BETWEEN:

RONALD K. CUMMING .....APPELLANT;

AND

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

Ottawa 1967 Sept. 26-28 Nov. 8

Income tax—Practice of profession—Anaesthetist—Services rendered at hospital—Administrative work done at home—Automobile expense of travel between home and hospital—Whether deductible—Whether "personal and living expenses"—Income Tax Act, s. 12(1)(h).

Appellant, a doctor, carried on practice exclusively as an anaesthetist, rendering all of his services to patients at the Ottawa Civic Hospital. As there was no place in the hospital where the administrative functions of his practice, billing etc., could be carried on he performed most of this work at his home about half a mile away, using an automobile to travel between his home and the hospital.

Held, since appellant could not live at the hospital nor carry out all of his activities there he had to have a place away from the hospital for the successful carrying on of his practice, and therefore the expense of maintaining and operating the automobile in travelling between the two places for the purpose of his practice was a deductible expense and not a "personal and living expense" within the meaning of s. 12(1)(*h*) of the *Income Tax Act*. *Newsom v. Robertson* (1952) 33 T.C. 452, distinguished.

INCOME TAX APPEALS.

Gordon F. Henderson, Q.C. and *Antoine de L. Panet* for appellant.

M. A. Mogan and *R. D. Janowsky* for respondent.

THURLOW J.:—The issue in these appeals, which are from re-assessments of income tax for the years 1962 and 1963 respectively, is the extent of the deductions to which the appellant is entitled, in computing his income, for the expenses of operating an automobile and for allowances in respect of its capital cost.

The appellant is a physician and is engaged in practicing exclusively in his specialty as an anaesthetist. He holds what is referred to as an appointment to the staff of the Ottawa Civic Hospital and it is there that he renders all of his services to his patients. But there are no emoluments paid to him by the hospital. His income receipts from his practice consist of the amounts which the patients pay him for his services. The billing of these patients and most of

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what may be classed as the administrative work involved in securing payment for his services is done at his home, which is located about half a mile from the hospital. In both years the appellant used an automobile for the purpose of travelling between his home and the hospital and the principal dispute in the appeals turns on the question whether expenses incurred in maintaining and operating the automobile for this purpose are properly deductible in computing his income from his practice. The Minister's position is that the expenses of ordinary travelling between these points at the beginning and end of a day's scheduled work at the hospital and of travelling between them in response to a call at a time when the appellant happens to be at his home (as opposed to travelling to the hospital on receipt of a call when actually engaged in working on his records at home) are not "incurred for the purpose of gaining or producing income" from the appellant's business within the meaning of the exception to section 12(1)(*a*) of the *Income Tax Act* but are "personal or living expenses" the deduction of which is prohibited by section 12(1)(*h*) of the Act. There is also an issue of fact to be determined as to the extent to which the expenses incurred and the use made of the automobile in the years in question were referable to travelling concerned with the appellant's practice as opposed to travelling for purposes in no way referable to it.

In general the services rendered by the appellant in connection with the administration of anaesthetic for a scheduled operation consist in visiting the patient in his room in the hospital the evening before the operation for the purpose of determining the particular anaesthetic and the quantity to be administered and other details, administering the anaesthetic immediately prior to and during the operation, visiting the patient to determine his condition *vis-à-vis* the anaesthetic prior to his leaving the recovery room and visiting the patient again about twenty-four hours afterwards for the purpose of checking on the effects of the anaesthetic and ascertaining whether they have completely disappeared. In the case of an emergency operation the appellant's services are the same save that the pre-operative visit may not be possible. In addition the appellant and other anaesthetists render emergency resuscitative services for patients suffering from impairment of

the respiratory or circulatory systems when occasion to do so arises. There are some twenty-six different rooms or areas in the hospital where anaesthetics are administered and at the material times there were fifteen anaesthetists engaged in administering them at the hospital. The appellant's services to his patients were thus rendered in a variety of different places within the hospital itself including the various operating rooms, the recovery rooms and the patients' rooms.

A minor portion of the equipment which the appellant used in rendering his services was his own and this he carried with him when visiting the patients. Most of the equipment used belonged to and was provided by the hospital which also provided all the anaesthetic and other medical supplies which he required.

