1945
Sept. 14
—
Nov. 29

BETWEEN:

JAMES C. MAHAFFY.............. APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income War Tax Act, R.S.C. 1927, c. 97, secs. 3, 5.1(f) 6.1(a), 6.1(2)—"Travelling expenses"—"Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"—"Personal and living expenses"—"Trade or business"—Expenses incurred by a member of a legislative assembly while attending sessions of the legislature are not deductible—Appeal dismissed.

Appellant, a resident of Calgary, Alberta, was a member of the Legislative Assembly of the Province of Alberta which meets at the Capital City of Edmonton, and received the sum of $2,000, as an allowance. In his income tax return for the year 1941 he deducted certain expenses and disbursements incurred for living expenses in the provincial capital while in attendance at legislative sessions and for travelling expenses from Calgary to Edmonton and return for weekends during the time of such session. All of these deductions were disallowed and an appeal was taken to this Court.

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

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

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

APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before His Honour Judge J. C. A. Cameron, Deputy Judge of the Court, at Calgary.

S. J. Helman, K.C. for appellant.

S. H. Adams, K.C. and *J. G. McEntyre* for respondent.

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

CAMERON, Deputy Judge, now (November 29, 1945) delivered the following judgment:

This is an appeal from an income tax assessment, dated June 16, 1944, in respect of the Appellant's income for 1941. The taxpayer gave notice of appeal on July 6, 1944, and on September 22, 1944, the Minister of National Revenue gave his decision affirming the assessment, which decision is in part as follows:—

> The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notice of Appeal and matters thereto relating, hereby affirms the said Assessment on the ground that the amounts disallowed by the Minister in assessing the taxpayer are not expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income within the meaning of Section 6(*a*) of the Act and therefore on these and related grounds and by reason of other provisions of the Income War Tax Act the said Assessment is affirmed.

On October 13, 1944, the Appellant filed Notice of Dissatisfaction and on January 11, 1945, the Minister gave his reply and confirmed the assessment.

The appeal was set down for hearing at Calgary on September 14, 1945. By consent of the parties no evidence was then taken but a memorandum was filed setting out the agreed facts relevant to the appeal and subsequently both parties filed written argument.

The Appellant is a barrister practising his profession in Calgary, Alberta. He was elected to represent the constituency of Calgary in the Legislative Assembly of Alberta and in the year 1941 received the sum of $2,000 from the Province as an allowance paid to members of the said Assembly. In his tax return for 1941, he deducted certain expenses and disbursements from that allowance of $2,000 the details of which are set forth in the agreed memorandum of facts hereinafter referred to. These deductions were disallowed in full and hence this appeal.

In the memorandum of agreed facts it is stated that:

> The disputed item in this matter totals $236.35, which amount is arrived at by taking certain expenses claimed by Mr. Mahaffy which were disallowed and subtracting from them an item of $27.40 which had been reimbursed from the Provincial Government as against these expenses.

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The expenses consist of the following:—

(*a*) The bill of the McDonald Hotel in Edmonton being the place at which the Provincial Legislature sits and in respect to which the Appellant paid for a room at a monthly rate of $80 per month, making a total of..........................	$144 35
(*b*) Expenses for berths and other conveyances to and from Calgary to Edmonton for 14 single trips which the Appellant took over each week-end so as to be in Calgary on Saturdays and Sundays in order to be available to confer with his constituents who might wish to see him about various matters, making a total of..	43 40
As to the above it is to be noted that the actual railroad fare, apart from berths, was provided by a pass issued to the Appellant and in respect to which he has made no claim.	
(*c*) Additional expenses for meals and other incidentals while away from Calgary and in Edmonton over and above the cost of the same to the Appellant while he is at home, which the Appellant has calculated at $2 per day for 38 days making a total of..	76 00
	$263 75
Less	27 40
	$236 35

The Legislature of the Province of Alberta has its sessions at the City of Edmonton.

The Appellant claims that he is entitled to deduct these expenses or disbursements as travelling expenses under the provisions of Section 5. 1(*f*) and alternatively that they should be allowed under the provisions of Section 6. 1(*a*) thereof. For the Respondent it is argued that the expenses and disbursements made by the Appellant could not be allowed under either section, and that, alternatively, as personal and living expenses, they should be disallowed by the provisions of Section 6. 1(*f*).

No question arises as to assessability for the income of $2,000 which is provided for by Section 3. 1(*d*) (ii) and there is also no question that the amounts claimed were actually disbursed; the sole problem is whether they are such expenses as the Appellant is entitled to deduct under the provisions of the Income War Tax Act. It will be noted that they referred to expenses incurred in travelling on several occasions during the session from Calgary to Edmonton and return and for board and lodging at Edmonton. One might think that it would not be unreasonable that anyone accepting the honourable position of member of a legislature, often at pecuniary loss to him-

self, should be credited in his assessment with the amount expended by him in going to and from the place where his duties are to be carried out, together with his reasonable living expenses while there or, in the alternative, that the responsible authorities should fix the salary attaching to the office at a sum sufficient to cover these expenses; but however that may be no such opinion can affect this appeal. The Court has only to construe the law as it stands.

