 as allowance "pour dépenses de voyages" received from the Wartime Prices and Trade Board, from October 3, 1939, to December 31, 1940, less such expenses to the extent of the same sum of $1,950, stating on his return that his expenses had been about $2,500. In effect, therefore, while reporting the amounts he had received, he claimed that he was not assessable for income tax in respect of them.

The income tax branch of the Department of National Revenue broke up the total item of $1,950 and in respect of the 1939 income tax year assessed the appellant in the sum of $480 in respect of the allowances received by him for that year without allowing any deductions. Subsequently it reassessed him and allowed him a deduction of $2 per diem. Similarly, in respect of the 1940 income tax year, it first assessed him in the sum of $1,470 and subsequently reduced the amount of this assessment by allowing him a deduction of $2 per diem. In the evidence before me, the reason for this reduction did not appear, but that is not material.

From these assessments for the years 1939 and 1940, the appellant appealed, and the issues involved in his appeal are now before the Court for determination.

It is not disputed that the appellant actually disbursed while absent from his place of residence in connection with his duties as Hides and Leather Administrator more than the total amounts received by him by way of allowance. He says also that he kept no vouchers in respect of these expenditures since he never expected that the

1943

MAURICE SAMSON v. MINISTER OF NATIONAL REVENUE.

Thorson J.

amount of the allowances would be taxable and it had never been his practice to produce itemized accounts of travelling expenses. The amounts expended by him were for payment, while he was absent from his place of residence in connection with his duties, of hotel bills, meals, seats or berths on the train from Quebec to Ottawa and elsewhere and back, tips and other expenses incidental to such absences.

In the appellant's statement of these expenses he excluded items of expense that were purely transportation expenses, such as for railway tickets and taxi fares from his residence in Quebec to the station and back. His "actual transportation expenses" were, of course, not included in his income tax returns and no issue with regard to such expenses arises in this appeal.

The appeal involves a number of important income tax questions calling for careful consideration of certain sections of the Income War Tax Act. In the first place, are the per diem living allowances "income" at all within the meaning of the statute? If they do constitute income to the recipient, is he entitled to make any deductions therefrom in view of the provisions of section 6, paragraph (*a*) or under section 5, paragraph (*f*) or are deductions prohibited under section 6, paragraph (*f*)? The effect of these sections of the Income War Tax Act, as well as section 3 thereof, which defines taxable income, was fully argued on the hearing of the present appeal.

After consideration of the notice of appeal herein, the decision of the Minister of National Revenue, the respondent, was that the amounts received by the appellant as living allowance of $20 per diem were taxable under the provisions of sections 9 and 3 of the Income War Tax Act and that deductions therefrom were not allowable under the Act. Accordingly, he affirmed the assessments as being properly levied. No question under section 9 of the Statute arises.

On the argument of the appeal, counsel for the respondent contended that the per diem living allowances received by the appellant were taxable "income" within the meaning of the Income War Tax Act and that no deductions were permissible either under section 6 (*a*) or section 5 (*f*) of the statute.

In the course of his argument on the meaning and effect of section 6 (*a*) counsel for the respondent referred to the judgment of this court in *In re Salary of Lieutenant-Governors* (1) in which Audette J. had before him a claim for deductions from a salary of a fixed amount. The claim was disallowed, but in the course of giving his reasons for judgment, Audette J. made some observations of a general nature which require comment. While counsel for the respondent cited this case only in support of his contentions under section 6 (*a*), with which I shall deal later, it is important to consider some of the general statements made in this case from the point of view of ascertaining the meaning of the term "income" and of determining whether the allowances in question in this appeal, being of a fixed amount per diem, are, therefore, of necessity net or taxable income. It will not be possible to deal with the general statements made by Audette J. in the *Lieutenant Governors' Case* (*supra*) without dealing with the specific issue that was before the court, even although this involves an anticipation of the effect and meaning of section 6 (*a*) of the statute. In that case the appellant in making his income tax return had declared his salary as Lieutenant-Governor, which was fixed by the Revised Statutes of Canada, 1906, chapter 4, section 3, and claimed a deduction therefrom of the sums expended by him as Lieutenant-Governor for social entertainments, and gave the particulars of such expenditures. He contended that he should not be assessed on the gross salary, but on the net, after having deducted the amount of his expenditures for social entertainments which, he alleged, were necessarily laid out for the purpose of earning the income, outside of his living expenses.

The claim involved a consideration of subsection 8 (*a*) of section 3 of the Income War Tax Act, as amended by 13-14 Geo. V, chap. 52, reading 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.

It is to be noted that this subsection 8 (*a*) is now section 6 (*a*) of the statute. All that the court had to decide was

(1) (1931) Ex C R 232

1943

MAURICE SAMSON v. MINISTER OF NATIONAL REVENUE.