The appellant had a locker at the hospital but no office or desk was provided for him and there was no place at the hospital where the administrative functions of his practice could be carried out. The hospital maintained an operation booking office which produced daily a list of operations scheduled for the next day from which the appellant obtained each evening information respecting the cases to which he had been assigned for the following day and he proceeded to carry out his routine with respect to each patient on the basis of that information. In addition he attended to emergency cases when called on whenever they might arise. For the latter purpose the hospital maintained a duty roster requiring two duty anaesthetists and what was referred to as a "back up" anaesthetist to be available on call for specified periods. Even when on call for emergencies the appellant was not required to remain at the hospital when not actually engaged with a patient. There was a library where he might study and a lounge where he might sit if he wished. There was also a couch in the office of the department of anaesthesia where he might take a nap, if he could, between cases. These facilities, however, were not for his use alone but were provided for the use of all the anaesthetists on the hospital staff.

The appellant's routine was to go to the hospital at about 6:30 each evening to obtain the schedule of operations for the following day and to visit in their rooms the patients to whom he was scheduled to administer anaesthetic the following day and patients to whom he had

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administered anaesthetic the previous day. This usually took him until about 8:00 o'clock when he would return to his home. The following morning he would return to the hospital in time for the first scheduled operation at which he was to serve and he would remain there until his schedule for the day was completed unless there was a gap in his schedule or cancellations should occur leaving him time to go home to work on his records or to study. If a gap was not long enough to make it worthwhile to go home he might use the time in visiting patients to whom he had administered anaesthetic on the previous day. The schedule for the day was normally completed by 4:00 o'clock in the afternoon when he would again return to his home. Some days there would be no opportunities to go home before the schedule was completed while on others there might be several.

Emergency work was, of course, unscheduled and was in addition to the routine of scheduled or elective work. In emergency cases the call for his services might come at any time of the day or night and whether on weekends or other days. It might occur when he was at home or when he was elsewhere whether for social or business reasons. In such cases he was expected to go to the hospital with all necessary dispatch. When he was on emergency call duty, if not already at the hospital in connection with other cases, he was usually at his home and it is there that he was called.

When going to the hospital the appellant carried a booklet in which he would make notes of the names and locations in the hospital of patients that he was to attend and he also carried a supply of cards on each of which, whenever an opportunity to do so occurred, he would enter the name of a patient, his address, next of kin, age, telephone number, location in the hospital, date of operation, surgeon's name, the operation performed, and the time of day, the anaesthetic administered, information as to any insurance coverage which the patient might have and possibly other details concerning the particular patient. From the information on these cards, the appellant would later prepare and send out a bill to the patient for his services. The amount of the fees charged would also be entered on the card and subsequent payments would be recorded on it as well. The work of completing the entries of charges on the cards, making up the bills, preparing insurance claim

forms, corresponding with insurance companies, receiving and making entries with respect to payments, preparing and sending out receipts and follow-up bills both for unpaid accounts and for balances not paid by the insurer, the making up of bank deposits, the paying of bills or expenses and the keeping of records of receipts and expenditures, was all done at his home, by the appellant himself and his wife.

The appellant's home was built to serve his needs and to his specifications. In an area of the building designated on its plan as a den, there was a built-in secretary where the appellant kept his business records and stationery, text books and periodicals and other office equipment and it was there that the work of maintaining the records, sending out accounts, and other office work was done. This was also the part of his home where the appellant's professional study and writing were done. His wife estimated that he works about twelve hours a week on his accounts and that she also works about twelve hours a week attending to opening the mail, posting payments, preparing and sending out receipts and follow-up bills, telephone calls to patients who have not paid their accounts and other details.

When patients call at the house, whether to pay bills or to have insurance forms completed, which is not encouraged and is infrequent, they are received in this room but they are not treated there. The room is also said to be out of bounds to the appellant's children.

This was the appellant's system during 1962, the first of the taxation years in question. In 1963 there was a difference in the original billing and collection phases of the operation. During that year the appellant submitted the necessary information to DARMCO Limited, a company organized to render and collect physicians' accounts, which thereupon billed the patients on the appellant's behalf, collected the payments and accounted to the appellant for them. When DARMCO Limited was unable to collect an account it was returned to the appellant who thereafter took steps to collect it by re-billing the patient, telephoning him and if necessary putting the account into the hands of a collection agency. In other respects the operation was carried out in the same way in both years in question.