Taxable income is defined in Section 3.1 of the Act which, omitting those parts not relevant to this case, is as follows:

Sec. 3. "Income"—1. 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, as the case may be whether derived from sources within Canada or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, 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,

(ii) members of Provincial Legislative Councils and Assemblies,

(iii) members of Municipal Councils, Commissions or Boards of Management,

(iv) any Judge of any Dominion or Provincial court whose salary was increased by chapter fifty-nine of the Statutes of one thousand nine hundred and nineteen or by chapter fifty-six of the Statutes of one thousand nine hundred and twenty and who accepted such increase, and any Judge of any such Court appointed after the seventh day of July, one thousand nine hundred and nineteen, and

(v) all persons whatsoever, whether the said salaries, indemnities or other remuneration are paid out of the revenue of His Majesty in respect of his Government of Canada, or of any province thereof, or by any person, except as herein otherwise provided.

Part of the argument centered around the question of interpreting this definition, the Appellant claiming that it was only his annual *profit or gain* from the appointment that constituted a taxable income and that he was entitled to deduct items of expense in order to arrive at the profit or gain. For the Respondent it was urged that as the word "net" was not used in the 17th line of the section

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quoted, that therefore, the amount of the income was taxable without deductions being allowed, and reference was made to the case of *Lieutenant-Governors* v. *Minister of National Revenue* (1). I am of the opinion, however, that the words "annual net profit or gain" in the second line of the definition refer to income whether ascertained or unascertained; and as the word *source* is used in line 18 it could be argued that it refers to all the following subsections of clause 1 of Section 3 and that the various classifications therein detailed are given as *sources* of income rather than items of taxable income. The Lieutenant-Governors case (*supra*) was the subject of some observations by the President of this Court in the case of *Samson* v. *Minister of National Revenue* (2) and I am in agreement with his conclusions in that regard that "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". It is only the net profit or gain that constitutes taxable income. From the gross income, therefore, there may be deducted such items of expenses and disbursement as are permitted under the Act in order to ascertain the net or taxable income.

I propose to deal first with the Appellant's claim that he is entitled to these deductions under the provisions of Section 5. 1(*f*) which is as follows:

"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.*

In considering the meaning of those words (and of the words contained in Section 6. 1 (*a*)) it is to be remembered that a decision in favour of the Appellant would operate in favour not only of the Appellant but of all those mentioned in Section 3. 1(*d*) namely, members of the Senate and House of Commons and officers thereof, members of all Provincial Legislative Councils and Assemblies, members of Municipal Councils, Commissions or Boards of Management and many others therein referred to, and would or might enable the holder of any position or appointment to deduct his living expenses while away from his home.

(1) (1931) Ex. C.R. 232

(2) (1943) Ex. C.R. 17

Are the words used in subsection 5. 1(*f*) apt to include the expenses now in question? Judicial consideration has been given to the meaning of these words in the case of *Bahamas General Trust Company et al* v. *Provincial Treasurer of Alberta* (1). It is to be noted that the Income Tax Act of the Province of Alberta, 1931, Section 5 contained the identical words of Section 5. 1(*f*) of the Income War Tax Act; and the Court, in that case, held that the Section referred to expenses such as those of commercial travellers.

The words: "travelling expenses" were also considered in the case of *Ricketta* v. *Colquhoun* (2) where Rowlatt M.R. said:

> Now, that, I think, means—that where the office is of such a nature that in order to execute its duties its holder, has to travel from place to place, has, in other words, itinerant duties, there the expenses of such travelling, necessary to and involved in the work attached to the office, are and may be allowed as an expense, the obligation of which is necessarily incurred by the holder of the office.

This opinion was referred to with approval in the judgment of Lord Blanesburgh in the House of Lords in the same case (3).

The question also arises as to whether these expenses are incurred "while away from home in the pursuit of a trade or business". It is clear to me that they are not incurred in the pursuit of a trade. The word "business" however has a much wider implication and it is defined in Halsbury's Laws of England, 2nd Edition, Vol. 32 at p. 306, as follows: "Business" is a wider term not synonymous with trade and means practically anything which is an occupation distinguished from a pleasure. Further definitions of the word "business" were given in the case of *Samson* v. *Minister of National Revenue* (*supra*) at pp. 32, 33.