Thorson J.

the narrow issue as to whether a deduction of expenditures for social entertainments was allowable under the subsection or not. No other question was before the court.

Audette J. held against the appellant Lieutenant-Governor on the ground that there was no legal obligation on his part either contractual or otherwise to make the social expenditures in question. In effect, he held that the Lieutenant-Governor would have been entitled to the whole of his salary even if he had not made any expenditures on social activities. They were not "wholly, exclusively and necessarily" laid out or expended for the purpose of earning the income and were, therefore, not deductible. At page 235, he said:

> —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.

and further on the same page:

> 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.

and at page 236, he said:

> 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 renewal or dismissal.

The *ratio decidendi* of the judgment in this case is to be found in these extracts from the reasons for judgment given by Audette J. for disallowing the contentions of the appellant Lieutenant-Governor. No appeal was taken from this judgment.

Mr. Justice Audette did, however, make certain general statements, which were not necessary to the determination of the issue that was before him and are, in my opinion,

subject to critical comment. For example, at page 235, after referring to subsection 8 (*a*) of section 3 of the statute and stating that it was obvious that the section did not apply to a case of the kind that was before him, he said:

> 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 later, on the same page, he also said:

> 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.

and then made the following distinction and statement to which I draw particular attention:

> 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.

The words which I have underlined contain the statement, which, with all respect, I consider much too broad. It seems that ever since the decision in the *Lieutenant-Governors' Case* (*supra*), which was decided in 1924 but not reported until 1931, the income tax branch of the Department of National Revenue relying upon this statement of Audette J., has not allowed deductions from salaries or similar income of a fixed amount, except such deductions as are specifically allowed by some provision of the statute, on the ground that it was decided by Audette J. in the *Lieutenant-Governors' Case* (*supra*) that such an income being an ascertained one constitutes "of itself" a "net" income and, therefore, taxable under the statute. This is likewise the basis for the contention in this case, that the allowances being of the fixed amount of $20 per diem, are, therefore, net income and taxable as such, without deductions other than those specifically authorized.

The general statement made by Audette J., that an annual salary from any office or employment, being an amount which is duly ascertained and capable of computation, is, therefore, "of itself" a "net" income, was not necessary to the determination of the issue before the court. Indeed, it went beyond the *ratio decidendi* of the

1943

MAURICE SAMSON v. MINISTER OF NATIONAL REVENUE.

Thorson J.

judgment, namely that there was no legal obligation of any kind on the part of the Lieutenant-Governor to incur the expenses for social entertainments, and that accordingly, they were not "wholly, exclusively and necessarily" laid out or expended for the purpose of earning the gross income. The general statement was, as a matter of law, *obiter* and becomes an expression of personal view with no binding character as a judicial pronouncement.

The decision in *In Re Salary of Lieutenant-Governors* (*supra*) is not authority for the view that sums of money received by a taxpayer, "as being wages, salary, or other fixed amount", are necessarily "net" or taxable income. It may well be that sums of money received by a taxpayer as wages or salary, even although they are of a fixed amount, may be subject to deductions other than those specifically permitted, such as charitable donations and the like, in order to determine the amount that is properly assessable for income tax purposes under the provisions of the Income War Tax Act.

Furthermore, the statement that an annual salary, being an amount duly ascertained and capable of computation is "of itself" a "net" income, and taxable as such under the statute, is, in my opinion, at variance with the definition of "income" contained in the taxing statute itself. Section 3 of the Income War Tax Act defines taxable income. In part it reads as follows:

> 3. For the purposes of this Act, "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, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, . . .

From this definition it appears that there are broadly two types of incomes, namely, those which are "ascertained" and capable of computation as being wages, salary, or other fixed amount, and those which are "unascertained" as being fees or emoluments, or as being profits, etc. The term "net" is an integral part of the statutory definition of taxable income. It is the annual "net" profit or gain or gratuity that is "income" for the purposes of the taxing statute. The statement made by Audette J. in the *Lieutenant-Governors' Case* to the effect that an income, such

as an annual salary, which is duly ascertained and capable of computation, constitutes "of itself" a "net" income, is in my opinion at variance with the statutory definition in that it does not give proper effect to the relationship of the word "net" in the statutory definition to the words that follow. The statement assumes that it is only with respect to "unascertained" incomes that there is any necessity to consider deductions in order to arrive at the amount of the annual "net" profit or gain or gratuity that is taxable income. The statute, in my opinion, shows clearly that it is the "net" profit or gain or gratuity that is taxable income whether the profit or gain or gratuity, of which only the "net" is taxable income, is ascertained or unascertained. The test of taxability of an annual gain or profit or gratuity is not whether it is "ascertained" or "unascertained", but whether it is "net". The word "net" in the statutory definition of taxable income is just as referable to what is ascertained as it is to what is unascertained.