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In both years the appellant maintained two automobiles one of which, a Vauxhall, was used generally by his wife and by him only when the other was undergoing repairs or when for some reason it was convenient for him to use it. The expenses of operating this car do not enter into the problem. The other car, a 1961 Chevrolet station wagon, was used by the appellant in travelling to and from the hospital, to the bank or to the DARMCO office or elsewhere in connection with his practice and to some extent as well, for purposes not connected with his practice. The appellant considered it to be mandatory for him to have a car available for his use when required to go to the hospital in response to emergency calls and he also said that apart from this without a car the carrying on of his practice would be more complicated and his office work would pile up. There is evidence that the other anaesthetists practicing in Ottawa also used automobiles to travel to and from the hospital and that the expenses of operating an automobile for that purpose were regarded as being properly deductible for the purpose of computing profit from the practice on commercial accounting principles.

In his return for the year 1962 the appellant claimed deductions of $1,454.01, in respect of the use of the automobile in his practice this being 90 per cent. of a total amount of $1,615.57 made up of $993.06 for operating expenses and $622.51 for capital cost allowance. For the year 1963 the appellant claimed to deduct $1,002, being 90 per cent. of $1,113.33 of which $677.57 was for operating expenses and $435.76 was for capital cost allowance. In respect of each of the two years the Minister in assessing the appellant disallowed the whole of the amount claimed for capital cost allowance and all but $100 of the amount claimed for operating expenses.

It is common ground that the appellant's practice is a business within the meaning of that expression as defined in the *Income Tax Act*. That definition reads:

> 139(1) In this Act,
>
> . . .
>
> (*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

As this definition makes it clear that "business" does not include an office or employment[1] cases such as *Ricketts v. Colquhoun*,[2] *Mahaffy v. M.N.R.*[3] and *Luks v. M.N.R.*,[4] in each of which particular statutory provisions relating to the computation of income from an office or employment were under consideration, have no application and indeed none of these cases was relied on as governing the present case. The case of *Pook v. Owen*[5] arose under the same statutory provision as *Ricketts v. Colquhoun* and as I see it, is inapplicable for the same reason. The statutory provisions on which the present case is to be determined are, in addition to the definition already cited, section 4 of the *Income Tax Act*, which defines income from a business for a taxation year as being, subject to the other provisions of Part I of the Act, "the profit therefrom for the year" and paragraphs (*a*) and (*h*) of section 12(1) of the Act. These read as follows:

> 12(1) In computing income, no deduction shall be made in respect of
>
> (*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, . . .
>
> (*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.

It appears to have become established in England, as well as in Rhodesia and in some other parts of the Commonwealth, that where a professional man lives at a distance from the office or chambers where he carries on his practice the expenses of travelling between his home and his office or chambers are not to be regarded as having been incurred "wholly and exclusively" for the purposes of his practice but on the contrary are personal or living expenses, even though he may do at his home a considerable portion of the work by which his income is earned.

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[1] Income from employment is specifically defined in section 5 of the *Income Tax Act* and that section goes on to prohibit any deduction therefrom whatsoever save what is specifically permitted by certain particular paragraphs of section 11.

[2] [1926] A C 1.

[3] [1946] S C R 450

[4] [1959] Ex. C R. 45.

[5] [1967] 2 All E R 579

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Thus in *C. v. Commissioner of Taxes*[6] Macdonald J.A. speaking for the Appellate Division of the High Court of Rhodesia described the situation as follows at page 141:

> A taxpayer who earns his income in several different places cannot perform the impossible feat of living in all those places at the same time. He will normally choose to live in one of the places where he earns income. The cost of travelling between his home and business in that place are, for reasons which are, to a certain extent, historic and are in modern conditions somewhat artificial, regarded as "living expenses"; see *Newsom v. Robertson, supra.* Journeys for business purposes between that place and the other places in which "income" is earned are not made from choice but of necessity if such income is to be earned and generally speaking, it is not possible, without doing violence to the plain meaning of words, to describe the expense of making these journeys as a "living", "domestic" or "private" expense. If, in the particular circumstances of the case, such expense can be properly described as "domestic or private", then, of course, no deduction may be made.

