
Vancouver 1966 Apr. 26 Apr. 29

BETWEEN:

ROBERT M. RANDALL ..... APPELLANT;

AND

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

Income tax—Managing horse race meetings in U.S.A.—Whether "business" or "employment"—Whether living and travelling expenses deductible—Income Tax Act, ss. 12(1)(a), 12(1)(h), 139(1)(e).

Appellant, a resident of North Vancouver, entered into a contract to manage the business of a company which carried on horse race meetings in Portland, Oregon in return for a share of the profits and reasonable expenses. In 1958 he declared income therefrom of over $17,000 but sought to deduct the sum of $5,241 as his expenses in travelling from Vancouver to Portland and his living expenses there. The Minister would allow only $1,200 of the amount claimed.

Held, while the provision of services under the contract was a "business" and not an "employment" within the meaning of s. 139(1)(e) of the *Income Tax Act,* the expenses claimed did not arise in the perfor-

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mance of the contract but were purely personal and therefore barred from deduction by s. 12(1)(*a*) as not being incurred "for the purpose of gaining income from a business". Further, the expenses in question although incurred away from appellant's home were not deductible under s. 12(1)(*h*): that enactment required that they also be incurred "in the course of carrying on his business".

Samson v. M.N.R. [1943] Ex. C.R. 17, per Thorson P. at p. 32; *Royal Trust Co. v. M.N.R.* [1957] 9 D.L.R. (2d) 28, per Thorson P. at p. 39; *Mahaffy v. M.N.R.* [1946] S.C.R. 450, per Rinfret C.J. at p. 453, applied.

APPEAL from decision of Tax Appeal Board.

David A. Freeman for appellant.

Bruce Verchere for respondent.

SHEPPARD D.J.:—This appeal is from the judgment of the Tax Appeal Board affirming the disallowance by the Minister of National Revenue from the 1958 return of travelling and living expenses of the appellant.

On the 20th March, 1957, the appellant who resides in North Vancouver and his brother, John Garfield Randall, entered into an agreement with the Portland Turf Association, an incorporated company, to manage the business affairs and transactions of the Association arising out of the horse race meetings at Portland, Oregon, for a share of the profits and reasonable expenses (Ex. A3). In 1958 the appellant declared an income therefrom of $17,626.71 and claimed to deduct the sum of $5,241.53 as his expenses in travelling from Vancouver, B.C. to Portland, Oregon and his living expenses at Portland while attending race meetings. The Minister of National Revenue allowed him $1,200.00 but disallowed the remainer. An appeal by the appellant was dismissed by the Tax Appeal Board and the appellant now contends that those expenses should be allowed under Section 12(1)(*h*) of the *Income Tax Act*.

That contention of the appellant raises the questions:

(1) whether the allowance of those expenses has been excluded by Section 12(1)(*a*) and,

(2) if not so excluded whether the deduction of the expenses is allowed elsewhere: *Royal Trust Co. v. Minister of National Revenue*[1].

Here the appellant contends that the deduction is authorized by section 12(1)(*h*).

[1] (1957) 9 D.L.R. (2d) 28.

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The first question is whether the appellant was in "business": both sections 12(1)(*a*) and 12(1)(*h*) require that. The appellant and his brother as officers of a company, were associated in conducting racing in Exhibition Park, Vancouver and at Sandown Park, Vancouver Island. Under the agreement of the 20th March, 1957 (Ex. A3) the appellant and his brother jointly undertook to provide their experienced services for which the Association promised to pay them jointly the agreed amounts. The providing those services by the appellant and his brother is a business within the definition thereof in *Maurice Samson v. Minister of National Revenue*[1] where the President at page 32 said:

> It has, of course, a more extensive meaning than that which is given to the word "trade". In *Smith v. Anderson* (1880) 15 Ch. D. 247 at 258, Jessel M.R., after citing certain dictionary definitions of "business", said
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> > "Anything which occupies the time and attention and labour of a man for the purpose of profit is business."
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> and in *Erichson v. Last* (1881) 4 Tax. Cases, 422 at 427, Cotton L.J said:
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> > "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."
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> 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* (1908) 15 O.L.R. 118 at 122 and by Godfrey J. in *Shaw v. McNay* [1939] O.R. 368 at 371 where the word "business" was also described as "a word of large and indefinite import".

and the appellant was therefore within the statutory meaning of business in section 139(1)(*e*) unless excluded as "an office or employment".

It is not contended that the agreement (Ex. A3) creates an office, it is contended that the agreement is an "employment" by the Association and that the appellant was a servant or agent of the Association and therefore not engaged in business within section 139(1)(*e*). The relationship of the appellant to the Association was not that of master and servant as the Association had not that requisite control: *Bain v. Central Vermont Railway Co.*[2] The agreement (Ex. A3) exceeds the relationship of principal and agent but in any event that relationship does not preclude the agent being engaged in carrying on a business as may be seen in the case of factors, real estate agents and partnerships. Here the joint services of the appellant and his brother pursuant to a promise to pay them jointly has

[1] [1943] Ex. C.R. 17.

[2] [1921] 2 A.C. 412; 25 Halsbury (3rd Ed.) p. 447.

set up a joint fund. That appears to be a partnership but in any event is "a business" within section 12(1)(*a*) and "carrying on business" within section 12(1)(*h*).

