
BETWEEN:

CYRIL JOHN RANSOM .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .....RESPONDENT.

Montreal 1967 Apr. 13

Ottawa Aug. 18

Income tax—Income from office or employment—Reimbursement of transferred employee for loss on sale of house—Company policy—Whether benefit received in course of employment—Whether allowance—Income Tax Act, ss. 5(1)(a),(b), 25.

In accordance with a statement of policy of appellant's employer appellant was reimbursed by his employer in respect of the loss sustained by him on the sale of his house in Sarnia following his transfer by his employer to Montreal.

Held, the amount reimbursed was not chargeable as income to appellant under either s. 5 or s. 25 of the *Income Tax Act*. Under s. 5 the effective cause, i.e., the legal source, of the payment must be the services rendered by the employee, and in this case the source was not services rendered but the agreement which resulted from appellant's acceptance of his employer's offer to compensate him for loss.

The reimbursement of a loss or expense actually incurred by an employee in the course of employment is not an "allowance" within the meaning of s. 5(1)(*b*), which word implies a payment in respect of some possible expense without obligation to account. Neither is it remuneration nor a "benefit of any kind whatsoever" within the meaning of s. 5(1)(*a*) of the Act. Finally, such a payment is not within the language of s. 25 of the *Income Tax Act*.

Jennings v. Kinder, Hochstrasser v. Mayes 38 T.C. 673, discussed. *Tenant v. Smith* [1892] A.C. 150, referred to.

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INCOME TAX APPEAL.

R. de Wolfe MacKay, Q.C. for appellant.

A. Garon and *P. F. Cumyn* for respondent.

NOËL J.:—This is an appeal from an assessment dated November 8, 1965, whereby the appellant was assessed for additional tax in the amount of $773.04 by reason of adding to his declared taxable income for the year 1963 the amount of $2,809, a portion of the loss incurred by him on the sale of his home in Sarnia, which amount had been reimbursed by DuPont of Canada Limited, his employer.

The appellant was transferred on January 16, 1961, from Sarnia, in the Province of Ontario, to the City of Montreal, in the Province of Quebec.

On March 23, 1959, he had purchased a house in Sarnia in which he dwelt until September 30, 1961, at which date he moved his family to Montreal, where since January 16, 1961, he was then working. He then attempted to sell his house in Sarnia with no success until the year 1963 when on May 15 of that year he sold it for a gross price of $17,000 which, after payment of legal fees and real estate commission of $808, resulted in a net selling price of $16,192. According to the appellant, the cost of the said house was $21,002 made up as follows:

Purchase price	$ 18,750
Extras	275
Inside painting	335
Legal fees and mortgage insurance	805
Improvements	837
	$ 21,002

The expense which the appellant claims he incurred on the sale of the house, caused by his employer's requirement that he move from Sarnia to Montreal amounted, therefore, to $4,810 (i.e., $21,002 minus $16,192 (net selling price)).

In accordance with the general policy of the appellant's employer, DuPont of Canada Limited, as set forth in its statement of General Company Procedure (Exs. ASF-6,

ASF-7, ASF-8 and ASF-29) of which I will say more later, the employer reimbursed the appellant in respect of such expense an amount of $3,617 which, less legal fees and real estate commission of $808, namely $2,809, was, as aforesaid, added to appellant's taxable income for the 1963 taxation year as a taxable allowance under section 5 of the *Income Tax Act* of Canada.

Prior to selling the said house, it was appraised by independent appraisers at Hamilton Loan & Investment Company, of Sarnia, Ontario, at an appraised selling price of $20,012.

The appellant herein states that as his employer, DuPont of Canada Limited, required as a condition of his employment, that he move from Sarnia, Ontario, to Montreal, P.Q., reimbursement to the extent above mentioned constituted reimbursement of expenses caused to him by reason of his employment.

The appellant further urged (although this allegation was not established at the trial) that the said reimbursement by the employer was a matter of convenience for the employer who preferred to make the above mentioned reimbursement rather than purchase the employer's house (as it could have done under the company's housing scheme) at the appraised selling price and then incur expenses of subsequently disposing of it.

The appellant, therefore, takes the position that as the expenses incurred by him were caused wholly and exclusively by reason of the terms and conditions of his employment in respect of which his employer, by reason of its General Company Procedure, undertook to reimburse him, this reimbursement constituted one of the expenses incurred by him in the course of his employment, and one provided for as a term and condition of his employment.