In the *Newsom v. Robertson*[7] case the Court of Appeal in England had considered the case of a barrister who had chambers in London where he carried on his practice but resided at Whipsnade where he maintained a library and worked on professional matters during the evenings and weekends in term time and throughout the week days as well during the long vacation. He claimed deductions in respect of the expense of travelling between his residence and his chambers both in term time and during the vacation but the Court denied both.

Somervell L.J. said at page 462:

> Mr. Tucker for Mr. Newsom based his argument naturally on the finding that Mr. Newsom's profession was exercised partly at the Old Rectory. Many examples were given in the course of the argument, but the following would be I think a fair example of the type of case to which Mr. Tucker would assimilate the present.
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> A professional man, say a solicitor, has two places of business, one at Reading and one in London. He normally sees clients and does his professional work at Reading up till noon and then comes to London. He may live at Reading or in London or at neither. I would have agreed with Mr. Tucker that the journeys to and fro between Reading and London were deductible within the Rule. He is carrying on one profession partly in London and partly at Reading. It is therefore necessary to examine in the light of the facts what is meant by the finding that he exercises his profession at the Old Rectory and what are the implications of the fact that the Inland Revenue have recognised that he uses a room there for the purposes of his profession.
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> One thing is quite clear, that Whipsnade as a locality has nothing to do with Mr. Newsom's practice. That differentiates it from the case of the solicitor which I have put. If he had found a house that suited

[6] [1966], S.A.T.C., 127.

[7] (1952) 33 T.C. 452.

him in Hertfordshire or Oxfordshire, everything would have gone on in precisely the same way. There is, I think, force in Mr. Talbot's criticism of the form of the Commissioners' finding in the Crown's favour, which I have read, namely, that there was a dual *purpose*. Mr. Newsom's purpose in making the journeys was to get home in the evenings or at weekends. The fact that he intended to do professional work when he got there and did so does not make this even a subsidiary "purpose" of his profession. An author who has to go to the seaside to recuperate may write an article while he is there, but in ordinary language that was not the purpose of the journey. He was exercising his profession there, but some authors who do not depend on libraries or local colour can do that anywhere. The places where they exercise their profession would be irrelevant to their profession and I cannot see how the cost of moving from one to the other could be said to be wholly and exclusively laid out for the purpose of their profession. It would be laid out because the author found it pleasant to have, say, two homes. The position would not, I think, be affected by the fact that the author might be entitled to a study allowance in one or perhaps both of his homes.

The conclusion of the Special Commissioners with regard to the expenses in term time seems to me to be right in law. I would myself have doubted whether the journeys to and fro were for the purposes of the profession in any sense. If they were, then in my opinion they were a second and subsidiary purpose.

He also said at page 463:

The Commissioners accepted that a practising barrister need not have chambers and can carry on his profession anywhere he pleases. That is unusual in London, at any rate, and anyhow is not this case. Mr. Newsom had chambers in Lincoln's Inn. They remained open in the vacation. I think they remained his professional base although for his own convenience he had papers sent down from there, or possibly on instructions direct by solicitors, to Whipsnade. The learned Judge held that the position throughout the period of assessment must be taken as a whole. So far as this case is concerned, I agree. There might, of course, be cases where *quoad* travelling expenses the position for one period of the year might differ from the rest of the year. The learned Judge based his decision on what I may call the principle of a dual purpose. He had the authority for that principle not only in the words "wholly" and "exclusively" but in a statement in a judgment of this Court in *Bentleys, Stokes & Lowless v. Beeson,* [1952] 2 All E.R., pages 82, 87. I agree with the learned Judge's reasoning though, as I have stated, I doubt whether the taxpayer in the present case reaches this stage. I therefore would dismiss the appeal.

