1949
Dec. 12, 14 & 16
1950
Jan. 14

BETWEEN:

WILLIAM KEPPIE MURRAY,..........APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE, ... RESPONDENT.

Revenue—Income War Tax Act, R.S.C. 1927, c. 97, ss. 6(1) (a), 47, 92(3)—Deductions—Onus on appellant to prove expenses claimed as deductible—Failure of appellant to show that deductions claimed had been "wholly, exclusively and necessarily laid out or expended to earn the income"—Appeal dismissed.

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Appellant, a securities salesman, was paid by his employer on a commission basis solely, no allowance being made to him for expenses incurred in the course of his employment. In his income tax return for the taxation year 1945 appellant deducted certain items of expense incurred by him. Respondent, in the absence of vouchers or receipts to establish that the amounts had been expended, disallowed part of the deduction so claimed on the ground that they had not been shown to have been wholly, exclusively and necessarily laid out or expended for the purpose of earning the income within the meaning of s. 6(1) (*a*) of the Income War Tax Act, and assessed appellant accordingly. Appellant appealed to this Court.

Held: That the onus is on the appellant to show by acceptable evidence that he did expend the sums he claims as deductions and since appellant has not satisfied that onus the appeal is dismissed.

APPEAL under the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Cameron at Toronto.

E. H. Dewart for appellant.

R. I. Ferguson, K.C. and *R. S. W. Fordham, K.C.* for respondent.

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

CAMERON J. now (January 14, 1950) delivered the following judgment:

This is an appeal from an assessment to Income Tax dated March 19, 1948, for the taxation year 1945. The appellant in that year was a salesman of securities on the staff of C. C. Fields and Co. (stockbrokers of Toronto) and was paid entirely by commission on sales, no allowance being made to him for his expenses. In his return he claimed as deductions the following items of expenses:—

Item	Amount
Railway Fares	$ 294.76
Telephones, Telegrams	345.76
Hotels and meals	1,415.25
Automobile	442.04
Taxis	275.00
Total	$2,772.81

In the absence of any vouchers or receipts which would establish that such amounts had actually been expended by the appellant, the respondent reduced such expenses to

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$1,500 and assessed the appellant accordingly. Pursuant to the provisions of section 92(3) of the Income War Tax Act, the respondent had requested the appellant's employer to furnish information as to the conditions of his employment, and, in compliance therewith, the employer had supplied the information now contained in Exhibit A, which *inter alia* indicated that in the year 1945 the appellant had been working in his home territory at Toronto for 38 weeks and away from his home territory 14 weeks. An appeal was taken and the respondent by his decision affirmed the assessment on the ground that the deductions claimed had not been shown to have been wholly, exclusively and necessarily laid out or expended for the purpose of earning the income, within the meaning of section 6(1) (*a*) of the Act. Notice of dissatisfaction followed and by his Reply, the respondent affirmed the assessment. By order of this Court pleadings were delivered.

All of the items claimed were of such a nature that, if proven to have been disbursed, they would have been allowed as proper deductions from the appellant's income. His income was earned by commissions on sales made by him to his own clients, some of whom resided in Toronto, but the majority of them resided elsewhere in Ontario. To contact them and effect sales it was necessary for him to leave Toronto, to expend moneys for railway fares, taxis, hotels and meals, telephones and telegrams and for the operation of his motor car.

In this appeal, the onus is on the appellant to show by acceptable evidence that he did so expend the sums which he claims as deductions. He kept no books of account, vouchers, records or receipts of any sort, and, admittedly, his evidence is based solely on his recollection of trips taken and expenses incurred. He frankly admits that in every case the amount is an estimate only.

