
St. Catharines 1966
June 1
Ottawa June 22

BETWEEN:

JAMES SIM ..... APPELLANT;

AND

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

Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 4, 5, 12(1)(a)(h), 139(1)(e)(m)(ab)—Income from business whether as employee or carrying on business—Out-of-town trips to give lectures—Whether part-time lecturer engaged as "officer" or "employee"—Deductibility of travelling expenses.

The appellant, a dentist in St. Catharines, where he carried on his practice, agreed to give lectures on various aspects of dentistry at the University of Toronto, as an assistant. In the years 1961 and 1962 he made occasional trips to deliver similar lectures for dental associations in other cities.

In his annual income tax returns, the appellant reported the entire amounts of $782.55 for 1961, and $813.48 for 1962, a sum total of $1,596.03 which however, he sought to deduct on the ground that they were "travelling expenses" within the excepting proviso of paragraph (*h*), subsection (1) of the Act's section 12.

The Minister denied such an assumption, contending the expenditure afore-mentioned consisted of "personal or living expenses" and assessable as such.

Both parties agreed that the nature of Dr. Sim's connections with the scientific bodies before which he lectured would influence the problem's solution strongly.

In other words, it remained to be decided whether or not the appellant's capacity could be likened to that of an employee.

Held, That in ordinary usage the appellant was not an "employee" because none of the bodies which engaged him could, as of right, "control and direct" the form, method or manner of his teaching, "as to details and means" nor could they exactly prescribe "the result to be accomplished".

2. That the appellant was entitled to the deductions claimed because his lecturing activities had none of the characteristics belonging to the status of an employee.

3. That a part-time assistant lecturer could not be said to occupy an "office", particularly when not eligible to participate in any superannuation or other beneficial plan and not a member of the permanent staff.

4. That the appellant was carrying on an educational business or pursuit.

5. That the appeal be allowed.

APPEAL from a decision of the Income Tax Appeal Board.

J. R. Barr, Q.C. for appellant.

N. A. Chalmers for respondent.

DUMOULIN J.:—Dr. James Sim, a member of the Royal College of Dental Surgeons, practices his profession in the City of St. Catharines, Ontario, where he permanently maintains an office with a staff of three employees.

He derives the major portion, and by far, of his income from attending patients in St. Catharines. For a few years past, the appellant was also paid some professorial fees by the Dental School of the University of Toronto and, occasionally, for lectures to dental associations or dental student groups in various cities in Canada or the United States, the two American centres mentioned in exhibit A-6 being Birmingham, Michigan, and Syracuse, New York.

The taxation years in issue are 1961 and 1962, during which some payments received by Dr. Sim for lectures included an allowance on account of travelling expenses inherent thereto. "In other cases, a flat fee was paid", but, without any exception, the appellant listed in his yearly

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returns all sums received and claimed as deductible the actual amount paid out by him for travelling expense "in earning this income". The inclusion in appellant's tax reports for 1961 and 1962 of all emoluments received is admitted by the respondent.

On the ground that "travelling expenses to the extent of $782.55 in 1961 and $813.48 in 1962 claimed as deductions from income were personal or living expenses within the meaning of paragraph (*h*) of subsection (1) of section 12 of the Act", the Minister, by notification dated January 19, 1965, affirmed his previous disallowance of these out-of-pocket disbursements.

In his appeal against this refusal, the appellant argues, and properly so, I believe, that "the point in issue...is whether or not, at the time he delivered his various lectures, he was an officer or employee of the body which had invited him to lecture and not entitled to deduct any of his travelling expenses" (cf. Statement of Facts, para. 7 as amended at trial).

Paragraph 5 of a Memorandum of Readiness, eased the evidence in stating that "...The parties, by their counsel, have agreed that for the purposes of this appeal, it will not be necessary for the plaintiff to prove the said expenditures...", their deductibility constituting the only moot question.

Relying upon section 4 and paragraph (*a*) of subsection (1) of section 12 of the *Income Tax Act,* the appellant submits the total outlay of $1,596.03 was incurred "for the purpose of gaining or producing the reported income", and, therefore, ought not to have been assessed.

To the above contention, respondent takes exception for the threefold motive that:

(*a*) the income derived by the appellant from lectures was income from an office or employment within the meaning of sec. 5 of the Income Tax Act;

(*b*) the amounts claimed by Dr. Sim as travelling expenses for the purpose of earning income, being derived from lectures, were personal or living expenses and no portion of them had been incurred in the course of carrying on his business, as excepted by sec. 12(1)(*h*);

(*c*) the appellant, pursuant to para. (*a*) of ss. (1) of sec. 12, is not entitled to any deduction, because the lecture fees received by him were not income from a business but from an office or employment.