It does not, he says, in any manner whatsoever, constitute a benefit for services as an employee under the provisions of section 5 of the *Income Tax Act* or any other section of the said Act.

In making the assessment for the appellant's 1963 taxation year, the respondent assumed that:

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(*a*) the sum of $2,809 paid by DuPont to the Appellant constituted salary, wages or other remuneration paid to Appellant in 1963, within the meaning of s.s. (1) of Section 5 of the *Income Tax Act*;

(*b*) the aforementioned sum was paid to the Appellant as an allowance for personal expenses or for some other purpose and therefore was income of the Appellant within the meaning of paragraph (*b*) of s.s. (1) of Section 5 of the *Income Tax Act*.

and relies *inter alia* upon section 3, paragraphs (*a*) and (*b*) of subsection (1) of section 5 and section 25 of the *Income Tax Act*.

The respondent admits that the appellant sold his house for $16,192, that he had purchased it for $18,750 and that his employer paid him $2,809 but refused to admit that the appellant is entitled to add to the amount of $18,750 the "extras, inside painting, legal fees and mortgage insurance and improvements" totalling $2,252. The respondent also contests the right of the appellant to place in the amount of loss the price of the following items: mortgage insurance ($255), inside painting ($335), television antenna and tower ($120), drape-rods ($90), and fire screen and grate ($40) (the last two of which are included in the item of $837 for improvements). The respondent, indeed, alternatively submits that the real expense incurred by the appellant upon selling his house was not $2,809 but rather (a) $1,479.88 being the difference between the house's cost price of $18,750 and its selling price of $16,192 with a three per cent per annum allowance for occupancy or, subsidiarily, (b) $2,669.31 being the difference between the house's appraised value of $20,012 and its selling price of $16,192, with a three per cent per annum allowance for occupancy, and that in either case the excess of appellant's allowance over his real expense should be included in his taxable income for 1963 for services in that year.

The appellant joined Canadian Industries Limited on June 3, 1950, after graduating from the University of Toronto with a degree in mechanical engineering and first commenced to work for the above corporation at Shawinigan Falls, P.Q. He agreed that when he became an employee of the corporation, he knew he would not work in Toronto and expected that the company would move

him to different locations in Canada. He also knew, and it was understood, that he would be reimbursed for his expenses, but this did not form part of the written contract. The evidence also shows that he had no inducement to move as he expected no increase in salary nor any advancement when it occurred. It was a practice of the company to move its employees from one location to another, because of their experience, skill and qualifications, the employees having no say in the matter as the transfer is the decision of the company and not the employee.

From Shawinigan, he was transferred to Montreal, P.Q. on June 1st, 1952, where he dwelt with his wife and children until he was transferred on August 1st, 1955, to Winnipeg, Manitoba. Prior thereto, as appears from Ex. ASF-3, on June 1st, 1954, the appellant's employment was transferred from Canadian Industries Limited to DuPont Company of Canada Limited, as a result of the segregation of the assets of the former company pursuant to a compromise sanctioned by the Quebec Superior Court under section 126 of the *Companies Act* of Canada. Under an assignment (Ex. ASF-3) the appellant agreed to the transfer to DuPont Company of Canada Limited of all rights accruing to Canadian Industries Limited under his employment agreement in consideration of the assumption by DuPont Company of Canada Limited of all the obligations of Canadian Industries Limited. On January 1st, 1957, the appellant then agreed, pursuant to a record of assignment (Ex. ASF-4) to the transfer to DuPont Company of Canada (1956) Limited of all rights accruing to DuPont Company of Canada Limited under his employment agreement in view of the consolidation of the latter company into DuPont Company of Canada (1956) Limited. The latter company's name was later changed to DuPont of Canada Limited in 1958.

On June 1st, 1957, he was transferred from Winnipeg to Montreal where he bought a house and on July 3rd, 1959, he was transferred to Sarnia, Ontario. On this occasion he sold his Montreal house at a capital loss of $1,000 which,

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however, he did not claim from the company because he did not think the amount involved was large enough.