There is nothing in the Income War Tax Act to justify the view that merely because an income, in the ordinary sense of the term, is of a fixed amount it is necessarily "net" income and taxable under the statute; nor does the statute preclude the possibility of deductions from fixed incomes in order to determine the amount thereof that is taxable under it.

Whether an income of a fixed amount is subject to deductions or not in order to determine the amount that is taxable income under the statute cannot be stated in general terms. In income tax matters generalizations are dangerous. Each case must be considered on the merits with all its attendant facts and circumstances. It is not necessary for me to go further for the purposes of this case than to hold that an income is not necessarily a "net" income and taxable as such under the statute merely because the amount of it is fixed.

If, therefore, the amount of the allowances received by the appellant in this case constitute income, they do not necessarily constitute "net" or taxable income within the meaning of the taxing statute merely because they are stated to be allowances of a fixed amount per diem. It remains to consider whether deductions from the total amounts received by the appellant are permissible under

1943

MAURICE SAMSON v. MINISTER OF NATIONAL REVENUE.

Thorson J.

any of the provisions of the statute. Such consideration will also be helpful in determining whether in this case the allowances in question are taxable income at all, within the meaning of the statute.

Section 6 (*a*) of the Income War Tax Act provides as follows:

> 6. 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;

It will be observed that section 6 (*a*) contains a double negative. It does not define what disbursements or expenses may be deducted except in a negative way. The taxpayer may therefore make deductions for disbursements or expenses from what would otherwise be his taxable income only if they are outside the exclusions of the section. Why the statute should be couched in this double negative form, when statutes in other jurisdictions with similar objects are framed in positive terms, does not appear. This is, however, not a matter for the Court. Opposing views as to the effect of this section were strongly advanced by counsel. It was contended for the appellant that if the allowances in question were income the living expenses of the appellant while absent from his place of residence in connection with his duties were deductible, and in support of such contention he cited the definition of the section by the Supreme Court of Canada in *Minister of National Revenue* v. *Dominion Natural Gas Company Limited* (1), where Sir Lyman Duff C.J.C., in speaking of this statutory provision, said:

> First, in order to fall within the category "disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" expenses must, I think, be working expenses; that is to say, expenses incurred in the process of earning "the income".

Counsel for the respondent, on the other hand, contended that this section had been very strictly interpreted and that under the authorities, the disbursements and expenses of the appellant in this case did not fall outside the exclusions of the section. In support of such contention he cited in addition to *In Re Salary of Lieutenant-Governors*

(1) (1941) S.C.R. 19, at 22

(*supra*), which has already been discussed, *Ricketts* v. *Colquhoun* (1); *Cook* v. *Knott* (2); *Jardine* v. *Gillespie* (3); and *Nolder* v. *Walters* (4).

In *Ricketts* v. *Colquhoun* (*supra*) a decision of the House of Lords, the facts before the court were that a barrister residing and practising at London, who held the office of Recorder of Portsmouth, which carried an annual emolument of £250 per year, claimed the right to deduct from the amount at which the emoluments of his office had been assessed, his travelling expenses incurred in travelling from London to Portsmouth and back and his hotel expenses incurred while at Portsmouth. The claim was made under the Income Tax Act, 1918, Schedule E, rule 9, reading as follows:

> If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed.

The House of Lords unanimously disallowed the claims and held that the travelling expenses were attributable to the exercise by the Recorder of his own volition in choosing to reside and practise in London and were not expenses which he was "necessarily obliged" to incur and defray in the performance of his duties as Recorder. Similarly it was held in respect of his expenses while at Portsmouth that none of these was expended "wholly, exclusively and necessarily in the performance" of his duties within the meaning of the rule. Viscount Cave L.C., said, at page 4, with regard to the travelling expenses:

> In order that they may be deductible under this rule from an assessment under Sch. E, they must be expenses which the holder of an office is necessarily obliged to incur—that is to say, obliged by the very fact that he holds the office and has to perform its duties—and they must be incurred in—that is, in the course of—the performance of those duties.
>
> The expenses in question in this case do not appear to me to satisfy either test. They are incurred not because the appellant holds the office of Recorder of Portsmouth, but because, living and practising away from Portsmouth, he must travel to that place before he can begin to perform his duties as Recorder and, having concluded those duties, desires to return home. They are incurred, not in the course of performing his duties,

(1) (1926) A.C. 1.
(2) (1887) 2 Tax Cases, 246
(3) (1906) 5 Tax Cases 263.
(4) (1930) 15 Tax Cases 380.

1943

MAURICE SAMSON v. MINISTER OF NATIONAL REVENUE.