Denning L.J. said at page 463:

In the days when Income Tax was introduced, nearly 150 years ago, most people lived and worked in the same place. The tradesman lived over the shop, the doctor over the surgery, and the barrister over his chambers, or, at any rate, close enough to walk to them or ride on his horse to them. There were no travelling expenses of getting to the place of work. Later, as means of transport quickened, those who could afford it began to live at a distance from their work and to travel each day by railway into and out of London. So long as people

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had a choice in the matter—whether to live over their work or not—those who chose to live out of London did so for the purposes of their home life because they preferred living in the country to living in London. The cost of travelling to and fro was then obviously not incurred for the purpose of their trade or profession.

Nowadays many people have only a very limited choice as to where they shall live. Business men and professional men cannot live over their work, even if they would like to do so. A few may do so, but once those few have occupied the limited accommodation available in Central London, there is no room for the thousands that are left. They must live outside, at distances varying from 3 miles to 50 miles from London. They have to live where they can find a house. Once they have found it, they must stay there and go to and from it to their work. They simply cannot go and live over their work. What is the position of people so placed? Are their travelling expenses incurred wholly and exclusively for the purposes of the trade, profession, or occupation? I think not. A distinction must be drawn between living expenses and business expenses. In order to decide into which category to put the cost of travelling, you must look to see what is the base from which the trade, profession, or occupation is carried on. In the case of a tradesman, the base of his trading operation is his shop. In the case of a barrister, it is his chambers. Once he gets to his chambers, the cost of travelling to the various courts is incurred wholly and exclusively for the purposes of his profession But it is different with the cost of travelling from his home to his chambers and back. That is incurred because he lives at a distance from his base. It is incurred for the purposes of his living there and not for the purposes of his profession, or at any rate not wholly or exclusively; and this is so, whether he has a choice in the matter or not. It is a living expense as distinct from a business expense.

On this reasoning I have no doubt that the Commissioners were right in regard to Mr. Newsom's travelling expenses during term time. The only ground on which Mr. Millard Tucker challenged their finding during term time was because Mr. Newsom has a study at his home at Whipsnade completely equipped with law books and does a lot of work there. The Commissioners did not regard this as sufficient to make his home during term time a base from which he carried on his profession, and I agree with them. His base was his chambers in Lincoln's Inn. His home was no more a base of operations than was the train by which he travelled to and fro. He worked at home just as he might work in the train, but it was not his base.

Romer L.J. put the matter thus at page 465:

> Now it is, of course, true that on days when Mr. Newsom has to appear in Court in the Chancery Division the expense of his journey to London from Whipsnade is incurred for the purpose of enabling him to do so in the sense that if he did not come to London he could not earn his brief fee. But if this view of the position were sufficient to justify the deduction of his fares to London for Income Tax purposes every taxpayer in England whose profits are assessable under Schedule D could claim as a permissible deduction his expenses of getting from his place of residence to his place of work. On the other hand, it could scarcely be argued that the cost of going home at the end of the day would be similarly eligible as a deduction and it would be a curious

result of Rule 3 that the morning journey should qualify for relief but that the evening journey should not. Mr. Newsom, in a letter to the Inspector of Taxes, frankly disclaimed any right to relief founded merely on the ground of having to proceed from his home to his place of work and conceded that a man's "profession is not exercised until he arrives at the place at which it is carried on". In my judgment this proposition is, in general, true Moreover, it cannot be said even of the morning journey to work that it is undertaken in order to enable the traveller to exercise his profession; it is undertaken for the purpose of neutralising the effect of his departure from his place of business, for private purposes, on the previous evening. In other words, the object of the journeys, both morning and evening, is not to enable a man to do his work but to live away from it.

Is the position altered, then, by the fact, as found by the Commissioners, that Mr. Newsom works in his house at Whipsnade as well as in his chambers in Lincoln's Inn? I am clearly of opinion that it is not. It seems to me impossible to say that this element assimilates the case to that of a man who possesses two separate places of business and, for the furtherance and in the course of his business activities, has to travel from one to another. The appellant could, if he liked, carry on the whole of his profession in London, though he certainly could not do so at Whipsnade if only for the reason that the Courts of the Chancery Division do not sit there. It seems to me accordingly that it is almost impossible to suggest that when the Appellant travels to Whipsnade in the evenings, or at week-ends, he does so for the purpose of enabling him "to carry on and earn profits in his" profession—let alone that he does so exclusively for that purpose. That purpose, as I have said, could be fully achieved by his remaining the whole of the time in London. He goes to Whipsnade not because it is a place where he works but because it is the place where he lives and in which he and his family have their home. Even busy barristers occasionally have an evening free from legal labour, and I feel sure that if Mr. Newsom were lucky enough to have one he would not remain in London on the ground that there was no work to take him to Whipsnade.