He stated that he was roughly familiar with the policy of the company permitting him to claim compensation for his loss but did not know exactly the details of the procedure to follow to recover it until he was returned to Montreal in 1961.

He left his family in Montreal until his wife sold his Montreal house and stayed in Sarnia alone where he attempted to rent a house. There were, however, no houses available for rental and he therefore had one built and moved into it in November of 1959. He financed the purchase of this house through the Dominion Bank and paid the balance of six or seven thousand dollars in cash.

He was then transferred from Sarnia to Montreal on June 20, 1961, and as soon as he was notified of his transfer, the house in Sarnia was put up for sale. He advertised in the newspaper and then shortly thereafter it was placed in the hands of a real estate agent until it was sold. He had considerable difficulty in selling his house in Sarnia because at that time Imperial Oil had just decided to move a fairly large number of their senior personnel from Sarnia to Toronto with the result that there were about 60 homes in the same price bracket as his for sale at the same time. The company participated in no way in the sale of his house, which took place on May 15, 1963, for a gross price of $17,000.

Upon arriving in Montreal, he bought a three-bedroom house and has not moved since.

The parties admitted that the General Company Procedure, which the employees of DuPont of Canada could take advantage of in order to obtain reimbursement for the financial loss sustained as a result of their transfer to another location was ASF-29, for the period January 1st, 1956, to May 31st, 1961, ASF-6 for the period June 1st, 1961, to August 4th, 1963, and ASF-7 from August 5th, 1963, and is still in effect.

The main difference between General Company Procedure Exs. ASF-29 and ASF-6 and ASF-7 is that ASF-29

and ASF-6 contain a provision for reimbursement of transfer expenses and real estate losses only, whereas Ex. ASF-7 contains in addition thereto a housing scheme under which it provides interest-free loans to an employee who has been transferred to another location in an amount not to exceed the difference between the adjusted cost and the outstanding indebtedness on the employee's present residential property which loan must be used for the purchase of a house at the new location. To be eligible for such a loan the employee must evidence his intention of disposing of his present residential property by placing it on the market with a real estate broker or agent unless there is a *bona fide* offer or sales contract relating to the employee's property in existence at the time of his loan application.

The appellant herein did not, however, borrow from his employer as he purchased his house by means of a loan from a bank and a personal investment of some $7,000, nor does it appear did he borrow for the purchase of a house at the new location. He merely claimed and obtained reimbursement for the real estate loss he sustained as a result of his transfer to Montreal.

It is stated in Ex. ASF-6 that "it is the policy of the Company that an employee transferred to a new location by the Company should not suffer financial loss as a result of such transfer except through his own fault", and except for the above mentioned differences the moving or transfer expenses provided for under the old and new procedure are substantially the same. They are spelt out in the procedure as covering (a) the cost of moving the employee's household goods, (b) transportation for the employee and his family, (c) hotel expenses for a temporary period, (d) unexpired rental payments under a lease agreement, (e) other necessary expenses arising out of the transfer at the discretion of the department manager.

A number of incidental expenses can also be reimbursed the employee as out of pocket expenses, such as (a) connection of appliances, (b) alteration of rugs and draperies, (c) house cleaning and other similar expenses within the discretion of the department manager. The procedure which

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covers reimbursement of real estate losses upon providing details of same to the Real Estate Division of the company sets down the manner in which the loss shall be calculated which, the procedure provides, shall be the amount by which the cost of the employee's house (i.e., the purchase price plus reasonable legal and survey fees and capital improvements which increased the market value of the property) exceeds the net selling price of the house (i.e., gross sale price less the amount of any normal real estate commission and mortgage prepayment penalty paid, legal fees and other reasonable costs incidental to the sale). In the event the loss appears greater than warranted by local real estate conditions, the Real Estate Division may, at its discretion, make an appraisal of the property. Where the appraisal reveals that either purchase or sale was out of line with prices for comparable properties in the area the procedure provides that such deviation shall be taken into account and the loss reduced accordingly.

I should also add that under the old procedure, ASF-6, the real estate loss is adjusted by reducing it by 1/60 for each full calendar month of owner occupancy (thus the loss of $4,810 reduced by $1,844 gives us an adjusted loss of $2,966) whereas under the new or more recent procedure (Ex. ASF-7, which was adopted in the present case and where the amount reimbursed is equal to (a) selling expenses or (b) capital loss, whichever is the greater) the capital loss is the excess of adjusted cost over net proceeds or $3,617. This is the amount paid to the appellant from which legal fees and real estate commission of $808 was deducted to obtain $2,809, which as already mentioned, was added to the taxable income of the appellant by the assessment appealed from.