Thorson J.

but partly before he enters upon them, and partly after he has fulfilled them. No doubt the rule contemplated that the holder of an office may have to travel in the performance of his duties, and there are offices of which the duties have to be performed in several places in succession, so that the holder of them must necessarily travel from one place to another, That was no doubt the case of the minister whose expenses were in question in the case of *Jardine* v. *Gillespie* (1) But it rarely, if ever, happens that a Recorder is in that position, and there is no suggestion that any such necessity exists in the case of the present appellant

and, at page 5, with regard to the hotel expenses:

Passing now to the claim to deduct the hotel expenses at Portsmouth, this claim must depend upon the latter part of r 9, which allows the deduction of money, other than travelling expenses, expended "wholly, exclusively and necessarily in the performance of the said duties". In considering the meaning of those words it is to be remembered that a decision in favour of the appellant would operate in favour, not only of Recorders, but of any holder of an office or employment of profit who is liable to be assessed under Sch E, and would or might enable every holder of such a position to deduct his living expenses while away from his home. It seems to me that the words quoted, which are confined to expenses incurred in the performance of the duties of the office, and are further limited in operation by the emphatic qualification that they must be wholly, exclusively and necessarily so incurred, do not cover such a claim A man must eat and sleep somewhere, whether he has or has not been engaged in the administration of justice Normally he performs those operations in his own home, and if he elects to live away from his work, so that he must find board and lodging away from home, that is by his own choice, and not by reason of any necessity arising out of his employment, nor does he, as a rule, eat or sleep in the course of performing his duties, but either before or after their performance.

Lord Blanesburgh pointed out that the expenses incurred by the Recorder were personal to himself and had nothing to do with his duties as Recorder, for the performance of which he received his emolument. At page 9 he said:

It seems to me, expenses incurred by him in going from and returning to his London professional chambers cannot in any true sense be described as money expended "wholly, exclusively, and necessarily" in the performance of his judicial duties. Rather are they expenses incurred by him because, for his own purposes, he chose to live in London; in other words they are purely personal to himself

And further:

Nor of the appellant's hotel expenses at Portsmouth can it, in my judgment, be said that they were incurred "wholly, exclusively, and necessarily, in the performance" of the duties of the office of Recorder of Portsmouth.

And later on the same page:

I cannot myself see why the appropriate expenditure by a Recorder living at Portsmouth in his own home during sessions is not as much

(1) (1906) 5 Tax Cas 263

wholly, exclusively, and necessarily expended in the performance of his duties as is the cost of the appellant's room at a hotel. The truth is that these expenses cannot in either case be properly so described; they are personal in each case to the Recorder—expenses to be defrayed, out of his stipend, but in no way essential to be incurred that he may earn it.

I need not refer in detail to the other cases. Both the *Lieutenant-Governors' Case* (*supra*) and *Ricketts v. Colquhoun* (*supra*) show how closely the words "wholly, exclusively and necessarily" have been construed. Counsel for the respondent contended that under the authorities cited by him, the expenses incurred by the appellant while absent from his place of residence in connection with his duties were not necessarily incurred by him in the performance of his duties as Hides and Leather Administrator, and were consequently not wholly, exclusively or necessarily expended by him to earn the income.

I cannot accept this contention in its entirety in relation to the facts of this case for it begs the basic question as to what the income was paid for, if, indeed, the allowances in this case are really taxable income at all. I have referred to *Ricketts* v. *Colquhoun* (*supra*) at some length, for the purpose of shewing how carefully the courts have considered what the income is paid for, and how closely the disbursements and expenses must be referable to the "process of earning the income". The facts in this case are fundamentally different from those in *Ricketts* v. *Colquhoun* (*supra*). In that case the London barrister received an annual emolument for the performance of his duties as Recorder of Portsmouth and the income for which he was being assessed was the amount which he received for the performance of his duties as such Recorder. In the present case, the appellant received no emolument for the performance of his duties as Hides and Leather Administrator, other than the purely nominal salary of one dollar. His duties required his attendance from time to time in Ottawa, and on one occasion, at least, he was required to go to Washington to confer with officials there. The per diem allowances that were paid to him were not referable to the performance of duties at all, and they were not income to him for the performance of duties. The per diem allowances were paid to him as living allowance for the days, while absent from his place of residence in connection with his duties. The payments were referable to

1943

MAURICE SAMSON v. MINISTER OF NATIONAL REVENUE.

Thorson J.

his absence from his place of residence and were not referable to the performance of duties. If such payments, referable as they are only to absence from the appellant's place of residence, nevertheless, constitute income to him he is not debarred from deducting disbursements and expenses therefrom merely because the amount of the allowances is a fixed amount per diem, if they are wholly, exclusively and necessarily laid out or expended in the "process" of earning the "income", namely the payments for living allowances in respect of his days of absence. In that view of the object for which the so-called income was paid, and on that assumption that the amounts of the allowances are income to the appellant, I am of the opinion that he may deduct such disbursements and expenses as are "wholly, exclusively and necessarily" referable to the absences in respect of which the income was paid. In that sense there could not be any income to the appellant at all without absence from his place of residence and there could not be absence without some expense being "wholly, exclusively and necessarily" laid out or expended in the course of such absence. That some amount is deductible for such expenses seems to me beyond dispute. Such amount may not be easy of ascertainment, since some items of living expense would have been incurred by the appellant even if there had been no absences, but the administrative difficulty involved in ascertaining the amount of a deduction that should be allowed is no reason for its disallowance. Some solution of the administrative difficulty will have to be found.

