1950 BETWEEN:

Nov. 8, 23-24, HENRY GOLDMAN ....APPELLANT;

AND

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Oct. 12 THE MINISTER OF NATIONAL REVENUE .... } RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 59-69, 69A, 69B, 69C—Income Tax Act, S. of C. 1948, c. 52, ss. 89-95—Appeal from Income Tax Appeal Board a trial de novo—Onus on taxpayer appellant to establish incorrectness of assessment—Taxpayer appellant opens proceedings—Remuneration for services taxable.

The appellant was chairman of a protective committee for a certain class of shareholders of a company under reorganization and appointed B as counsel for the Committee. Under the plan of reorganization

there could be no compensation to members of committees as such but B agreed with the appellant to make him an allowance out of his counsel fees as remuneration for services and assigned part of his fees accordingly. A payment made to the appellant pursuant to the assignment was included in his assessment from which he appealed to the Income Tax Appeal Board which dismissed his appeal.

Held: That the appeal to this Court from a decision of the Income Tax Appeal Board, whether by the taxpayer or by the Minister, is a trial *de novo* of the issues involved, that the parties are not restricted to the issues either of fact or of law that were before the Board but are free to raise whatever issues they wish even if different from those raised before the Board and that it is the duty of the Court to hear and determine such issues without regard to the proceedings before the Board and without being affected by any findings made by it.

2. That where the taxpayer is the appellant the onus is on him to establish that the assessment to which he has objected is incorrect either in fact or in law.
3. That where the taxpayer is the appellant he should be called on to open the proceedings.
4. That on the evidence the sum in question in the appeal was paid to the appellant and received by him as remuneration for services and it was immaterial that it was made by someone other than the person for whom the services were rendered or whether it was made pursuant to an enforceable obligation or was made voluntarily.

APPEAL from a decision of the Income Tax Appeal Board.

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

H. H. Stikeman and *A. L. Bissonette* for appellant.

R. S. W. Fordham K.C., *W. R. Jackett K.C.* and *P. H. McCann* for respondent.

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

THE PRESIDENT now (October 12, 1951) delivered the following judgment:

This appeal is from the decision of the Income Tax Appeal Board dismissing the appellant's appeal from his income tax assessment for 1947 whereby the sum of $7,000, which he had shown as a gift on his income tax return, was added as taxable income to the amount reported by him.

The appeal was brought under the amendments of the Income War Tax Act, R.S.C. 1927, chap. 97, relating to appeals from assessments enacted in 1946, Statutes of

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Canada 1946, chap. 55, sec. 15, whereby Part VIII A and the Schedules referred to therein were added to the Act immediately after Part VIII and made applicable in respect of assessments of income of 1946 and subsequent years. Under this part a taxpayer who objected to an assessment had the right by section 69A to serve a notice of objection on the Minister and by section 69B to appeal to the Income Tax Appeal Board. Then section 69C gave a right of appeal to this Court to either the Minister or the taxpayer.

At the outset counsel for the appellant submitted that the hearing of an appeal to this Court from a decision of the Income Tax Appeal Board is a trial *de novo* of the issues involved. It is clear that prior to the establishment of the Board the appeal to this Court was an appeal from the assessment. The taxpayer had two opportunities for relief from it, namely, an appeal to the Minister and then, if he was dissatisfied with the Minister's decision, an appeal to this Court. Under section 59 he might serve a notice of appeal upon the Minister if he objected to the amount at which he was assessed or considered that he was not liable to taxation under the Act. He had thus a right of appeal on grounds of fact as well as of law. Section 59 required that the Minister upon receipt of the notice of appeal should duly consider the same and affirm or amend "the assessment appealed against" and notify the appellant of his decision. The sole issue was whether the assessment was correct. Then the sections following section 59 prescribed the procedure to be followed before the appellant could have his appeal to this Court heard. This appeal was frequently referred to as an appeal from the decision of the Minister but this description was incorrect. What was before the Court was the assessment, not the decision of the Minister. An examination of the Act makes this clear. Section 60 provided that if the appellant was dissatisfied with the Minister's decision he might mail to the Minister a notice of dissatisfaction stating that he desired his appeal to be set down for trial. The section thus contemplated that the appellant might carry his appeal beyond the Minister's decision. The only appeal thus far referred to was the appeal mentioned in the notice of appeal, namely, the appeal from the assessment. Section 61 provided for the giving of security for the costs of the appeal and section 62 required the Minister to reply to