Whether or not the reasoning of this decision is applicable in Canada, where the imposition of federal income tax has a history of but fifty years, and where the expression "not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, etc." does not appear in section 12(1)(*a*) of the present *Income Tax Act*, is a matter on which I have some doubt. In the absence of such a decision it would not have occurred to me to think of expenses of operating an automobile for the purpose of getting to a place where the taxpayer's services are to be rendered and returning therefrom were in any ordinary sense "personal or living expenses", nor would it have occurred to me to think that the expenses of the appellant in the circumstances described in this case in travelling between his home, where the administrative side of his practice was carried out, and the hospital, where his

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medical services were rendered, were not incurred by him for the purpose of gaining or producing income from his business. But, as I see it, the applicability or otherwise under the Canadian statute of the opinions expressed in *Newsom v. Robertson* as to the expenses there in question being personal or living expenses is a question which it is unnecessary to decide for in my view the decision rests on the particular facts of the case as well as on the applicable statutory provision and besides the differences in the statutory provisions the facts of the present case present a very different picture. It might well be observed of the barrister in the English case that his living at such a distance as to involve both car and train journeys to get from his home to his professional chambers was the result of a choice made for his personal, rather than his professional, reasons and that this coloured the expense of travelling between these points with a personal character. Here on the contrary, I would think that the appellant's choice of a location for his home about half a mile from the hospital was dictated either wholly or at least partially by the desirability for reasons relating to his practice of his living conveniently near to the place where his services were required as opposed to personal preferences for that over any other location in Ottawa or elsewhere. Somervell L.J., appears to me to have made this point when he said at page 462:

> One thing is quite clear, that Whipsnade as a locality has nothing to do with Mr. Newsom's practice. That differentiates it from the case of the solicitor which I have put. If he had found a house that suited him in Hertfordshire or Oxfordshire, everything would have gone on in precisely the same way.

Romer L.J. also appears to me to have had the same consideration in mind when he observed at page 465:

> The appellant could, if he liked, carry on the whole of his profession in London, though he certainly could not do so at Whipsnade if only for the reason that the Courts of the Chancery Division do not sit there.

I doubt therefore, as well, that the reasoning of this case has any clear application to facts such as I have described in the present case.

However, even assuming that the reasoning of the case may be applied for resolving the present problem, I am of the opinion that it does not support the Minister's position. The reasoning poses the question of the location of

the base of the taxpayer's operation and proceeds to its conclusion after determining this point. On it the Minister's contention was that the base of the appellant's operation was the hospital, where the appellant rendered the services for which he was paid. It was, however, admitted in the course of argument that the appellant conducted part of his practice at his home, that the nature of the business was such that the bookkeeping and financial activities had to be carried on at a location different from that where the patients were treated and that there were no office facilities available to him at the hospital where he might have carried out this part of his business.

While I think it might be said in a particular sense that the appellant exercised his profession at the hospital, as I see it, he had no base of his practice there. His services were not performed in any one place in the hospital but in the numerous areas in which anaesthetics were administered, in the recovery rooms, in the areas where resuscitation procedures were carried out and in the various patients' rooms. The appellant had no space there but a locker that he could call his own. There was a cot in the office of the department of anaesthesia where he might go for a nap if he wished and time permitted between cases. There was also a library where he might study and a lounge where he could sit when not engaged with a patient. But these were not his nor were they for his use alone. They were for the use of all the anaesthetists. Nor had he an office or even a desk there to which he could repair to do the administrative work of his practice when he was not immediately engaged with a patient. The operations booking office was also a place to which he might go for some purposes such as to get a copy of the schedule of operations for the next day but I do not regard any of these places or the aggregation of them as having been any more in the nature of a base for his operation of practicing his profession than any other room which he may have visited for a purpose associated with the carrying out of his professional activity. And if the whole hospital were to be considered his base I fail to see why the area consisting of the whole hospital plus his house and the distance between them could not just as readily be said to be the base of his practice. As I view the matter the appellant had no more of a base for his professional business at the hospital than a

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barrister can be said to have at a court house where he attends frequently as required and in the course of a day may have occasion to be engaged in one or more court rooms on one or more cases and incidently to spend some time in the barristers' robing room and possibly in the court registry office as well. In my view therefore there is no basis for holding that the base of the appellant's practice within the reasoning of *Newsom v. Robertson* was at the Ottawa Civic Hospital.