There are no decisions in this country on the taxability of an indemnity paid to an employee against the loss sustained on the sale of his house when he is transferred from one locality to another and the present appeal is a test case of special interest to a number of employees who, like the appellant, do not wish to be taxed on amounts which they consider to be reimbursement for expenses incurred in the course of their employment.

There are, however, two English decisions, *Jennings v. Kinder*[1] and *Hochstrasser v. Mayes*[2], which were heard together in the Court of Appeal and the House of Lords and were reported together in 38 T.C. at p. 673.

In the case of *Jennings v. Kinder*, the majority in the Appeal Court held that the payment in question made under a scheme to compensate the employee for the loss suffered on the sale of his house, when he had to move in the course of his employment, was a payment for a consideration other than services, as such payment had been received not in his capacity as employee but in his capacity as party to the contract concerning his house and that the amount received should, therefore, not be added to his income.

There is, in that case, a statement by Jenkins L.J. to the effect that even if the employee had not given any consideration other than service for the payment, it might not have been taxable as not constituting a profit. He expressed this at p. 693 of volume 38 of Tax Cases as follows:

> The transaction may be described as a form of insurance. It cannot bestow any profit on the employee but merely protects him against loss. To segregate the benefit (in cases in which it materialises) from the burden, and to ignore the cost to the employee of obtaining it (in the shape of the purchase money he has laid out in the faith of the housing scheme and agreement and lost through the depreciation in value of the house), ignoring also the other forms of consideration moving from the employee as above described, and thus to arrive at the conclusion that the sum paid by I.C.I. under the indemnity by way of recoupment for that loss is a profit of his employment as being a sum received for no consideration other than services appears to me to involve a considerable distortion of the facts.

And at p. 694 he concludes:

> I find it difficult to rid myself of the inclination to think that, if the house-purchase transaction is looked at as a whole, no profit arises from it to the employee even in a case in which the guarantee becomes operative.

The above English decisions were rendered under Schedule E, the first rule of which reads as follows:

> Tax under Schedule E shall be annually charged on every person having or exercising an office or employment of profit mentioned in

[1] [1958] 3 W.L.R. 215.

[2] [1959] 1 Ch. D. 22.

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Schedule E or to whom any annuity, pension or stipend chargeable under that Schedule is payable in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment, after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament where the same have been really and *bona fide* paid and borne by the party to be charged.

The above rule is quite different from the sections under which the appellant was assessed and which are reproduced and emphasized hereunder:

5. (1) Income for a taxation year from an *office* or *employment* is the *salary, wages* and *other remuneration,* including *gratuities,* received by the taxpayer in the year plus

(*a*) the value of board, lodging and *other benefits of any kind whatsoever* (except the benefit he derives from his employer's contributions to or under a registered pension fund or plan, group life, sickness or accident insurance plan, medical services plan, supplementary unemployment benefit plan or deferred profit sharing plan) *received* or *enjoyed* by him in the year *in respect of, in the course of, or by virtue of* the office or employment; and

(*b*) all amounts received by him in the year as an *allowance* for personal or living expenses or as an *allowance for any other purpose except*

(i) travelling or personal or living expenses allowances.

A number of specific exceptions then follow of expenses which are not included in income and the section then ends as follows:

minus the deductions, permitted by paragraphs (*i*), (*ib*), (*q*) and (*qa*) of subsection (1) of section 11 and by subsections (5) to (11), inclusive, of section 11 but *without any other deductions whatsoever,* (emphasis added).

25. An amount received by one person from another,

(*a*) during a period while the payee was an officer of, or in the employment of, the payer, or

(*b*) on account or in lieu of payment of, or in satisfaction of, an obligation arising out of an agreement made by the payer with the payee immediately prior to, during or immediately after a period that the payee was an officer of, or in the employment of, the payer,

shall be deemed, for the purpose of section 5, to be remuneration for the payee's services rendered as an officer or during the period of employment, unless it is established that, irrespective of when the agreement, if any, under which the amount was received was made or the form or legal effect thereof, it cannot reasonably be regarded as having been received

(i) as consideration or partial consideration for accepting the office or entering into the contract of employment,

(ii) as remuneration or partial remuneration for services as an officer or under the contract of employment, or

(iii) in consideration or partial consideration for covenant with reference to what the officer or employee is, or is not, to do before or after the termination of the employment.