the notice of dissatisfaction. The appeal was then ready to be launched in this Court. Section 63 required that within two months from the date of mailing the reply the Minister should cause to be transmitted to the Registrar of this Court typewritten copies of certain specified documents. These included the appellant's income tax return, the notice of appeal, the Minister's decision, the notice of dissatisfaction, the Minister's reply thereto and also the notice of "assessment appealed" and all other documents and papers relating to "the assessment under appeal". This shows that the appeal to this Court was an appeal from the assessment. Then section 66 gave this Court exclusive jurisdiction to hear and determine "all questions that may arise in connection with the assessment". That was the subject matter of the appeal to it. The Court was not concerned with the correctness of the Minister's decision but with the correctness of the assessment "under appeal". Finally, section 69 provided that if a notice of appeal was not served or a notice of dissatisfaction was not mailed within the time limited therefor the right of the taxpayer to appeal should cease and the assessment should be valid and binding notwithstanding any error, defect or omission therein or in any proceedings required by the Act. From this it is clear that in the absence of steps by way of appeal the assessment was binding. But, while the appeal to this Court was from the assessment and the issue before it was whether the assessment was correct, it was also provided by section 63(2) that after the filing of the documents referred to in section 63(1) the matter should "thereupon be deemed to be an action in the said Court ready for trial or hearing". I think it may fairly be assumed that the purpose of this provision was to give the appellant all the benefits that an action could afford for attacking the assessment, such as the production of documents, the examination for discovery of an officer of the Crown and the calling of witnesses.

Under this state of the law the proceedings before this Court were both an action and an appeal. Making the proceedings an action enabled the parties to place all the facts relating to the assessment before the Court but this did not prevent them from being an appeal from the assessment. There was a presumption of validity in its favor which might be rebutted by an appellant from it

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but if the requisite steps by way of appeal were not taken it was binding. It was not incumbent upon the Minister to support the assessment. The onus was on the appellant to establish that it was incorrect. Consequently, it was always the appellant who was called upon to open the proceedings. The onus of proof that the assessment was incorrect in fact was on him: *Vide Dezura* v. *Minister of National Revenue* (1). The nature of this onus was clearly described by the Supreme Court of Canada in *Johnston* v. *Minister of National Revenue* (2). There Rand J., speaking also for the Chief Justice and Kerwin J., pointed out that notwithstanding the fact that the appeal to the Court was spoken of in section 63(2) as an action ready for trial or hearing the proceeding was an appeal from the taxation; that since the taxation was on the basis of certain facts and certain provisions of law either those facts or the application of the law was challenged; that every fact found by the Minister must be accepted unless questioned by the appellant; that if he intended to contest any fact on which the taxation rested he might bring evidence before the Court although it had not been before the Minister but the onus was on him to demolish the basic fact. It was also his view that there was no basic change in the proceedings where pleadings were directed and that pleadings could not shift the burden of showing error in the assessment from what it would be without them. It may, therefore, be taken as established that on an appeal to this Court under the law applicable to assessments for years prior to 1946 the assessment was presumed to be valid and the onus of establishing that it was incorrect was on the appellant. This was, perhaps, not a precise statement for while it was proper to say that the onus of proof that the assessment was incorrect in fact lay on the appellant it was not, strictly speaking, correct to say that the onus of showing that it was wrong in law lay on him, for once the facts were brought before the court the question whether in the light of such facts the appellant was subject to taxation under the Act was a question of law for the court to determine.