In my opinion the base of the appellant's practice, if there was any one place that could be called its base, was his home. This was the place from which he was called when required and whence he set forth to serve patients, whether by scheduled appointment or in emergencies. It was the place where the records of his practice were kept, where he worked on them and where his studying for particular cases and for the purpose of keeping up with developments in his specialty was done. It was the place to which he returned during the day whenever the time available was long enough to enable him to make the trip and do some work of the kind which he did there. Indeed, though in fact he went nearly every day, he had no occasion to go to the hospital at all in connection with his practice except when there was some service to be rendered to a patient there. And when he had no work to do there he had no place of his own or base of his practice to repair to but his home where the administrative side of his practice was carried out.

It seems to me that if the appellant had not found it convenient to carry out at his home that part of the work of his practice in fact done there and had maintained an office for the purpose, whether near to or at some distance from the hospital, there could have been little doubt that such office was the base of his practice and that both the reasonable expense of maintaining it and the expense of travelling between it and the hospital would have been expense of his business. The result is, I think, the same where the office, such as it was, was at his home and the work was done there. In the present case it seems to me to be the only single place which could be regarded as the base from which his professional operation was carried on. The case is thus not like that of the barrister travelling from his home to his professional chambers—which, in

Newsom v. Robertson was the base of his operation—but resembles more closely that of the same barrister's travelling between his chambers and the courts, the expense of which, had it involved expense, would, I apprehend, not have been regarded as personal or living expense and would, I also think, have been allowable as a deduction even under the stringent prohibition of the English statute. As I view the matter therefore *Newsom v. Robertson* affords no guide for the determination of the present case and it seems to me to be necessary to reach a conclusion by applying the words of section 12(1)(*a*) and 12(1)(*h*) of the Act without assistance from the jurisprudence of other countries.

In my view, since the appellant could not possibly live in or over the hospital so as to incur no expense whatever in getting to and from it when required and since he could not even carry out at the hospital all the activities of his practice necessary to gain or produce his income therefrom, it was necessary for the successful carrying on of the practice itself that he have a location of some sort somewhere off the hospital premises. This necessity of itself carried the implication that travel by him between the two points would be required. Where, as here, the location off the hospital premises was as close thereto as it might reasonably be expected to be from the point of view of his being available promptly when called as well as from the point of view of economizing on the expense of travelling between the two points it is, I think, unrealistic and a straining of the ordinary meaning of the words used in the statute to refer to any portion of the expense of travelling between these points in connection with his practice as "personal or living expenses" and this I think is so whether the taxpayer lives at or next door to his location off the hospital premises or not. There may no doubt be cases where a further element of personal preference for a more distant location has an appreciable effect on the amount of the expense involved in travelling between the two points but I do not think such an element is present here. In the appellant's situation there is, in my view, no distinction to be made either between journeys from his home to the hospital and returning therefrom in the course of his scheduled daily and evening routines and similar journeys made in response to emergency calls or between journeys

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of either of these types and those made either in response to a call when he was working on his records at home or from the hospital to his home for the purpose of working on his records and then returning to the hospital to attend another patient. In my view whenever he went to the hospital to serve his patients he was doing so for the purpose of gaining income from his practice and the expenses both of going and of returning when the service had been completed were incurred for the same purpose. All such expenses, in my view, fall within the exception to section 12(1)(*a*) and are properly deductible and none of them in my opinion can properly be classed as personal or living expenses within the prohibition of section 12(1)(*h*).

There remains, however, the question of how much of the amounts claimed by the appellant as deductions was properly referable to the appellant's use of the automobile in question in his practice and how much was referable to his use of the automobile for other purposes.