The evidence submitted I think may be divided into two portions. The only evidence as to the amounts disbursed by the appellant is that supplied by the appellant himself, and as I have said, it is in each case an estimate only. As to the railway fares, he states that he made several trips to Windsor, North Bay and Montreal and to one or two other places and that the cost of these trips amounted to $327. He stated that he actually expended on this item

at least the sum of $294.76 as claimed. His claim for telegrams and telephones is based on an estimated weekly average of $7. Again he says that he did expend the amount claimed—$345.76—and may have spent more. As to hotels and meals, he states that he was away from home approximately 240 days in 1945, and the average cost per day for accommodation and food was $6. His claim is for $1,415.25. He states that he used his own motor car for business purposes, a total of ten thousand miles and that a charge of 4½c per mile is reasonable. His claim for that item is $442.04. He gave no details as to the times when any of such trips were made or the distances travelled. He estimated his expenses for taxis at $275, stating that when he did not have his own motor car he employed taxis to take him to interview his clients.

However, there is other evidence as to the number of days he was absent from his Toronto office on business. Alexander Davidson, who was in charge of the stock position book at C. C. Fields in 1945, left that firm in February, 1946, and has since been in the employ of the appellant. His duties were in the main office of that firm, which office was located some distance from that occupied by the appellant, although on the same floor. It was no part of his duty to know where the appellant was at any given time and the books in his charge contained no record of the appellant's movements. He says that the appellant told him where he had been or where he was going and that he would estimate that throughout the year the appellant averaged 4 days per week out of Toronto. This witness admitted that it was the duty of Lugsden—the office manager of C. C. Fields & Co.—to know where the appellant was engaged at all times.

Miss Jessie E. Vawter was employed as a stenographer by C. C. Fields & Co. from March, 1945, to the end of that year. She occupied a part of the appellant's office and did such office work as he required her to do. No records were kept as to the appellant's movements but she also estimated that he was out of his office on an average of 4 days each week. The appellant informed her from time to time where he was to be so that she should contact him if necessary.

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Mr. R. W. Lugsden—office manager of C. C. Fields & Co.—gave evidence on behalf of the respondent. He was employed by that firm throughout the whole year 1945 and stated that he had a duty to know where the appellant was from time to time. He had charge of recording the sales made by the salesmen of the firm, including those made by the appellant. He stated that from his personal observations and from statements made to him by the appellant, the appellant in 1945 spent 38 weeks in the office in Toronto and was absent on business out of Toronto 14 weeks only. He pointed out that under normal circumstances salesmen did not work on Saturday or Sunday in any week unless possibly on occasions when they were away on a long trip. It was part of the duty of the appellant to know the position of the market from day to day so as to be able to advise his clients as to sales and purchases, and for that reason he would have to spend a considerable part of his time in Toronto, but no office record was kept of the days when the appellant was out of town. This witness stated that the appellant would advise him when he intended to leave Toronto in order that he, the witness, might be able to look after any business that arose on behalf of the appellant during his absence. In cross-examination he admitted that he had no control over the movements of the salesmen, that they could come and go as they pleased, and that it was possible for the appellant to have left Toronto from time to time for a few hours or even a day without his knowledge. As I have said, this witness depended entirely upon his recollection as to the movements of the appellant, but is quite positive that it was impossible for the appellant to have been away from the office a total of 240 days in that year. He was convinced that his own estimate of 14 weeks was as accurate as possible.

In assessing the appellant the respondent acted under the provisions of section 47 of the Act and notwithstanding the return filed by the appellant, determined the amount of the tax to be paid by him.

In *Dezura* v. *Minister of National Revenue* (1), the President of this Court considered the nature of an assess-

(1) (1948) Ex. C.R. 10.

ment made under section 47 and the onus resting on an appellant therefrom. At p. 15 he said:—

The result is that when the Minister, acting under sec. 47, has determined the amount of the tax to be paid by any person, the amount so determined is subject to review by the Court under its appellate jurisdiction. If on the hearing of the appeal the Court finds that the amount determined by the Minister is incorrect in fact the appeal must be allowed to the extent of the error. But if the Court is not satisfied on the evidence that there has been error in the amount then the appeal must be dismissed, in which case the assessments stand as the fixation of the amount of the taxpayer's liability. The onus of proof of error in the amount of the determination rests on the appellant.