With the establishment of the Income Tax Appeal Board in 1946 there were several changes in the procedure for appealing from an assessment. Section 69B gave the tax-

(1) (1948) Ex. C.R. 10 at 15. (2) (1948) S.C.R. 486.

payer the right to appeal to the newly constituted Income Tax Appeal Board. This took the place of the appeal to the Minister under the former procedure. But before a taxpayer who objected to his assessment could appeal to the Board he had to serve on the Minister a notice of objection and the Minister had to reconsider the assessment and either vacate or confirm it or reassess and notify the taxpayer. If a notice of objection was not served within the required time the assessment was deemed valid. All matters in connection with the appeal to the Board were to be regulated by the Third Schedule which constituted the Board and regulated its procedure. The Board was a court of record and could require the attendance of witnesses and the production of documents. It had power to dismiss the appeal, make the assessment that should have been made or vacate it and refer it back to the Minister for reconsideration and assessment. On the disposition of the appeal the Registrar of the Board was required to forward a copy of the decision and the reasons therefor to the Minister and the appellant. The appeal to the Income Tax Appeal Board was an appeal from the assessment. Then section 69C provided for an appeal to this Court either by the taxpayer or by the Minister. All matters in connection with this appeal were to be regulated by the Fourth Schedule to the Act. In 1949 the Third and Fourth Schedules to the Income War Tax Act were repealed by section 52(4) of an Act to amend the Income War Tax Act and the Income Tax Act, Statutes of Canada 1949, 2nd Session, chap. 25, and section 52(1) of this amending Act provided that all references in the Income War Tax Act to the Third or Fourth Schedules of that Act should respectively be deemed to be references to Division I or Division J of Part I of the Income Tax Act. The present appeal was brought after the amending Act of 1949 came into effect so that even although the appeal was taken under the Income War Tax Act the procedure for it is governed by Division J, sections 89 and 95, of the Income Tax Act, Statutes of Canada 1948, chap. 52, as amended.

There are, I think, several reasons for accepting the submission of counsel for the appellant that the appeal to this Court from a decision of the Income Tax Appeal Board, whether by the taxpayer or the Minister, is a trial

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de novo of the issues involved therein. While there are several descriptions of the proceedings as an appeal and while it is true that on the appeal the Registrar of the Income Tax Act Appeal Board is required by section 91(1) of the Income Tax Act to transmit to the Registrar of this Court "all papers filed with the Board on the appeal thereto together with a transcript of the record of the proceedings before the Board" there is no provision that the appeal must be based on such record. On the contrary, section 89(3) requires the appellant to set out in the notice of appeal a statement of the allegations of fact, the statutory provisions and reasons which he intends to submit in support of his appeal and section 90(1) calls upon the respondent to serve and file a reply to the notice of appeal admitting or denying the facts alleged and containing a statement of such further allegations of fact and of such statutory provisions and reasons as he intends to rely on. There is nothing in these provisions to restrict the parties to the allegations of fact made before the Board. Additional facts or even different facts may be alleged. Then section 91(2) provides that upon the filing of the material referred to in section 91(1) or 91A and of the reply required by section 90, "the matter shall be deemed to be an action in the court and, unless the Court otherwise orders ready for hearing". This section is almost identical with section 63(2) of the Income War Tax Act. Its purpose is to give the parties the benefits of the proceedings in an action to establish their respective allegations which would not be available in an ordinary appeal. There would be no purpose in these provisions if Parliament intended that the appeal should be heard on the basis of the record before the Income Tax Appeal Board. They contemplate that the issues as defined by the statement of facts and the reply should be tried by this Court according to the processes of an action in this Court. This necessitates a trial *de novo*. While this view lends itself to the possibility that the taxpayer or the Minister may make a different case or defence in this Court from that made before the Board and it may seem anomalous that Parliament should permit this there is nothing in the Act to bar it. The freedom of the Court to deal with the issues raised before it, without regard to the proceedings before the Board, is further indicated by the provision in section 91(3) that any fact

or statutory provision not set out in the notice of appeal or reply may be pleaded or referred to in such manner and upon such terms as the court may direct and by the power given to the court by section 91(4) of disposing of the appeal by dismissing it, vacating or varying the assessment or referring it back to the Minister.