The language of section 5(1)(*a*) appears to be wider than its English counterpart as it taxes ". . . *other benefits of any kind whatsoever . . . received or enjoyed* by him (the employee) in the year *in respect of, in the course of, or by virtue* of the office or employment".

I should also point out that the facts of the present case are not entirely the same as in the two English decisions in that the appellant had not taken advantage of the interest-free loan in purchasing the house he later sold at a loss having merely availed himself of the right he had as an employee to require reimbursement of the capital loss he sustained upon the sale of it. In the English cases, on the other hand, both taxpayers had taken advantage of the whole scheme having borrowed from their employer to purchase their house and having later claimed compensation for the loss sustained through depreciation in its value against which the employer had guaranteed them.

In the English cases under the terms of the agreement signed by each employee taking advantage of the scheme, he was required, if he wanted to sell or let the house on being transferred to a new place of employment in the company's service, to offer to sell the house first to the company. Furthermore, the employee was bound to keep the house in good tenantable repair.

It was because of this that the Court held that the payment made to the employee in both cases was made for a consideration other than services and, therefore, was not taxable. Jenkins L.J. clearly sets this out in *Hochstrasser (H. M. Inspector of Taxes) v. Mayes* and *Jennings v. Kinder (supra)* at p. 692:

> In order to participate in the housing scheme an employee of I.C.I., over and above answering that description, and being married, had to comply with a number of conditions. In order to bring himself

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within the ambit of the scheme he had, of course, as an essential prerequisite, to buy a house and find the purchase money for it either out of his own resources or by means of an ordinary mortgage supplemented by an interest-free loan granted by I.C.I. It is, of course, true that an employee need not buy a house or enter the scheme unless he chose. But any employee buying a house and entering the scheme must, I think, be taken to have done so on the faith of the scheme. Apart from the scheme and the guarantee which it promised, he would in all probability not have ventured to buy a house owing to the risk of capital loss in the event of his having to sell, especially in the case of his being transferred. Then he had to enter into the housing agreement and comply with the conditions on which his right to the indemnity was by that agreement made to depend. In the forefront of those conditions is the positive obligation laid upon him to offer the house for sale to I.C.I. in the event of his desiring to sell or let it by reason of transfer. This, as I understand it, is an obligation with which the employee is bound to comply in that event and not merely a condition he must fulfil in order to claim the benefit of the guarantee. Moreover, it applies when the employee desires to let and not merely when he desires to sell. This, I think, is a restriction of substance. The employee might have perfectly good reasons for wishing to let rather than sell on being transferred. But the housing agreement precludes him from doing this without first offering the house for sale to I.C.I. Then it is to be observed that the agreement makes it a condition precedent to any claim under the guarantee that the employee should keep the house in good tenantable repair . . .

And then lower down at p. 693 he continues:

. . . In the event of the house depreciating in value, the employee does no doubt gain a substantial advantage, but not, as I think, by any means an advantage representing pure bounty on the part of I.C.I. referable to no consideration moving from the employee other than his services.

Jenkins L.J. then concluded at p. 696 as follows:

I think it may well be said here that, while the employee's employment by I.C.I. was a *causa sine qua non* of his entering into the housing agreement and consequently, in the events which happened, receiving a payment from I.C.I., the *causa causans* was the distinct contractual relationship subsisting between I.C.I. and the employee under the housing agreement, coupled of course with the event of the house declining in value.

Mr. Pennycuick said, in effect, that a consideration other than services could only be shown if the consideration, other than services, moving from the employee for the benefit received demonstrably represented full value in money or money's worth for the benefit in question. I find no warrant in the authorities for this proposition. It would no doubt be right to disregard a fictitious or colourable bargain designed to disguise what was in fact remuneration as payable on some other account. But nothing of that sort enters into this case. The housing agreement constitutes a genuine bargain, advantageous

no doubt to the employee, but also not without its advantages to I.C.I., and I see no reason for disregarding it as the source of the payments sought to be taxed in these two appeals.

