1946
Sept. 4
Oct. 31

BETWEEN:

GEORGE FREDERICK DANIELS BOND, APPELLANT,

AND

THE MINISTER OF NATIONAL REVENUE, ... } RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 6 (a) —"Income"—"Net" profit or gain or gratuity—"Ascertained" and "unascertained"—Income of fixed amount not necessarily net—Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income—Annual practising fees paid by lawyers deductible from fixed salary.

Appellant was employed as Counsel to the City of Winnipeg on salary of fixed amount. His duties were mainly those of a barrister but he performed some solicitor duties as well. To entitle him to practise he was required to pay annual practising fees to the Law Society of Manitoba. Non-payment of such fees would result in suspension from practice and striking off the rolls. Thereafter any attempt to practise would be unlawful and subject him to penalty and injunction.

Appellant claimed deduction of practising fees from fixed salary but such deduction was disallowed.

Held: That cases decided under Schedule E, Rule 9, of the Income Tax Act, 1918, of the United Kingdom have no application to the proper interpretation of section 6 (*a*) of the Income War Tax Act or the determination of what disbursements or expenses are deductible under such Act.

2. That the making of an expenditure cannot by itself serve the purpose of earning the income but it may enable the maker of it to earn it and thus be a working expense and part of the process of earning the income, and, therefore, be made for the purpose of earning it.

3. That the payment by a practising lawyer to his law society of his annual practising fees or an obligatory annual assessment is not a disbursement or expense "not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" and is not excluded as a deduction from his remuneration by section 6 (*a*) of the Act.

4. That the test of taxability of an annual gain or profit or gratuity is not whether it is "ascertained" or "unascertained" but whether it is "net". *Samson* v. *Minister of National Revenue* (1943) Ex. C.R. 17 at 24 followed. Dictum of Audette J. in *In Re Salary of Lieutenant-Governors* (1931) Ex. C.R. 232 at 235, that an annual salary from any office or employment, being an amount which is duly ascertained and capable of computation, is therefore of itself a "net" income, disapproved.

5. That an income is not necessarily net annual profit or gain or gratuity and therefore taxable income merely because it is a salary of a fixed amount.

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6 That the appellant is entitled to deduct from his fixed salary the amount of his Law Society annual practising fees and obligatory assessment and that his right to do so is not affected by the fact that his remuneration is by way of a fixed salary instead of fees.

APPEAL under the Income War Tax Act.

The Appeal was heard before the Honourable Mr. Justice Thorson, President of the Court, at Winnipeg.

W. P. Fillmore K.C. for appellant.

C. B. Philp K.C. and *E. S. MacLatchy* for respondent.

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

The PRESIDENT now (October 31, 1946) delivered the following judgment:

The issue in this appeal under the Income War Tax Act, R.S.C. 1927, chap. 97, is whether a member of the legal profession employed as such on a salary of a fixed amount may, for the purpose of determining his taxable income, deduct from such fixed amount the amount of the Law Society annual practising fees which he must pay to entitle him to practise in the year in which such fees are payable.

The appellant is qualified as a legal practitioner in the Province of Manitoba in both branches of the profession, having been admitted to the rolls as an attorney-at-law and solicitor in October, 1919, and called to the bar as a barrister in March, 1920. Since his admission and call he has been a member in good standing of the Law Society of Manitoba, the governing body of the legal profession in that province. Membership in good standing in the Society, which is governed by The Law Society Act, R.S.M. 1940, chap. 115, as amended, is a prerequisite of the lawful practice of the profession in the province. Section 38 empowers the benchers of the Society to make rules and by-laws for fixing the fees payable annually by each barrister and attorney and for striking off the rolls and suspending from practice any barrister or attorney for non-payment of such fees. By Rule 74 of the Rules, By-laws and Regulations of the Society, dated September 28, 1939, every barrister, solicitor, or barrister and solicitor is required to take out an annual certificate in order to be entitled to

practise in that year, the fee for which is fixed at $20, and it is provided that if such annual fee is not paid by a specified date he shall ipso facto stand suspended from practising his profession unless and until he shall have taken out his certificate and that if he does not do so by a further specified date he shall ipso facto be struck off the rolls. Then section 38 A (1), added by an amending Act in 1943, Statutes of Manitoba, 1943, chap. 29, sec. 2, empowered the benchers to create a special fund, later called the Reimbursement Fund, by the levy of an annual assessment on the members of the Society and by By-law 59, dated April 22, 1943, the benchers fixed an assessment of $5 for the balance of the year 1943 and attached the same consequences of suspension from practice and striking off the rolls for non-payment of such assessment as for non-payment of the annual fees. The unauthorized practice of law is prohibited by section 53, as enacted by section 3 of the amending Act of 1943, and serious consequences are attached to such unauthorized practice. Section 53 (1) provides in part as follows:

> 53. (1) No person shall in the Province of Manitoba
> (a) carry on the practice or profession of barrister or attorney-at-law or solicitor,
> (b) act as a barrister or attorney-at-law or solicitor in any superior or inferior court of civil or criminal jurisdiction or before any justice of the peace,
> (d) hold himself out as or represent himself to be or practise as a barrister or attorney-at-law or solicitor or for gain or reward act as a barrister or attorney-at-law or solicitor,
>
> unless he has been duly called or admitted . . ., or while he is disbarred or struck off the rolls as a barrister or attorney-at-law or solicitor, or while he is suspended from practice.

Section 53 (7) provides that violation of section 53 shall be an offence for which penalties of fine or imprisonment are provided and, in addition, section 53 (10) authorizes an injunction at the instance of the Society against the offending party. The payment of the annual fees is, therefore, necessary to the lawful and continuous practice of the profession in the year in which they are payable.

The appellant is employed as Counsel to the Corporation of the City of Winnipeg having been appointed as such by By-law No. 15489 of the City, dated August 31, 1942. By such by-law he is required to devote his whole time to the duties of his office and to perform such duties in

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respect of such office as may be prescribed by by-law. Prior to his appointment there was only one chief law officer of the City, known as the City Solicitor, but on his retirement the duties of his office were divided between the appellant as Counsel to the City and another member of the legal profession as City Solicitor. The duties of the City Solicitor prior to this division of duties are set out in section 119 of By-law No. 15330 of the City, dated June 10, 1941. It will be seen that they include functions that only a barrister can perform as well as those that are ordinarily done by a solicitor. The appellant had charge of and took responsibility for all litigation in which the City was interested, although process was issued in the name of the City Solicitor; he prepared the pleadings, did all the work of preparation and conducted the proceedings in the courts. It was also his duty to investigate claims against the City, to advise whether they should be resisted or settled, and to negotiate settlements. He represented the City on tax appeals before the assessment appeal boards and the courts. He was called upon for legal opinions, both verbal and written, when required by the City Council or its committees. In addition to these duties he also did solicitor's work, such as dealing with tax sale applications and passing on documents affecting real estate or personal property. His functions and duties were thus those of a solicitor as well as those of a barrister.

The appellant paid the annual fees of $20 and the assessment for the Reimbursement Fund of $5 for the year 1943 and on his income tax return for that year claimed the sum of $25 as a deduction. On his assessment this deduction was disallowed and its amount added as taxable income to the amount shown on his return. From this assessment he appealed to the Minister, who affirmed the assessment. Being dissatisfied with the Minister's decision he now brings his appeal to this Court.

The Minister's decision reads:

> The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notice of Appeal and matters thereto relating hereby affirms the said Assessment on the ground that the taxpayer has been correctly assessed and that the deductions claimed are not permissible under the provisions of the Act. Therefore on these and related grounds and by reason of other provisions of the Income War Tax Act the said Assessment is affirmed.

The ground thus assigned for affirming the assessment does not disclose any specific reasons at all. But the validity or otherwise of an assessment does not depend upon the soundness or unsoundness of the reasons given by the Minister for his decision on the appeal to him under section 58 of the Act or whether reasons are given or not. The appeal to the Court provided by the Act is an appeal from the assessment, not from the Minister's decision or the reasons or lack of reasons for it: *Nicholson Limited* v. *Minister of National Revenue* (1).