After consideration of these decisions I have reached the conclusion that the deductions here claimed by the Appellant do not come within the nature of "travelling expenses" under this section which, in my view, must be in the nature of itinerant expenses. I think it could not be said that the cost of board and lodging of a member of a Legislature or a member of the House of Commons, etc. while engaged over a period of many months in the performance of his

(1) (1942) 1 W.W.R. 46 at 53
(2) (1926) 1 K.B. 725 at 731
(3) (1926) A.C. 8

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duties, at a Provincial Capital, or at Ottawa, could, in any sense, be considered as travelling expenses and that is the governing word in the section.

In so far as the Appellant's claim includes a small item for travelling expenses from Calgary to Edmonton and return it is to be noted that it covers 14 single trips said to have been incurred, in part, so that the Appellant could be in Calgary at week-ends to confer with his constituents. While it is doubtless of great advantage both to a member and to his constituents that such meetings should frequently take place, it is undoubtedly the fact that the duties of his office, which result in the payment of his income, do not require such visits to his constituency. Moreover, the Legislative Assembly Act of the Province of Alberta, R.S.A. 1922, chap. 3, provides for travelling expenses in going to the session at Edmonton and returning therefrom to his place of residence and this expense for the year 1941 was paid to the Appellant and is not part of his assessed income. His railway pass provided him with free transportation to and from Edmonton.

Alternatively the Appellant claims the benefit of the provisions of Section 6. 1(*a*) of the Act which is as follows:

> 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.

This section contains a double negative but it is clear by inference that expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income are allowable deductions (unless barred by other sections of the Act). At first sight it would seem that the expenses here claimed would fall within this category. The Appellant resides in the constituency of Calgary. The Provincial Capital is at Edmonton and it is apparent that in order to earn the income he must attend the Legislature there and must, of necessity, incur expenses in the way of travelling, meals and lodging. But are these expenses in reality made for the purpose of earning the income or are they, as to the travelling expenses, for the purpose of reaching the place where the duties are to be performed; and, as to meals and lodging,

merely to sustain life and health? Are they wholly, exclusively and necessarily laid out or expended for the purpose of earning the income?

Were it not for the interpretation placed on the wording of this section in decisions binding on me, I would have been inclined to the opinion that the Appellant was entitled to succeed as to expenses for board and lodging *under the terms of this section.* The clause was considered in the case of *Minister of National Revenue* v. *Dominion Natural Gas Company Ltd.* (1) and while the facts in that case are quite different from these in the instant case, the statements made by the Chief Justice are relevant. At page 22 he says:

> 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 be working expenses; that is to say, expenses incurred *in* the process of earning the income.

In that judgment the court followed the decision in *Lothian Chemical Co. Ltd.* v. *Rogers* (2); *Robert Addie & Sons Ltd.* v. *Inland Revenue Commissioner* (3). In the *Addie* case it was held that in order to be allowed, such expenditure must be laid out as part of the process of profit earning. Reference may be also made to the case of *Montreal Coke and Manufacturing Company* v. *Minister of National Revenue* (4) where it was held that expenditure to be deductible must be directly related to the earning of income from the trade or business conducted.

I have previously referred to the case of *Ricketts* v. *Colquhoun,* the final judgment in which was given in the House of Lords (5) and which was an appeal from an order of the Court of Appeal affirming the order of Rowlatt J. The facts are briefly given in the headnote as follows:

> The Recorder of a provincial borough, who was a barrister residing and practising in London, claimed to deduct from the amount at which the emoluments of his office had been assessed for the purpose of income tax under Sch. E of the Income Tax Act, 1918, certain travelling expenses incurred by him in travelling from London to the borough and back, and certain hotel expenses incurred while in the borough:—
>
> 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, nor were any of the

(1) (1941) S.C.R. 19
(2) (1926) 11 T.C. 508
(3) (1924) S.C. 231 at 235
(4) (1944) A.C. 126
(5) (1926) A.C. 1

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expenses money which he was "necessarily obliged" to expend "wholly, exclusively, and necessarily in the performance" of his duties, within the meaning of r. 9 of Sch. E; and that, therefore, he was not entitled to deduct the expenses in question from the amount of his assessment.

This decision had to do with Section 9 of Schedule E of the Income Tax Act, which is 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 important words there are "wholly, exclusively and necessarily—in the performance of the said duties." The judgment in the main turned on the limitation of the words "in the performance of his duties".

Viscount Cave L.C. in his judgment at p. 4 said:

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 being 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, but partly before he enters upon them, and partly after he has fulfilled them. No doubt the rule contemplates 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......

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 these 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.