Set in its true context the fabric of the case is that Dr. Sim, aged 38 years in 1961, having graduated in 1946 with high honours from Toronto University, started a dental practice in St. Catharines, a populous city 80 miles distant from the provincial capital, and rapidly achieved an enviable measure of success.

His excellent record as a student, duplicated in his professional capacity, could not escape the attention of the University authorities. The young practitioner had barely left the dental school when he was invited to join, on a purely part time basis (cf. A-3, for instance), with the modest rank of "Assistant", the academic personnel of the Faculty of Dentistry.

Dr. Sim's acceptance of the offer was prompted by a practical appreciation of the flattering acknowledgement rendered to his technical skill and, in no less a measure, by a grateful wish of devoting some of his time to the educational pursuits of his former Alma Mater.

Against an hourly stipend of $10, spread over a teaching schedule of eighteen assignments of six hours each for the session 1960-1961, and of approximately 22 others for 1961-1962, (each Thursday from August 17 to February 9 inclusive; cf. exhibits A-1 and A-2), it is not improbable that this well noted practitioner, in a thriving urban centre, did not ignore the call of duty when he agreed, for a span of several working days, to leave his office, travel 160 miles to and from Toronto, and shoulder a heavy teaching assignment requiring long periods of preparation.

An itemized account of the sums paid to the appellant for lectures and clinical demonstrations at the School of Dentistry, coupled with expense allowances amounting respectively to $1,067.70 (fees), and $217.50 (travelling expenditures), for taxation year 1961, and to $991.25 and $340 for 1962, is listed on exhibit A-6, a statement prepared for Dr. Sim by Mr. J. E. Lee, a chartered accountant of Hamilton, Ontario.

On the same sheet are also mentioned the appellant's two lectures in Birmingham and Syracuse, U.S.A., and six or seven lectures in as many Ontario towns, delivered under the auspices of the extra-mural plan, an initiative sponsored by the Royal College of Dental Surgeons. Again, in these instances, fees and travelling expenses are shown on exhibit A-6.

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Dr. Sim explained the objectives and functioning of the extra-mural plan "designed to bring post-graduate education to dentists practicing in outlying districts. It is administered by the University of Toronto which makes some financial contributions to the scheme". The witness added "I was paid from two sources: first, from the University of Toronto, the cheque depending on the length of absence from my office. Next, you would receive a travel expense form sent by the Royal College of Dentists. You would then fill in this form, return it and be reimbursed for travelling expenditure".

This recital of facts substantiates the view, practically shared by both parties, that the problem up for solution is the nature of Dr. Sim's connection with the various medical organizations at whose request he lectured or gave clinical demonstrations, whether or not, when so doing, he was an employee or officer of those scientific bodies.

I assume the most pertinent provisions of the Act to be found in sections 12(1)(*a*), 12(1)(*h*), 139(1)(*e*), 139(1)(*m*) and 139(1)(*ab*).

At the outset of the academic year, the appellant was duly notified by the Dean of the Dentistry School, Dr. Roy G. Ellis, Exhibits A-1, A-2, A-3 are so many customary letters in which reappears a selfsame phrase, suggestive of a purely optional choice, scarcely reconcilable with the grant of an employment or the bestowal of an office; I quote: "*If you participate* (emphasis not in text) in the lectures, you will be notified regarding these either directly from the administrative office or by the head of the department concerned".

The current or colloquial interpretation of a word usually affords some insight into its true meaning; in this line of thought, the noun "employee", as defined in Black's Law Dictionary[1], does not differ from the sense popularly attached to it. This definition reads thus:

EMPLOYEE.

...it is understood to mean some permanent employment or position.

...

One who works for an employer; a person working for salary or wages; applied to anyone so working, but usually only to clerks, workmen, laborers, etc., and but rarely to the higher officers of a corporation or government or to domestic servants....

[1] 4th ed., 1961.

Generally, when person for whom services are performed has right to control and direct individual who performs services not only as to result to be accomplished by work but also as to details and means by which result is accomplished, individual subject to direction is an "employee".... "Servant" is synonymous with "employee"...

Were it permissible to decide the point in the light of the lexicon's language, it could readily be held that Dr. Sim's teaching activities had none of the characteristics belonging to the status of an employee. Neither the University, nor the executive bodies of the extra-mural plan or dental societies could, as of right, "control and direct" the form, method or manner of his teaching "as to details and means" nor could they exactly prescribe "the result to be accomplished". And, of course, a University lecturer offers but a poor synonym indeed for "servant".

Let us now progress from the dictionary to the concise and technical definitions attributed by our *Income Tax Act* to the substantives: business, employee, employment and office, so many words which derive their interpretation from section 139 and legal consequences from sections 12(1)(*a*) and 12(1)(*h*).

139.(1)(*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.* (emphasis added throughout these notes.)

139.(1)(*la*) "employee" includes officer.

139.(1)(*m*) "employment" means the position of an individual *in the service of some other person* (including Her Majesty or a foreign state or sovereign) and "servant" or "employee" means a person holding such a position.