It was also contended on behalf of the respondent that section 6 (*f*) of the Income War Tax Act should be read with section 6 (*a*). The former section provides as follows:

> 6 In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*f*) Personal and living expenses;

It was urged that the paragraphs of section 6 should be read conjunctively and that while an expense item might be deductible as falling outside the exclusion of paragraph (*a*) it might still be disallowed by reason of failing to fall outside the exclusion of some other paragraph of the section such as paragraph (*f*). I think that this contention may be accepted and that the form of stating it is likewise correct in view of the phraseology of the section, but

I do not agree that it is applicable to the facts of this case. The personal and living expenses referred to in section 6 (*f*) are those over which the taxpayer has a large amount of personal control, depending upon the scale of living which he may choose. Such expenses would probably not be deductible even if there were no provision in the statute relating to the matter, for if personal and living expenses were deductible from income and only the balance left for taxation purposes, the amount of net or taxable income would depend upon the taxpayer's own choice as to the scale of living that he might adopt and in many cases there would be no taxable income at all. It is obvious that the determination of what the taxable income of a taxpayer shall be cannot depend upon or be left to the taxpayer's own choice as to whether his personal and living expenses shall be up to the extent of his income or not. It is, I think, clear that the expenses of the appellant during his absences from his place of residence in connection with his duties, for which he received the per diem allowances, are not the kind of personal and living expenses referred to in section 6 (*f*), or rather, they are over and above the personal and living expenses contemplated by that section. It is only to a limited extent that the appellant in this case could control the expenses incidental to his absences from his place of residence. On the assumption that the per diem allowances are income, it may well be that to the extent that the expenses are the result of the appellant's choice, and are purely personal to him, and likewise to the extent that some expense would have been incurred even if he had not been absent from his place of residence, they are not deductible by reason of the exclusion by section 6 (*f*) of personal and living expenses, but that is not the case with respect to the items of expense that are inseparably connected with the absences and would not have to be incurred without them. Such expenses, being wholly, exclusively and necessarily laid out or expended in the course of and referable only to the absences in respect of which the allowances were paid, do not, in my view, fall within the exclusion of section 6 (*f*).

There remains for consideration one further section of the Income War Tax Act. Section 5 (*f*) thereof provides:

1943

MAURICE SAMSON v. MINISTER OF NATIONAL REVENUE.

Thorson J.

5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions.—

(*f*) Travelling expenses, including the entire amount expended for meals and lodging, while away from home in the pursuit of a trade or business;

Counsel for the appellant relied on the provisions of this section, but I am of the view that it does not apply to the facts of this case. The travelling expenses to be deductible must have been incurred "in the pursuit of a trade or business". The appellant was not engaged in the pursuit of trade. His duties did not involve buying or selling or manufacturing. They were solely of an administrative nature; and clearly not in the nature of trade. Were they in the nature of business? The word "business" is not defined in the statute. It has, of course, a more extensive meaning than that which is given to the word "trade". In *Smith* v. *Anderson* (1), Jessel M.R., after citing certain dictionary definitions of "business", said:

> Anything which occupies the time and attention and labour of a man for the purpose of profit is business.

and in *Erichson* v. *Last* (2), Cotton L.J. said:

> When a person habitually does a thing which is capable of producing a profit for the purpose of producing a profit, he is carrying on a trade or business

The definition of the word "business" in *Smith* v. *Anderson* (*supra*) was approved and adopted by Osler J. in *Rideau Club* v. *City of Ottawa* (3) and by Godfrey J. in *Shaw* v. *McNay* (4) where the word "business" was also described as "a word of large and indefinite import".

The word "business" may also include an activity without pecuniary profit being contemplated at all. In such a connection, as was pointed out by Pearson J. in *Rolls* v. *Miller* (5) "business" is a very much larger word than "trade" and is employed in order to include occupations which would not come within the meaning of the word "trade"—the larger word not being limited by association with the lesser.

(1) (1880) 15 Ch. D. 247 at 258.
(2) (1881) 4 Tax. Cases, 422 at 427.
(3) (1908) 15 O.L.R. 118 at 122.
(4) (1939) O.R. 368 at 371.
(5) (1883) 53 L.J. Ch.D. 99 at 101.