All these considerations lead to the conclusion that the appeal to this Court from a decision of the Income Tax Appeal Board, whether by the taxpayer or by the Minister, is a trial *de novo* of the issues involved, that the parties are not restricted to the issues either of fact or of law that were before the Board but are free to raise whatever issues they wish even if different from those raised before the Board and that it is the duty of the Court to hear and determine such issues without regard to the proceedings before the Board and without being affected by any findings made by it.

I now come to the question of onus and who should be called upon to open the proceedings. The issue on the appeal, whether by the taxpayer or the Minister, is the same as it was under the former procedure, namely, the correctness of the assessment. Where the taxpayer is the appellant, the appeal is in substance, if not in form, an appeal against the assessment. Certainly, that is so when the taxpayer appeals directly to this Court instead of first appealing to the Income Tax Appeal Board as he may now do under section 55(2) of the Income Tax Act. There is, I think, no difference in substance where he has first appealed to the Income Tax Appeal Board for the Board in dismissing his appeal from the assessment has left it in the same condition as it was before with a continuing presumption of validity in its favour. The onus on the appellant taxpayer is thus precisely the same as it was under the former procedure, namely, to establish that the assessment to which he has objected is incorrect either in fact or in law. And the remarks on the subject of the onus under the former procedure are equally applicable here. When the taxpayer challenges the correctness in fact of the assessment the onus of proof that the assessment is erroneous in fact lies on him. But when the validity of the assessment is attacked in point of law it is not, strictly speaking, correct to say that the onus of establishing its

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invalidity lies on the appellant. In such a case there is really no onus on either party, for once the facts have been established, the responsibility for determining the validity of the assessment as a matter of law is solely that of the court. It must decide the question according to the applicable law regardless of the submissions of the parties.

It follows from what I have said that where the taxpayer is the appellant he should be called on to open the proceedings. This was always the practice under the former procedure.

On the other hand, where the Minister is the appellant from the decision of the Income Tax Appeal Board it cannot be said that the appeal to this Court is an appeal from the assessment. There is this further difference, namely, that while the issue in the appeal is the correctness of the assessment, it is for the Minister to establish its correctness in fact and in law. The Board has power under section 83 of the Income Tax Act to vacate or vary the assessment or refer it back to the Minister for reconsideration and re-assessment. It is to be assumed that the Minister's appeal is from a decision by which the Board has exercised one of these powers. Consequently, the assessment has been found erroneous by a court of record and the Minister does not come to this Court with any presumption of its validity in his favour. Indeed, the reverse is true. Thus, subject to the same comments on the use of the term onus as those made previously, the onus is on the Minister to establish the correctness of the assessment. Likewise, it is the Minister who should be called upon to begin.

I now come to the facts. While there was a sharp divergence of evidence on some of them there was no dispute as to others. On February 15, 1944, the appellant became the chairman of a committee representing the 7 per cent preferred shareholders of the Abitibi Power and Paper Company Limited to protect their interests in the reorganization of the Company that was being negotiated by a committee appointed for the purpose by the Premier of Ontario and acting under the chairmanship of the Hon. F. J. Hughes, K.C. The appellant was authorized by his committee to engage counsel for the shareholders and engaged Mr. E. G. Black K.C. of Toronto who acted as