In the house of Lords[3] both Viscount Simonds and Lord Cohen appear to attach little importance to the adequacy of the consideration involved in the two cases. Indeed, both stated that the housing agreement was a *bona fide* arrangement in which the employer received consideration, the adequacy of which was irrelevant, in accordance with ordinary legal principles. The agreement, therefore, in their view, and not the employee's office or employment was the effective cause of the payment and constituted the source of the payment. In this respect Lord Cohen expressed himself as follows at p. 710:

> It is clear from the finding of the Commissioners that the Respondent was receiving under his service agreement the full salary appropriate to the appointment he held. The *housing scheme* pursuant to which the housing agreement was made was introduced by I.C.I. *not to provide increased remuneration for employees* but as part of a general staff policy to *secure a contented staff and to ease the minds of employees compelled to move from one part of the country to another as the result of the Company's action.* The housing agreement itself gave advantages to the Company which may not be easy to quantify but which are not negligible or colourable. For these reasons, as well as the reasons given by the noble and learned Lord on the Woolsack, I agree with Jenkins L.J., that the housing agreement constituted a genuine bargain, advantageous no doubt to the Respondent but also not without its advantages to I.C.I., and I see no reason for disregarding it as the *source* of the payment sought to be taxed in the appeal.

(The emphasis added).

Lord Radcliffe on the other hand seems to regard the conclusion that the amount received was not taxable as supported by the facts on the case, whether or not the employee provided consideration under the agreement. He expressed this at p. 708 as follows:

> . . . It is true enough that the guarantee or indemnity offered was not unqualified, that an employee adopting the housing scheme undertook certain obligations, and that some of these were capable of enuring in certain events to the advantage of the employer. But there is no reason to suppose that the employer's purpose in proposing the scheme was to obtain these advantages. What he wanted was *to ease the mind and mitigate the possible distress of an employee who,*

[3] Reported at 38 T.C. 702.

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having sunk money in buying a house, might find himself called upon at short notice to put it on the market without any assurance of getting the whole of his money back. To me therefore, it seems beside the point to scrutinize the housing agreement with the aim of measuring precisely how much in the way of valuable consideration was afforded by the employee under the agreement. *I should have taken the same view of the result if he had afforded none.*

(Emphasis added).

I can deal with section 25 of the Act briefly by saying that the appellant has, in my view, rebutted by the production of adequate evidence the presumption this section creates that the payment he received from his employer is remuneration for services rendered. It indeed appears clearly that the indemnity paid to the appellant in respect of the capital loss sustained upon the sale of his house when transferred, cannot reasonably be regarded as falling within any of the following categories: (i) "as consideration or partial consideration for accepting the office or entering into the contract of employment" as the evidence discloses that it had nothing to do with his engagement as an employee; (ii) "as remuneration or partial remuneration for services as officer or under the contract of employment" as the evidence discloses that the appellant was receiving under his service contract the full salary appropriate to his appointment. Furthermore, the source of the payment was not the services rendered by the appellant but resulted from the fact that he availed himself of the procedure whereby he could claim compensation for the capital loss sustained as a result of his transfer from Sarnia to Montreal. The fact that he did not claim the loss sustained in 1959 on the sale of his house in Montreal prior to his transfer to Sarnia, Ontario, would indicate that it was not part of his remuneration for services under his employment and that if he wanted to obtain such an amount, it was necessary to claim it by means of the procedure set down in the company's policy regulations and comply with its conditions; (iii) nor can it be said that the payment received by the appellant was "in consideration or partial consideration for covenant with reference to what the officer or employee is, or is not, to do before or after the termination of the employment".

I now come to section 5(1)(*a*) and (*b*) of the Act which, as already mentioned, is couched in language which appears to be wider than the English taxation rule on which the taxpayers in *Hochstrasser v. Mayes* and *Jennings v. Kinder (supra)* were held not to be taxable. The Canadian taxation section indeed uses such embracing words that at first glance it appears extremely difficult to see how anything can slip through this wide and closely interlaced legislative net.