In the United States, the Treasury has provided a definition of "trade or business" by a regulation contained in Article 8, Regulation 41, as follows:

> In the case of an individual, the terms "trade", "business", and "trade or business" comprehend all his activities for gain, profit, or livelihood, entered into with sufficient frequency, or occupying such portion of his time or attention as to constitute a vocation, including occupations and professions. When such activities constitute a vocation they shall be construed to be a trade or business, whether continuously carried on during the taxable year or not. *Vide* Federal Income Tax Handbook—Montgomery, page 303.

In my view, the term "trade or business" as it is used in section 5 (*f*) contemplates an activity in which the prospect of gain or profit is involved and "the pursuit of a trade or business" involves the pursuit of gain or profit. If that view is sound, then clearly the section does not apply to the facts of the appellant's case. His duties as Hides and Leather Administrator were not in the nature of trade or business contemplating the prospect of gain or profit, nor did he incur expenses in connection with such duties with a view to profit or gain therefrom. His duties as Hides and Leather Administrator for the Wartime Prices and Trade Board were in connection with the policies of price control which were entrusted to that body for administration and had no relation to trade or business with the prospect of gain or profit. If the allowances are income to the appellant it cannot be said that he received such income in respect of the trade or business of being Hides and Leather Administrator or that he was entitled to deduct his travelling expenses under section 5 (*f*) on the ground that he incurred them in the pursuit of such trade or business. Such a contention would involve the statement that he incurred the expenses with a view to earning the income. It is obvious that he did no such thing. He did not make the expenditures in order to get the allowances. I cannot, therefore, accept the contention of counsel for the appellant that he is entitled to deduction under section 5 (*f*) of the statute.

The answer to the difficulties that arise in considering the application of section 6 (*a*) and section 5 (*f*) to the facts of this case on the assumption that the payments of per diem allowances constitute income in the ordinary sense, and taxable income under the statute, after the proper deductions have been made, in order to determine

1943

MAURICE SAMSON v. MINISTER OF NATIONAL REVENUE.

Thorson J.

the amount of net gain or profit or gratuity involved in the allowances, lies in the fact that the per diem living allowances in this case are not taxable income at all within the meaning of the Income War Tax Act.

An analysis of the terms of the Order in Council under which the appellant was appointed, and careful consideration of the duties he was called upon to perform, together with all the attendant circumstances including the financial conditions attached to the appointment, lead me to the conclusion that no remuneration to the appellant other than the purely nominal salary of one dollar per year was involved in the appointment or contemplated by the Order in Council, and that the per diem living allowances in this case were not taxable income at all within the meaning of the Income War Tax Act, but were intended to be reimbursement to the appellant for the additional living expenses to which he would be put by reason of his necessary absences from his place of residence in connection with his duties.

The Order in Council breaks up the payments which the appellant was to receive in a three-fold way, namely, (1) a salary of $1 per year, (2) his actual transportation expenses, and (3) a living allowance of $20 per diem while absent from his place of business in connection with his duties. It is obvious that the reimbursement which the appellant received for his actual transportation expenses cannot be considered as taxable income to him. The other reimbursement which he received, namely, the per diem living allowances, is also reimbursement to him of additional living expense, and does not cease to have the character of reimbursement merely because the amount is set at a fixed amount per diem. All that is meant thereby is that a top limit of reimbursement of additional living expense has been fixed by the Order in Council.

It was contended on behalf of the appellant that the term "living allowance" as used in the Order in Council was different from any of the terms used in section 3 of the Income War Tax Act, which is the section of the taxing statute that defines "income" for the purposes of the statute and also specifies what it shall include. While a careful examination of terms is desirable, such examination is helpful in income tax disputes only in so far as it makes for a correct analysis of the true and real nature of the

amount received by the taxpayer. The assessability for income tax purposes of any particular amount does not depend upon what it is called, but rather upon what it really is. It cannot be too strongly stressed that great care must be taken in construing the terms of the Income War Tax Act. The word "income" in its popular and ordinary sense has a wide import, but the word "income" as used in the Income War Tax Act has only the restricted meaning which the statute gives to it. It has been repeatedly emphasized by the courts, that both the taxing authorities and the courts in considering whether a particular amount received by a taxpayer is taxable income within the meaning of the taxing statute, must first give close attention to the definition of taxable income contained in the statute and then look at the real nature of the amount received by the taxpayer in order to determine whether it comes within the statutory definition. If it does not, the amount, while it might be income in the popular sense of the word, is not "income" for the purposes of the taxing statute. It follows, therefore, that an amount received by a taxpayer that is not "income" under the statute, cannot become such by calling it income nor can an amount that is really "income" under the statute cease to be such through being called by some other name. Nothing, therefore, turns on the fact that the payments made to the appellant in this case are called allowances nor does the fact that the word "allowance" does not appear in section 3 of the taxing statute have any significance. The word is used in a number of statutes with different meanings. Its use is not conclusive for the purpose of determining whether a receipt of money in the hands of a taxpayer is really in the nature of remuneration to him resulting in net gain or profit or gratuity or is really reimbursement to him of expenses.