counsel for the committee and the 7 per cent preferred shareholders from February, 1944, to May, 1946. On January 3, 1945, Mr. Black was elected as a member of the committee but never acted in that capacity. On May 10, 1945, the Hughes committee submitted a plan of reorganization of the Company to the Premier of Ontario. Under paragraph 38(*e*) of this plan it was provided that the Company should pay or assume liability for the due payment of the costs and expenses of certain specified committees, of which the 7 per cent preferred shareholders' committee was one, and their respective counsel, "but not including any remuneration to the member of the said committees as such" and it was also stated that the amount of the costs and expenses in each case should be as agreed upon by the Bondholders' Protective Committee and the person entitled thereto or, in default of such agreement, as might be determined by the Supreme Court of Ontario. Mr. Black, after some negotiation, submitted his bill of costs at $75,000 and this was referred to Col. A. T. Hunter, K.C., the Assistant Master and Acting Taxing Officer of the Supreme Court of Ontario, for taxation. On the taxation Mr. Black stated that the amount asked for included not only his legal fees but also remuneration to the members of the Committee for their work. The taxing officer took the view that he was precluded by paragraph 38(*e*) of the plan of reorganization from allowing anything for remuneration of the members of the Committee and, on September 21, 1946, taxed Mr. Black's bill at $20,004.70. On October 22, 1946, Mr. Black wrote to the Abitibi Power & Paper Company stating that he was satisfied to have his account paid as follows, namely, $6,004.70 on or about November 1, 1946, $7,000 in January, 1947, and $7,000 in January, 1948, and assigned to the appellant the sum of $14,000 being the payments due to be made in 1947 and 1948. He gave a copy of this letter to the appellant. On November 19, 1946, the Company wrote to Mr. Black acknowledging receipt of his letter, enclosing a cheque in his favour for $6,004.70 and agreeing to make the payments to the appellant as assigned. The Company sent the appellant the first payment of $7,000 on January 2, 1947, and the second one on January 2, 1948.

We are here concerned with the sum of $7,000 received by the appellant in 1947. The nature of this amount in

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his hands is the sole issue in this appeal. The appellant and Mr. Black gave quite different versions of the reason for the payment. On his income tax return for 1947 the appellant reported it as a gift from Mr. Black but on the hearing before me he attempted several explanations, namely, that Mr. Black had assigned the $14,000 to him to be spent on the development of certain mining claims, that Mr. Black had contributed the money to the development of the claims in consideration of what he had done for him, that Mr. Black had paid him the money to reimburse him for what he had already spent and for what was still necessary to be spent, and that he considered the payment as a gift to him for the development of his mining properties. Mr. Black denied that he had made the assignment as a contribution to the development of the appellant's mining claims and stated that there had never been any suggestion that he should contribute to the financing of the claims or put any money into them. He also said that he had never heard of any such suggestion until after the appellant had given evidence to that effect before the Income Tax Appeal Board and characterized the appellant's evidence that the $14,000 had been paid to reimburse him for past and future expenses in the development of his mining claims as an absolute fabrication. I agree with this characterization and reject the appellant's evidence on this point. The assignment from Mr. Black to the appellant was not a gift or contribution for the development of the appellant's mining claims or connected with them in any way.

Mr. Black's statement of the reason for the assignment was clear cut. I summarize his evidence as follows. When the appellant told him that he had recommended his name to the committee as its counsel and solicitor Mr. Black said that he would be glad to act. There was then no discussion of fees. Later, when the negotiations for the reorganization were nearing completion, at one of the joint meetings of all the committees with the Hughes Committee the appellant raised the question of remuneration for committees. Mr. Hughes said that it had been understood throughout that there would be no remuneration for committees as such but that counsel fees should be on a scale that the committee could get something. After this meeting Mr.

Black told the appellant that while he did not like this arrangement he was prepared to follow it out and see that the committee got something but nothing was then said about the amount. Later, in a conversation with Mr. J. Tory, the solicitor for the 6 per cent preferred shareholders committee, who had charge of certain details of the reorganization, the subject of fees came up and Mr. Black said that he would be satisfied with $5,000 for himself. Mr. Tory said that he would recommend $10,000 to make it $5,000 for the committee. The appellant criticized Mr. Black for the small amount asked and instructed him to make a demand for $50,000. At a meeting of the bondholders' Committee the most that they would recommend was $8,000. This would leave only $3,000 for the committee and was not acceptable to the appellant. Then Mr. Black at the instance of the appellant drew a bill for $75,000. This had to be taxed and the appellant sat beside Mr. Black on the taxation. Mr. Black explained what Mr. Hughes had said, outlined the steps that had been taken by the committee, pointed out that its efforts had resulted in obtaining for their shareholders approximately $2,000,000 beyond the amount of the original offer, urged that the appellant had fought hard for his shareholders and was entitled to something and made it clear that in putting forward his bill at $75,000 he was asking not only for remuneration for himself but also for something for the committee. After written arguments had been put in Col. Hunter issued his certificate on September 21, 1946, that Mr. Black's bill had been taxed at $20,004.70. The appellant was very pleased when Mr. Black told him the amount of the taxation and said that he was going to tell the committee that Mr. Black's fee should be $6,000 instead of $5,000. This change came from the appellant and Mr. Black was glad to accept it. There was then a question as to division of the remuneration so that it would not all be taxable in the one year and it was decided that it might be spread over three years. The appellant agreed with this plan. After the taxation the appellant came in to see Mr. Black practically every day but when he came in on October 22, 1946, his manner was very brusque and he said that he wanted something about his money, that he wanted it assigned to him. Mr. Black was annoyed about his manner, called in his secretary, dictated the letter of