In order, however, to properly evaluate its intent it is, I believe, necessary to bear in mind firstly, that section 5 of the Act is concerned solely with the taxation of income identified by its relationship to a certain entity, namely, an office or employment and in order to be taxable as income from an office or employment, money received by an employee must not merely constitute income as distinct from capital, but it must arise from his office or employment. Similar comments were made in *Hochstrasser v. Mayes* with reference to the English legislation by Viscount Simonds at p. 705 and by Lord Radcliffe, at p. 707. Secondly, the question whether a payment arises from an office or employment depends on its causative relationship to an office or employment, in other words, whether the services in the employment are the effective cause of the payment. I should add here that the question of what was the effective cause of the payment is to be found in the legal source of the payment, and here this source was the agreement which resulted from the open offer of the employer to compensate its employee for his loss and the acceptance by him of such offer. The cause of the payment is not the services rendered, although such services are the occasion of the payment, but the fact that because of the manner in which the services must be rendered or will be rendered, he will incur or have to incur a loss which other employees paying taxes do not have to suffer.

Indeed, here, as in *Hochstrasser v. Mayes,* the real basis for the decision that the payment received should not form part of his income, is that the legal source of the payment, and therefore the effective cause, was the source designated by the *bona fide* procedure and agreement entered into by

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the parties and not the services rendered. It may indeed be inferred from the evidence that, as in the English cases, the company policy pursuant to which the present claim and reimbursement was made, was introduced by the appellant's company "not to provide increased remuneration for employees, but as part of a general staff policy to secure a contented staff and ease the minds of employees compelled to move from one city to another as the result of the company's action".

Furthermore, the agreement to pay this compensation to the appellant gave to the company the advantage of an employee whose production would not be affected by the prospect of sustaining a loss on the house he was leaving to proceed to another city where, again, he would be faced with other problems of location, which in view of the numerous transfers required as a result of its extended operations throughout the country, cannot be considered as negligible. It cannot be said here also that the payment was a fictitious or colourable bargain designed to disguise remuneration payable on some other account, nor is this the case of an employer undertaking to purchase a particular asset from an employee at a price in excess of the apparent value of the asset. The procedure laid down in the company procedure is indeed such that the price determined thereby is, in my view, substantially a fair evaluation of the capital loss sustained in all cases.

That the payment is made for no consideration in the legal sense, should not (as pointed out by Jenkins L.J. in *Jennings v. Kinder (supra)* at p. 692) "be treated as referable to services or as made to the employee in that capacity" if the payment is motivated or caused by reasons of efficiency or even of mere compassion. In this vein, it should not be irrelevant to point out in passing, that if a certain class of taxpayers in this country are required, in order to earn their emoluments of office or of employment, to incur certain expenses, reimbursement of these expenses should not be considered as conferring benefits under section 5(1)(*a*) of the Act. Furthermore, and this is really the answer to the respondent's case, a reimbursement of an

expense actually incurred in the course of the employment or of a loss actually incurred in the course of the employment is not an "allowance" within the meaning of the word in section 5(1)(*b*) as an allowance implies an amount paid in respect of some possible expense without any obligation to account.

There can, I believe, be no difference in principle between the reimbursement of an expense or of a loss nor, in my view, can anything turn on the fact that the loss or expense which is the subject matter of the present reimbursement covers the value of a capital asset.

Although I have no doubt, as a matter of substance, that the payment received by the appellant should not be included in his income, I have had some difficulty in expressing the reasons why such a result should be obtained. The English House of Lords' decision has been of some use in dealing with section 25 of the Act, it has not, however, been too helpful in applying section 5 to the instant case, as the wording of the English rule is quite different from our section 5 even though some of the facts are similar.

The correctness of the conclusion arrived at under section 5 can, however, I believe, be sustained by a mere examination of the notion of *remuneration, reimbursement* for money disbursed in the course of or by reason of the employment and *allowance*. These seem to me to be three distinctively different concepts.

In a particular case, it may be difficult to decide as a question of fact into which category a particular payment falls. There is, however, no difficulty when an employee is required to disburse money in the course of his employment, i.e., to make payments on behalf of the employer. A clear example is where a cashier pays wages. There would equally be no difficulty with reimbursement of such an expense paid out of an employee's own pocket and then reimbursed i.e., if a lawyer's clerk or stenographer paid search fees out of his or her own pocket and, upon returning to the office, took the money out of petty cash. Such transactions are too obvious for debate.