139.(1)(*ab*) "office" means the position of an individual entitling him to a fixed or ascertainable stipend or remuneration and includes a judicial office, the office of a Minister of the Crown, the office of a member of the Senate or House of Commons of Canada, a member of a legislative assembly, senator or member of a legislative or executive council and any other office, the incumbent of which is elected by popular vote or is elected or appointed in a representative capacity and also includes the position of a corporation director; and "officer" means a person holding such office.

Since the law's interpretation of "employment" substantially tallies with that of the dictionary, previously held inapplicable to the actual case, it needs no further comments. In a like vein, the far loftier connotation predicated of an "office" cannot be so reduced as to reach the part time task of Assistant at the School of Dentistry nor that of occasional lecturer on request.

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The appellant, moreover, never joined the executive staff of the Dental Faculty, nor belonged to any of its committees, and was ineligible to any superannuation, beneficial or protective plan sponsored by the University of Toronto.

A suitable inference remains: it is that Dr. Sim, in his capacity of part time clinical demonstrator and occasional lecturer, was, in the purview of the *Income Tax Act*, "carrying on" an educational business or pursuit.

Should the above assumption be a proper one, section 12 would entitle the appellant who, I repeat, dutifully reported all the fees earned, to deduct his travelling expenses. This deductibility is allowed, generally, by section 12(1)(*a*), and specifically by section 12(1)(*h*) providing that:

> 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 ... 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.*

Of the several cases referred to by the appellant's learned counsel, I must say that, after an attentive perusal, I could not detect any worthwhile analogy between those precedents and the matter at bar.

In *Ricketts v. Colquhoun*[1], the House of Lords considered the appeal of a London barrister appointed to the office of Recorder at Portsmouth who sought to deduct from his official emoluments the expenses of travelling many times each year from one city to another. A section of the relevant statute provided that:

> If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed.

[1] [1926] A.C. 1 at 4.

Conformably to the law, Viscount Cave said:

As regards the appellant's travelling expenses to and from Portsmouth, with which may be linked the small payment for the carriage to the Court of the tin box containing his robes and wig, the material words of the rule are those which provide that, if the holder of an office is "necessarily obliged to incur...the expenses of travelling in the performance of the duties of the office" the expenses so "necessarily incurred" may be deducted from the emoluments to be assessed. The question is whether the travelling expenses in question fall within that description. Having given the best consideration that I can to the question, I agree with the Commissioners and with the Courts below in holding that they do not. In order that they may be deductible under this rule from an assessment under Sch. E, they must be expenses which the holder of an office is necessarily obliged to incur—that is to say, obliged by the very fact that he holds the office and has to perform its duties—and they must be incurred in—that is, in the course of—the performance of those duties.

The expenses in question in this case do not appear to me to satisfy either test. They are incurred not because the appellant holds the office of Recorder of Portsmouth, but because, living and practising away from Portsmouth, he must travel to that place before he can begin to perform his duties as Recorder and, having concluded those duties, desires to return home. They are incurred, not in the course of performing his duties, but partly before he enters upon them, and partly after he has fulfilled them.

The actual appellant cannot be statutorily considered "the holder of an office or employment", therefore the irrelevancy of the pronouncement above becomes at once apparent.

In the matter of *Great Western Railway Co. on behalf of W. H. Hall, clerk to the G. W. R. Co. v. Bater, Surveyor of Taxes*[1], Hall had remained in the railway company's service for over 20 years, and was fully entitled to the superannuation provisions it extended to its permanent clerks, a state of facts nowise assimilable to the matter under examination.

In *Minister of National Revenue v. Wilfrid Pelletier*[2], the respondent enjoyed the full status of permanent employment in the service of the Quebec Government, as decreed by two Orders in Council, the second of which, dated May 3, 1954, is hereunder recited:

With regard to the salary of Mr. Wilfrid Pelletier as Director of the Conservatory of Music and Dramatic Art of the Province of Quebec:

> That the salary of Mr. Wilfrid Pelletier c/o the Conservatory of Music, 1700 St. Denis Street, Montreal, in his capacity as Director of the Conservatory of Music and Dramatic Art of the Province of Quebec be increased to $5,500.00 per annum with an additional $2,000.00 for travelling expenses; that he be assigned to class "G"

[1] [1920] 2 K.B. 266 and 271-272 [2] 63 D.T.C. 1059 at 1060.

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permanent commencing May 1, 1954, and this in accordance with the eligibility list No. 1051-54 of the Civil Service Commission of the Province of Quebec.

Dr. Pelletier also was eligible to the Province's Civil Service pension fund.

For the above reasons, the appeal herein should be allowed and the record of the case referred to the Minister for re-assessment in accordance with the findings of this judgment. The appellant is entitled to his costs after taxation.