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assignment already referred to and gave it to him. Mr. Black said that the assignment was made to the appellant for the Committee. Shortly after the cheque for $6,004.70 came in the appellant came in to see Mr. Black and told him that in addition to the $14,000 he wanted $3,500 out of Mr. Black's $6,000 claiming that Mr. Black had agreed to divide his legal fees with him. Mr. Black told the appellant that there was nothing in the $6,000 for him. There was a sharp disagreement between them and from then on they were not on good terms. Mr. Black told the appellant to take all his papers out of his office and that he did not want to have anything further to do with his business.

The appellant swore that the money he received from Mr. Black had nothing to do with his work as a member of the committee. I do not accept his denial. On the contrary, I accept the evidence of Mr. Black that he made the assignment because of his promise to the appellant to give the committee a share of the fees to compensate the committee and, because he had told the appellant that he would be satisfied with $6,000 for himself, he gave him the surplus. The $14,000 was turned over to the appellant as remuneration for the committee. Mr. Black said that he was obligated to give the surplus over what he had agreed to take to the appellant. He never considered whether it was a legal obligation or not. If the appellant had sued him perhaps he would not have won. He never gave it a thought. He knew that the appellant was not going to sue him for the appellant was going to get what he had promised. It is clear from Mr. Black's evidence that he paid the $14,000 to the appellant as remuneration for the committee. I also find that the appellant knew that the $14,000 was paid to him for services rendered by the committee. It is also clear that the appellant considered that he was entitled to this amount himself as remuneration for his services. This appears from the appellant's own statements made prior to his appeal to the Income Tax Appeal Board. After he had failed to extract anything from Mr. Black out of the $6,000 which he had retained for himself he wrote several letters of complaint to Mr. Black without any mention of his dispute about the $6,000 and then, on April 8, 1948, he wrote to the Law Society of Upper Canada laying a complaint

against Mr. Black. In this letter, after referring to Mr. Black's legal services to the shareholders committee, he said:

> Mr. Black made a definite agreement that all "legal fees" which he might receive from such companies was to be divided equally between himself and the writer. All moneys received for the committee efforts was to be solely the property of the writer in addition to the fifty per cent of whatever were to be "legal fees".

It is clear from this letter that the appellant considered that Mr. Black's fee was divisible into two parts, namely, that which he had set for himself as his fee and which the appellant described as "legal fees", and that which was in excess of such fee and which the appellant describes as moneys received for the committee efforts. The appellant considered the latter part, being the $14,000, solely as his property. That he considered this amount as compensation to himself for his committee work is clear from the second letter which he wrote to the Law Society on April 23, 1948. Mr. Black had written to the Law Society in reply to the appellant's letter in the course of which he said that he had agreed with the appellant that he would make an allowance from his counsel fee to remunerate members of the committee, and a copy of this letter had been sent to the appellant. The appellant, after referring to this statement in Mr. Black's letter, said:

> I can state and you can check with Mr. John D. H. Tory, that Mr. Black (without consulting with me and knowing that our agreement called for an even split in legal fee) did quote to Mr. Tory that he set his legal fee at $5,000. That was at a time when compensation to me for committee work had not yet been decided. Please remember that Mr. Black had agreed all over that amount set as legal fee was to be mine alone and he was in no way to share any part. Mr. Black, therefore, was content to obtain $2,500 in full for all his services. The balance to me.