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Another class of payment by an employer to an employee is also so well established as to be beyond debate. Where an employment contract contemplates an employee being away from his home base from time to time, the employee must eat and sleep while away from home. The expense involved in providing himself with food and shelter while away from home are personal expenses, but they are personal expenses that arise because the employee is required to perform the duties of his employment away from his home base temporarily. Such a payment is money disbursed "by reason of" but not "in the course of" his employment. Nobody questions that reimbursement of such an expense is something quite different from remuneration for the services performed by the employee. Such personal expenses are incurred *by reason of* the employment. Until the employee has been reimbursed for such expenses, he is out of pocket *by reason of* the employment. His remuneration can only be what he receives over and above such reimbursement.

In a case such as here, where the employee is subject to being moved from one place to another, any amount by which he is out of pocket by reason of such a move is in exactly the same category as ordinary travelling expenses. His financial position is adversely affected *by reason of* that particular facet of his employment relationship. When his employer reimburses him for any such loss, it cannot be regarded as remuneration, for if that were all that he received under his employment arrangement, he would not have received any amount for his services. Economically, all that he would have received would be the amount that he was out of pocket *by reason of* the employment.

An *allowance* is quite a different thing from reimbursement. It is, as already mentioned, an *arbitrary* amount usually paid in lieu of *reimbursement*. It is paid to the employee to use as he wishes without being required to account for its expenditure. For that reason it is possible to use it as a concealed increase in remuneration and that is why, I assume, "allowances" are taxed as though they were remuneration.

It appears to me quite clear that reimbursement of an employee by an employer for expenses or losses incurred by reason of the employment (which as stated by Lord MacNaughton in *Tenant v. Smith*[4] puts nothing in the pocket but merely saves the pocket) is neither remuneration as such or a *benefit* "of any kind whatsoever" so it does not fall within the introductory words of section 5(1) or within paragraph (*a*). It is equally obvious that it is not an allowance within paragraph (*b*) for the reasons that I have already given.

I would, however, exclude from the cost of the appellant's house the item added to its purchase price under "inside painting ($335)" because the appellant has not established clearly that it is not maintenance and, therefore, if so, it is a personal or living expense under section 139(1) (*ae*) (i). I would also exclude the television power antenna, the fire screen and grate, as well as the drape rods because the appellant has not established that such items could not be used in the new location. If they could have been so used, they could have been moved to Montreal, and cannot be considered as part of the real expense of moving to Montreal.

The remainder of the items, however, should be included in the cost of the house and the appellant's loss calculated on that basis. Such a loss, in my view, is in the same category as those other "removal expenses" (such as the expenses incurred by the employee in moving himself, his family and his household effects) which are considered by the respondent as conferring no benefit on the employee and which, as a matter of fact, are not added by the respondent to the appellant's income.

I can, indeed, see no difference in principle between the case of a salaried employee who is sent away for a few days to work outside and whose expenses are paid whether he remains away for a week, a month or even a year[5], or the case of the appellant here who incurred expenses in moving back and forth to wherever he was employed.

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[4] [1892] A.C. 150.

[5] (Although, of course, if the employee is away for more than a normal period, such expenses considered as travelling expenses may then become personal expenses).

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As a matter of fact, I would think that the situation of the appellant is very similar in that the payment he received covers a loss sustained by him because of the exigencies of his employment and is as far removed from remuneration for services or from a benefit of employment or even from an allowance, as the "removal expenses" he now receives without taxation liability.

I should also add that, although the procedure set down in Exhibit ASF-7 (whereby the capital loss was determined as being the excess of adjusted costs over net proceeds less legal fees and real estate commission of $808, namely $2,809) was not effective (as it bears the date of August 5, 1963) on the date of the sale of the appellant's house which took place on May 15, 1963, it was in operation and, therefore, available to the appellant on December 5, 1963, when his claim was finally settled.

It therefore follows that the cost of the inside painting and the estimated value of the television antenna, of the drape rods and fire screen and grate, totalling $585, should not be added to the cost of the house of the appellant.

Subject to the above correction, the amount received by the appellant represents in my view a fair calculation of the real expenses incurred by him as a result of his transfer to Montreal and should not be added to his income.

I would, therefore, allow the appeal with costs and refer the assessment back to the respondent for reassessment on the above basis.