At p. 7 Lord Blanesburgh said:

....But I am also struck by this, that, as it seems to me, although undoubtedly less obtrusively, the language of the rule points to the expenses with which it is concerned being only those which each and every occupant of the particular office is necessarily obliged to incur in the performance of its duties—to expenses imposed upon each holder ex necessitate of his office, and to such expenses only. It says: "If the holder of an office"—the words, be it observed, are not "If any holder of an office"—"is obliged to incur expenses in the performance of the duties of the office"—the duties again are not the duties of his office. In other words, the terms employed are strictly, and, I cannot doubt, purposely, not personal but objective: the deductible expenses do not extend to those which the holder has to incur mainly and, it may be, only because of circumstances in relation to his office which are personal to himself or are the result of his own volition...

And at p. 9:

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

It is to be observed that the words in the English statutes are "in the performance of his duties." In our Income War Tax Act the words are "for the purpose of earning the income". Were it not for the judgments above referred to and which have interpreted the words of our Act, I would have been of the opinion that the words "for the purpose of earning the income" had a different meaning than the words "in the performance of his duties" but they have been interpreted as meaning "in the process of earning the income", a meaning very similar to the words in the English Act.

It follows, therefore, adopting the interpretation laid down in the *Dominion Natural Gas Company* case (*supra*) that to be allowed, the expenses must have been incurred in the process of earning the income.

The Legislative Assembly Act of the Province of Alberta makes it quite clear that the allowance paid to a member is conditional on his attendance at the sessions of the legislature. It is at the sessions that he is in the process of earning his income and not when he is travelling to Edmonton from Calgary or while he is eating or sleeping.

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The process of earning the income—that is attendance at the Legislature, is the same for a member who resides elsewhere than at Edmonton as for one who normally resides there. If, therefore, the present claimant were entitled to deduction for board and lodging there seems no valid reason why a member residing normally in Edmonton would not be equally entitled. (See the above quotations from the judgment of Lord Blanesburgh in the *Ricketts* v. *Colquhoun* case).

Following, therefore, the decisions which I have cited, I must reach the conclusion that the appellant fails under this section also.

As to the expenses claimed for travelling, I find that they are properly disallowed under this section, for as previously indicated, the actual travelling expenses for going to and returning from the sessions were provided by the Legislature and the other trips were clearly not made exclusively for the purpose of earning the income.

The respondent also relies on the provisions of Section 6. 1(2) of the Act, which reads:

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.

The expenses here claimed deductions by the appellant as permissible deductions for board and lodging were clearly living expenses, but I do not construe this subsection as being quite as absolute as it appears. It must be read in connection with other sections, including section 5. 1(*f*) and 6. 1(*a*), but as I have found that the appellant cannot succeed under these sections and as I have not been referred to any other section where such an allowance could be made, I must conclude that the appellant must fail under the provisions of this subsection.

In the appellant's argument I was urged to consider the fact that in England deductions are allowed to members of Parliament in respect of travelling expenses, limited possibly to such expenses in going to and from Westminister to their constituencies. Such allowances are made under a special section of the English Act, section 10 of Sch. E. being as follows:

Where the Treasury are satisfied with respect to any class of persons in receipt of any salary, fees, or emoluments payable out of the public revenue that such persons are obliged to lay out and expend money, wholly,

exclusively, and necessarily in the performance of the duties in respect of which such salary, fees, or emoluments are payable, the Treasury may fix such sum, as in their opinion represents a fair equivalent of the average annual amount laid out and expended as aforesaid by persons of that class, and in charging the tax on the said salary, fees, or emoluments, there shall be deducted from the amount thereof the sum so fixed by the Treasury:

Provided that if any person would, but for the provisions of this rule, be entitled to deduct a larger amount than the sum so fixed, that sum may be deducted instead of the sum so fixed.

This section does not appear in our Act and it is a special provision for those whose incomes are out of public revenue and confers on the Treasury the power to determine the amount to be allowed for persons of that class. In the absence of any such provision in our Act I cannot give effect to the argument of the appellant's counsel that it should be allowed to members of Parliament and members of Legislatures in Canada, although, as he urges, it might well be considered "fair and just".

My attention was also directed by counsel for the respondent to section 75(2) of our Act, giving the Minister power to make regulations necessary for carrying the Act into effect, etc. and to authorize the Commissioner to exercise such of his powers in that regard as could in the opinion of the Minister be conveniently exercised by the Commissioner.

It was pointed out that the authorization by the Minister appointing the Commissioner to exercise such powers is dated August 8, 1940, and was published in the *Canada Gazette* on September 13, 1941, p. 832, and that pursuant thereto a regulation established by the Commissioner was published by him in the *Canada Gazette* on February 15, 1941, part of which under the heading "Taxation of Salaries" is as follows:

Please note that for 1939 and subsequent years all employees are to be taxable on any salaries or wages received without deduction by way of expenses.

My only comment in this regard would be that any such regulation must be deemed necessary for carrying the Act into effect and could not of itself affect the right of a taxpayer to deductions authorized under the Act.

For the reasons which I have stated the appeal fails and is dismissed with costs.

Judgment accordingly.