* * *

Ordinarily, the taxpayer knows better than any one else the amount of his taxable income and should be able to prove it to the satisfaction of the Court. If he does so and it is less than the amount determined by the Minister, then such amount must be reduced in accordance with the finding of the Court. If, on the other hand, he fails to show that the amount determined by the Minister is erroneous, he cannot justly complain if the amount stands. If his failure to satisfy the Court is due to his own fault or neglect such as his failure to keep proper accounts or records with which to support his own statements, he has no one to blame but himself.

In *Johnston* v. *Minister of National Revenue* (1), the question of the onus resting on an appellant from an assessment under the Income War Tax Act was under consideration. At p. 489, Rand J., said:—

Notwithstanding that it is spoken of in section 63(2) as an action ready for trial or hearing, the proceeding is an appeal from the taxation; and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged. Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant. If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules mentioned he should have raised that issue in his pleading, and the burden would have rested on him as on any appellant to show that the conclusion below was not warranted. For that purpose he might bring evidence before the Court notwithstanding that it had not been placed before the assessor or the Minister, but the onus was his to demolish the basic fact on which the taxation rested.

After giving full consideration to the evidence, I have reached the conclusion that the appellant herein has not satisfied the onus resting on him "to demolish the basic fact on which the taxation rested" namely, that the deductible expenses incurred in connection with his business operations, did not exceed $1,500.

(1) (1948) S.C.R. 486.

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The evidence of Mr. Davidson and Miss Vawter is not of sufficient probative effect to assist the appellant's own statement. Their evidence in the main was based on the fact that he himself had told them he was leaving Toronto on business, and of course neither would have had any personal or accurate knowledge as to where he had gone, or for what length of time he had been out of town on business. Miss Vawter's statement was that she estimated that he was *out of the office* an average of 4 days each week, but she did not say that he was engaged on business *out of Toronto* for that length of time.

On the other hand I see no reason for rejecting the evidence of Mr. Lugsden whose duty it was—as office manager—to know when the appellant was out of town and to see that matters arising in his absence were taken care of. His evidence was precise—perhaps somewhat too precise—based as it was on his recollection and personal observations only, but it was sufficient in my opinion, to establish beyond doubt that the appellant had greatly exaggerated the facts in stating that he was absent on business from Toronto for 240 days. Excluding Saturdays, Sundays and holidays it would have meant that he was away from Toronto practically the entire time. I cannot overlook the fact that in making his claim for deductions he stated the amounts in each case (but one) at an exact number of dollars and cents, as though his computations were based on accurate records. I think he must have done so in the belief that they would thereby be more readily acceptable as completely accurate.

While it may not have been necessary to produce vouchers and records for the disbursements so claimed, the appellant must have known that he would be required to establish his claim by evidence reasonably acceptable to the assessor. Considering the relatively large amounts involved, he should and could have kept vouchers, receipts or records to prove his case. Having failed to do so and having failed to establish affirmatively before me that such disbursements were in fact made, he has no one to blame but himself.

For the reasons which I have stated the appeal will be dismissed.

The respondent is entitled to be paid his costs after taxation. I direct, however, that in such taxation the respondent will be entitled to tax counsel fees at the trial for one day only. One or two days after the conclusion of the hearing a motion was made by the respondent for leave to introduce new evidence and the motion was granted. On a later day the additional evidence was heard. The appellant is also entitled to set off against the respondent's taxed costs, the costs of the motion made by the respondent, which costs I fix at $20.

It should be stated also that the appellant appealed from the disallowance of an item of $142.50 said to have been disbursed as charitable gifts. At the trial his counsel stated that this item of the appeal had been abandoned.

Judgment accordingly.