The further question is whether the deduction of the expenses has been excluded by section 12(1)(*a*) which reads as follows:

> 12. (1) In computing income, no deduction shall be made in respect of
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> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer.

In *Royal Trust Co. v. Minister of National Revenue, supra,* at page 39 the President said:

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

The obligation of the appellant under the agreement (Ex. A3) was to:

> Manage the business affairs and transactions of the Association arising out of the conducting and holding of horse race meetings...and will devote such time, labour skill and attention to such employment as may be necessary.

Hence the appellant's travelling to Portland, Oregon and his expenses of living there were not the performance of any undertaking in the agreement but on the contrary, were purely personal to him and outside the agreement. It follows that such expenses not being the performance by him of any undertaking in the agreement, were not "for the purpose of gaining or producing income from the business". Therefore their deduction was precluded by section 12(1)(*a*).

The expenses were not a deduction authorized by section 12(1)(*h*) which reads as follows:

> 12. (1) In computing income, no deduction shall be made in respect of
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> (*h*) personal or living expenses of the taxpayer except travelling expenses (including the entire amount expended for meals and lodging) incurred by the taxpayer while away from home in the course of carrying on his business,

The appellant contends that the words "in the course of carrying on his business" should be taken to modify the nearest antecedent, that is "away from home". Therefore

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that these were personal or living expenses of the taxpayer while away from home in the course of carrying on his business at Portland and therefore should be allowed. However, the construction contended for by the appellant would be unreasonable as authorizing personal or living expenses however extravagant, provided always that the taxpayer was away from home and in the course of carrying on his business. Such construction is contrary to the "rule of construction of taxing statutes". *Rex and Provincial Treasurer of Alberta v. C.N.R.*[1] The words "in the course of carrying on his business" (section 12(1)(*h*)) must be read as modifying "incurred", and such construction has been adopted in statutes in *pari materia*. In the *Bahamas General Trust Company et al v. The Provincial Treasurer of Alberta*[2], the question was whether the expenses of an officer travelling from the Orient, where he was on holiday, to Montreal to attend a director's meeting were deductible under Section 5 which reads:

5. (1) "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.

There O'Connor J. at page 53 said:

Then were the expenses here "expended...while away from home in the pursuit of a trade or business?" I hold they were not. James Ramsey was not away from Edmonton in pursuit of his trade or business as a director of the C.N.R. In my view, the section refers to expenses such as those of a commercial traveller.

In *Mahaffy v. The Minister of National Revenue*[3] the question was whether a member of the Legislative Assembly of Alberta was entitled to his travelling and living expenses in attending the Legislature, under section 5(1)(*f*) of the *Income War Tax Act* which read:

5. (1) "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;

[1] [1921] 1 W.W.R. 1178, affirmed [1923] A.C. 714.
[2] [1942] 1 W.W.R. 46.
[3] [1946] S.C.R. 450.

Rinfret C.J. in delivering the judgment of the majority said at p. 453:

> The occupation of Members of Provincial Legislative Councils and Assemblies is neither a trade nor a business. The travelling expenses there mentioned are in the nature, for example, of expenses of commercial travellers. *Bahamas General Trust Company et al. v. Provincial Treasurer of Alberta* [1942] 1 W.W.R. 46, at 53; *Ricketts v. Colquhoun* [1925] 1 K.B. 725, at 731 approved in the judgment of Lord Blanesburgh in the House of Lords in the same case [1926] A C. 8.
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> In our view, this is sufficient to eliminate subsection (*f*) of paragraph (1) of section (5) of the Act as supporting the appellant's contention.

and Rand J. said at p. 455:

> The question is whether the items deducted are travelling expenses "in the pursuit of a trade or business"; or
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> "disbursement or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income."
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> and in my opinion they are neither. Whether or not attending a session of a Legislative Assembly can be deemed "business" which I think extremely doubtful, certainly making the extra trips and lodging in a hotel in Edmonton cannot be looked upon as "in the pursuit" of it. That expression had been judicially interpreted to mean "in the process of earning" the income: *Minister of National Revenue v. Dominion Natural Gas Co.* [1941] S.C.R. 19. The sessional allowance is specifically for attendance by members at the legislative proceedings: it has no relation to any time or place or activity outside of that. The "pursuit" of a business contemplates only the time and place which embrace the range of those activities. To treat the travelling expenses here as within that range would enable employees generally who must, in a practical sense, take a street car or bus or train to reach their work to claim these daily expenses as deductions. Employees are paid for what they do while "at work"; and the legislators receive the allowance for their participation in the sessional deliberations: up to those boundaries, each class is on its own.

It follows that the words of section 12(1)(*h*) "in the course of carrying on his business" must be taken to modify "incurred" and hence require that the expenditure be "incurred by the taxpayer in the course of carrying on his business", and therefore exclude a deduction of the expenses in question which are not "in the process of earning the income" as not a performance of any undertaking in the agreement. The Tax Appeal Board has properly excluded like expenses in *George Frederick Drewry v. The Minister of National Revenue*[1] as excluded by section 12(1)(*a*) and also in *Edna Simmons Hersey v. The Minister of National Revenue*[2] as excluded by section 12(1)(*a*) and also by section 12(1)(*h*).

This appeal is dismissed.

[1] (1952) 7 Tax A.B.C. 248.

[2] (1954) 9 Tax A B.C. 380