On the evidence, I find that the sum of $14,000 was paid to the appellant and received by him as remuneration for the services of the committee and kept by him as remuneration for his own services as chairman of the committee.

The question whether the sum thus received was taxable income in the appellant's hands is not free from difficulty. Counsel for him contended that the payment could not as a matter of law be regarded as remuneration for services, that such a possibility was precluded by paragraph 38(*e*) of the plan of reorganization and excluded from consideration in the reasons for judgment of the taxing officer, that

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it could not be remuneration for services simply because Mr. Black so described it, that before a sum could be remuneration for services the rationship between the payer and the recipient had to be such that the services were rendered by the recipient to or for the payer and that there was no such relationship between Mr. Black and the appellant. Counsel, therefore, submitted that the sum was either an investment by Mr. Black or a voluntary gift to the appellant personal to him and not taxable in his hands. My finding that the assignment was not a gift or contribution for the development of the appellant's mining claims or connected with them in any way disposes of the first contention that the payment was an investment, but the other argument cannot be so categorically rejected. Counsel submitted that Mr. Black was under no legal obligation to make any payment to the appellant, that his promise to pay him everything over the sum of $5,000, and later $6,000, was not enforceable, that since there was no legal reason for the payment it must as a matter of law be regarded as a voluntary gift, that it was made to the appellant for reasons of friendship and personal relations, and was therefore personal to him and not taxable in his hands within the principle of such cases as *Cowan* v. *Seymour* (1) on which case counsel mainly relied. There the appellant acted as secretary of a company without remuneration from the date of its incorporation until his appointment as its liquidator. When the liquidation was completed there was a sum in hand, after discharge of all liabilities, which according to the company's memorandum of association was divisible amongst the ordinary shareholders. By a unanimous resolution they voted the sum in equal shares to the chairman of the company and to the appellant. The appellant contended that this payment was a voluntary gift, that his duties as secretary and liquidator had terminated before the gift was made and that it was not taxable. It was held by the Court of Appeal, reversing the judgment of Rowlatt J. in the court below, that the sum did not accrue to the appellant in respect of an office or employment of profit but was made after the employment was ended and was in the nature of a testimonial to him for what he had done and was not taxable.

(1) (1920) 1 K.B. 500.

Another case relied upon was that of *Reed* v. *Seymour* (1) where it was held that the award of the proceeds of a benefit match to a cricketer was not a profit accruing to him in respect of his office or employment but was a personal gift to him and not assessable to income tax.

In my opinion, the decisions referred to are not applicable to the present case. I do not agree that the payment to the appellant was in the nature of a present or testimonial to him or that Mr. Black gave him the money for any consideration of friendship or personal reasons. Mr. Black made the assignment pursuant to an agreement which he considered binding on himself and under which the appellant considered himself entitled. The appellant was anxious to receive remuneration for his services on the committee but because he could not, under the plan of reorganization, get any remuneration directly from the company, Mr. Black undertook to obtain it for him indirectly through the medium of his counsel fees. There can be no doubt that if the appellant had not pressed for remuneration for his services there would have been no agreement by Mr. Black to make him an allowance out of his counsel fees or to submit his account for taxation. The reality is that Mr. Black made himself a conduit pipe between the appellant and the company through which remuneration for services flowed to him. The finding that the money was paid and received as remuneration for services concludes the matter against the appellant's claim. It does not then matter what the source of the payment was or that it was made by someone other than the person for whom the services were rendered. Nor does it matter whether it was made pursuant to an enforceable obligation or was voluntary: *Vide Herbert* v. *McQuade* (2). The sum was a profit or gain from the appellant's activity on the committee and it came to him because of and for such activity and would not have come otherwise.

Under the circumstances, the sum was properly included in the appellant's assessment as an item of taxable income and his appeal must be dismissed with costs.

Judgment accordingly.

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(1) (1926-7) 11 T. C. 625.

(2) (1901) 4 T.C. 503.