The evidence indicated that the expenses claimed were the expenses of one car, the 1961 Chevrolet, used principally by the appellant in connection with his practice and that the Vauxhall was maintained for his wife's use though on occasion the appellant would use it. It appears from the information in the vouchers accompanying Exhibits 16 and 17 that the Chevrolet travelled 8,071 miles in the period of about one year between January 24, 1962 and January 18, 1963 and a further 5,505 miles in the six months' period between January 18, 1963 and July 15, 1963. It also appears from the vouchers that an item of $440 paid to Cockwell Body Shop and an item of $25.75 paid to Carling Muffler Ltd. included in the expenses claimed for 1962 were in respect of the Vauxhall and there is no explanation of how these became referable to the appellant's practice. In the course of argument Mr. Mogan for the Minister suggested 2,000 miles a year as an estimate of the mileage travelled for the purposes of the appellant's practice and on the basis of the appellant's evidence that five round trips from his house to the hospital per day would be a fair average, I would not regard any more than 2,000 miles per year of the mileage travelled by the car as being referable to the practice. Deducting from the total expenses of $993.06 for the year 1962 the amounts of $440 and $25.75 above mentioned, and discounting the balance of 75 per

cent. in respect of operation of the car other than for the purposes of the practice I assess the expenses of operating the car for the purposes of the practice in 1962 at $130.

On the same rough and ready basis I fix $170 of the total expenses of $677.57 as the proportion of the 1963 expenditures attributable to the operation of the car for the purposes of the practice.

The appellant's claims for capital cost allowances, however, must, I think, be dealt with on a somewhat different basis. With respect to these claims section 20(6) provides as follows:

> 20(6) For the purpose of this section and regulations made under paragraph (*a*) of subsection (1) of section 11, the following rules apply:
>
> . . .
>
> (*e*) Where property has, since it was acquired by a taxpayer, been regularly used in part for the purpose of gaining or producing income therefrom or for the purpose of gaining or producing income from a business and in part for some other purpose, the taxpayer shall be deemed to have acquired, for the purpose of gaining or producing income, the proportion of the property that the use regularly made of the property for gaining or producing income is of the whole use regularly made of the property at a capital cost to him equal to the same proportion of the capital cost to him of the whole property; and, if the property has, in such a case, been disposed of, the proceeds of disposition of the proportion of the property deemed to have been acquired for gaining or producing income shall be deemed to be the same proportion of the proceeds of disposition of the whole property;

On the basis of mileage alone, the use made by the taxpayer of the Chevrolet for the purposes of his practice appears to me to have been no more than 25 per cent. of the total use and if this were the only thing to be considered as being "use" of an automobile the basis for calculation of the appellant's capital cost allowance would, it seems, necessarily be limited by section 20(6)(*e*) to 25 per cent. of the total capital cost of the automobile. The appellant on the other hand, and his accountant, considered that 90 per cent. of the use of the car was use for the purposes of the practice and this I think was derived by considering its use from the point of view of the time involved in keeping it available for operation in the practice. Thus on a day when the appellant drove the car to the hospital, left it standing there while he was at the hospital, drove it again to return home and perhaps made several more trips with it to the hospital and back in the course of the

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day and at no time had any occasion to drive it for any purpose not associated with the practice, the car might well be considered as having been used throughout that day solely for the purposes of the practice. It was urged as well, and it is I think notorious, that an automobile depreciates both from operating it and by becoming obsolete and that the loss in capital value over a year through the latter might well be greater than through the former. I have no difficulty in accepting the evidence that the car was used (in the time sense) a great deal more for the purposes of the practice than it was used for other purposes but I think that an estimate of the proportion of the use to be attributed to the practice must have some regard both to the extent of wear and tear through driving it for the purposes of the practice as compared with the driving done for other purposes and to the extent of the time in which it was in use for the purposes of the practice as compared with the time it was in use for other purposes. On this basis I would fix the proportion of the use made of the car for the purposes of the practice at 50 per cent. and the capital cost for the purposes of section 11(1) (*a*) and the regulations at 50 per cent. of its capital cost. The appellant is entitled to deductions in each year for capital cost allowance calculated on that basis.

The appeals therefore succeed and they will be allowed to the extent indicated.

The appellant is entitled to costs.