Ordinarily, it may be assumed that neither the intention of the payer of an allowance nor that of the recipient of it as to whether it shall be taxable income or not can determine whether the amount of the allowance when it reaches the recipient is taxable income or otherwise. The intention of the parties cannot determine what is and what is not taxable income under the taxing statute.

It is otherwise, in my opinion, in the case of a statutory payment made under a statute having equal legislative

1943

MAURICE SAMSON v. MINISTER OF NATIONAL REVENUE.

Thorson J.

authority to that of the taxing statute itself, where such statute has made it clear that the payment which it has authorized is not of such a kind as to be considered taxable income under the taxing statute.

Certain provisions of The Senate and House of Commons Act, R.S.C. 1927, chap. 147, will serve as illustrations of what I mean. That statute provides for the payment of certain allowances; it uses the word "allowance" with a variety of meanings, sometimes in a sense that clearly contemplates a payment by way of remuneration and elsewhere in a quite different sense. For example, it is provided by section 33 that for every session of Parliament which extends over a period of sixty-five days or more there shall be payable to every member of the Senate and House of Commons, attending such session, a sessional allowance of four thousand dollars and no more. While the section is under the head note "Indemnity" and the payment is generally referred to as a sessional indemnity, the section of the statute authorizing its payment describes it as a sessional "allowance". It may be noted that this statutory payment is within the purview of the Income War Tax Act for section 3 thereof, in addition to defining "income" for the purposes of the Act, as meaning annual net profit or gain or gratuity, also states that "income" shall include:

> And also the annual profit or gain from any other source including
>
> (*d*) the salaries, indemnities or other remuneration of
>
> (i) members of the Senate and House of Commons of Canada and officers thereof, etc.

Apart entirely from what Parliament may have intended by the statutory provision for the payment of a sessional indemnity or sessional allowance, the Income War Tax Act has specifically provided or declared that the annual profit or gain from this source is included in "income" for the purposes of the Act. It may be interesting to note that in *Caron* v. *The King* (1), which upheld the right of the Parliament of Canada to enact the Income War Tax Act, 1917, and the amending Act of 1919, by which the above and other "salaries, indemnities or other remuneration" were included under the Act, Lord Phillimore in delivering the judgment of their Lordships of the Privy

(1) (1924) A C 999.

Council, expressed doubt as to whether the specific amendment of 1919 had been necessary. At page 1005 he said:

> It may be doubted whether it was necessary to amend the original Act in order to bring the various officers mentioned in s. 2 of the Act of 1919 within the scope of the Act of 1917. But assuming that this amending legislation was necessary, it is not to be regarded as in the nature of specific legislation directed against certain public officers, but merely as declaratory that certain classes of income are, as they certainly would be in this country, liable to taxation and not exempt.

Then section 42 of the same statute authorizes a payment to the member occupying the recognized position of the Leader of the Opposition in the House of Commons, in addition to his sessional allowance, and describes it as "an annual allowance of ten thousand dollars". The fact that this payment is referred to in the statute as an "allowance" does not prevent the amount of it from coming within the ambit of the term "the salaries, indemnities or other remuneration" as used in section 3 (*d*) of the Income War Tax Act. Of that there can be no doubt. But there is still another kind of allowance authorized by the Senate and House of Commons Act which is of an entirely different character. Section 43 provides:

> For each session of Parliament, there shall also be allowed to each member of the Senate and of the House of Commons his actual moving or transportation expenses, and reasonable living expenses while on the journey between his place of residence and Ottawa, going and coming, once each way.

It is obvious that this statutory allowance is not taxable income. Thus far there is no difficulty. Subsection 3 of section 43, however, provides for the commutation of these travelling and living expenses as follows:

> 43 (3) Any member residing at a greater distance than four hundred miles from Ottawa may commute such allowance for travelling and living expenses, receiving in lieu thereof an allowance of fifteen dollars per day for each day necessarily occupied in the journey between his place of residence and Ottawa, going and coming, once each way, the day of departure and the day of arrival being counted each as a full day.

The statute has made it clear that this statutory payment, also described as an "allowance", is not in any sense to be regarded as remuneration, whether the allowance is paid for "actual moving or transportation expenses, and reasonable living expenses" in the case of members residing within 400 miles from Ottawa or as a commuted allowance for such expenses at the fixed rate of $15 per day, in the case of members residing farther away. The commuting

1943

MAURICE SAMSON v. MINISTER OF NATIONAL REVENUE.

Thorson J.

of the reimbursement at a fixed rate per day does not change its essential character as a reimbursement or have the effect of turning into taxable income what was never intended by the statute to be such.

The fact that statutory payments of allowances are stated in a fixed amount does not change their character. In each case the true intendment of the statute must be ascertained. If a statutory enactment or its equivalent makes it clear, that a payment authorized by it is not by way of remuneration but only by way of reimbursement of expense, then the amount of such payment is not taxable income in the hands of the recipient unless the Income War Tax Act has clearly made it so, either in express terms or by necessary implication. If there is any reasonable doubt in the matter it should be resolved in favour of the taxpayer, for Parliament by appropriate legislation can easily put the matter beyond dispute.

The same observations will apply to other statutory allowances made for specific purposes, where the statute has made it clear that the payments are not made or received by way of remuneration. Where such allowances, according to the real intendment of the statute, are made for purposes other than those of gain or profit or gratuity to the recipient, they are not taxable income and do not become such because the amount of the allowance is fixed. Where the allowance is authorized for expenses, the fixed amount is to be regarded as the amount of expenses beyond which no reimbursement is authorized.

The same consideration should govern the interpretation and construction of the Order in Council under which the appellant was appointed. The full text of the Order in Council is to be found in Vol. I of Proclamations and Orders in Council, passed under the authority of The War Measures Act, R.S.C. 1927, chap. 206, at page 117—*Vide Canada Gazette,* October 7, 1939. While the Order in Council is not expressed to be made pursuant to the powers conferred by the War Measures Act, nevertheless it derives its authority therefrom. The Order in Council creating the Wartime Prices and Trade Board, under which the appellant acted as one of its administrators, was expressed to be made pursuant to the War Measures Act. It was held recently by the Supreme Court of Canada in *The*

Chemical Regulations Reference (1) that an Order in Council, passed under the authority of the powers conferred by the War Measures Act, has the effect of an Act of Parliament and is a legislative enactment, having the force of law to the same extent as any other statute. The Order in Council now under consideration comes within that statement.

If the Order in Council had provided for payment to the appellant of his actual transportation expenses and his actual living expenses while absent from his place of residence in connection with his duties no issue as to taxability of the allowances could reasonably have arisen for no element of net gain or profit to the appellant could have been present. This would have been so, even if the actual expenses incurred by the appellant, over and above his usual personal and living expenses, had exceeded the amount of the fixed allowances, which was the fact in this case, according to the sworn testimony of the appellant which I accept. Indeed, that fact is not in dispute. I do not think that this fact is material. What difference does it make to the essential character of the allowance that its amount is fixed at $20 per day? All that is meant by such fixation is that the Order in Council has set a top limit to the reimbursement that is authorized for the additional living expenses incurred. In view of the legislative effect of the Order in Council, the per diem allowance authorized by it is a statutory allowance for expense purposes of the same kind as the statutory allowances of $15 per day for travelling and living expenses authorized by subsection 3 of section 43 of the Senate and House of Commons Act. I think that this is abundantly clear from the terms of the Order in Council with its attendant circumstances.

It may well be that an arrangement made between individuals, under which a fixed amount is paid for certain expense purposes, may result in net gain or profit to the recipient of the fixed amount through his actually spending less than the fixed amount on such expenses, and the recipient may be properly assessable for income tax in respect of such net gain or profit in that it becomes remuneration to him, but, in my view, a similar consequence does not follow in the case of a payment authorized by a

(1) (1943) S C R 1

1943

MAURICE SAMSON v. MINISTER OF NATIONAL REVENUE.

Thorson J.

statute, emanating from the same legislative authority that enacts the taxing statute. If, under a statutory allowance, not intended or contemplated by the statute to be otherwise than for expense purposes, the recipient of it spends less than the amount fixed by the allowance, that is an individual and personal incident which does not alter the statutory effect of the allowance or transform it into taxable income. In such a case my view is that while the individual recipient may have made a saving in respect of the expenses, such saving is not "income" within the meaning of the Income War Tax Act. If it is gain or profit, it is an item that, in my opinion, is not caught, if I may use the term, by any of the provisions of the taxing statute.

As I interpret the Order in Council, I have come to the conclusion, having regard to all the circumstances of the case, that the per diem living allowances authorized by it involved no element of remuneration or net gain or profit or gratuity to the appellant, and did not result in any gain or profit to him. They were paid and received only as reimbursement of living expenses, over and above ordinary personal and living expenses up to the fixed amount per day. They were not in any sense "income" as defined by the Income War Tax Act and the appellant should not have been assessed for income tax purposes in respect of them.

In view of what has already been stated it is, perhaps, not necessary to say that the use of the word "allowance", whether in a statute or otherwise, does not of itself determine whether the amount of it is solely reimbursement of expense or whether it may have implications of remuneration. It is clear that in many cases the provision of an allowance, having regard to all the attendant circumstances, is in reality the payment of remuneration in respect of which the recipient is properly assessable for income tax purposes. The test is not merely that the amount is fixed. No such easy determination is possible, however convenient it may be for administrative purpose. In each case the true nature of the amount, by whatever name it may be described, must be determined.

In view of the foregoing the appeal herein must be allowed with costs.

Judgment accordingly.