Two lines of argument were laid out by counsel for the respondent in support of the disallowance of the deduction. One was that it was excluded under section 6 (*a*) of the Income War Tax Act which provides:

6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

(*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;

Counsel admitted frankly that the appellant could not continue to be Counsel for the City of Winnipeg without continuing to be a member of the Law Society of Manitoba and had to pay the annual fees and special assessment sought to be deducted in order to retain such membership but contended, nevertheless, that this disbursement was not wholly, exclusively and necessarily laid out by the appellant for the purpose of earning the income in that it was made only for the purpose of retaining his professional qualification so that he could earn the income but was not made for the purpose of earning it. The disbursement was said to be related to the maintenance of the professional qualification but not to the earning of the income. It was admitted by counsel that while the taxing authority has not allowed the deduction of Law Society annual fees in the case of practising lawyers in receipt of a salary of a fixed amount it has allowed such deduction in the case of those whose remuneration is by way of fees. It is obvious, of course, that if the contention put forward by counsel is sound then the deduction is no more justifiable in the one case than in the other, for the same argument would apply to both; the deduction is permissible either in both cases or in neither. Moreover, in as much as the fees paid by

(1) (1945) Ex. C.R. 191 at 200.

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the appellant were annual practising fees, it would also seem to follow that all similar fees, such as annual licence fees, would have to be disallowed as deductions on the ground that they were paid to entitle the taxpayer to do business but not for the purpose of earning the income.

In support of his contention counsel relied upon *Simpson* v. *Tate* (1). There a county medical health officer joined certain medical and scientific societies in order that by means of their meetings and published transactions he might be aware of all recent advances in sanitary science and keep himself up to date on all medical questions affecting public health and sought to deduct from the amount of his emoluments of office the subscriptions paid by him to these societies. The deductions were claimed under the United Kingdom Income Tax Act, 1918, Schedule E, Rule 9, which reads:

> 9. 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.

It was held that the subscriptions were not moneys expended "in the performance of his official duties", and the deduction was disallowed. Counsel also cited *Wales* v. *Graham* (1). There a county divisional engineer sought to deduct an annual subscription paid to the Institution of Civil Engineers. Candidates for the appointment had to be members of the Institution or hold other approved qualifications and while it was not specifically required that membership of the Institution should be continued after the appointment there was evidence that relinquishment of membership would render impossible the continued efficient discharge of the full duties of the office. Retention of membership depended upon payment of an annual subscription. The deduction was claimed under Schedule E, Rule 9, but was disallowed with no reasons given. In my view neither of the cases cited has any application to the question under review. Even on the facts the present case is distinguishable. In neither case was payment of the sub-

(1) (1925) 2 K.B. 214. (1) (1941) 24 T.C. 75.

scriptions sought to be deducted a necessary prerequisite of lawful and continuous practice, whereas in the present case the appellant had to pay the law society fees. They were annual practising fees and if they were not paid the appellant's attempt to carry out his duties, and to earn the income, would constitute unlawful practice and subject him not only to penalty but also to injunction. But there is even a stronger reason for not applying them. Both were decided under Schedule E, Rule 9, of the Income Tax Act, 1918, of the United Kingdom, which differs radically from section 6 (*a*) of the Income War Tax Act. Similar remarks would apply to other English cases decided under Schedule E, Rule 9, or similar prior legislation, such as *Cook* v. *Knott* (1); *Revell* v. *Directors of Elworthy Bros. & Co. Limited* (2); *Friedson* v. *Glyn-Thomas* (3); *Andrews* v. *Astley* (4); *Ricketts* v. *Colquhoun* (5); *Nolder* v. *Walters* (6); *Blackwell* v. *Mills* (7). These show that in the cases under Schedule E the deduction of expenditures from the amounts of the emoluments assessed under the schedule is permitted only to the extent that they fall within the express terms of Rule 9, which are rigidly applied. The deduction is limited to expenditures "in the performance" of the duties of the office; if they are made otherwise than "in the performance" of the duties they are not deductible. If there were any provision in the Income War Tax Act similar to Rule 9 of Schedule E it might be argued that the moneys paid by the appellant to the Law Society of Manitoba were not deductible in that they were not paid in the performance of his duties as a lawyer, but there is no such provision. Section 6 (a) is quite different. In interpreting the terms of a statute it is always dangerous to apply decisions in other jurisdictions upon other statutes that are not *in pari materia*; and nowhere is it more dangerous than in the case of such an Act as the Income War Tax Act. In my view, cases decided in the United Kingdom under Schedule E, Rule 9, of the Income Tax Act, 1918, have no application to the proper interpretation of section 6 (*a*) of the Income War Tax Act, or to the determination of what disbursements or expenses are deductible under such Act.

(1) (1887) 2 T.C. 246.
(2) (1890) 3 T.C. 12.
(3) (1922) 8 T.C. 302.
(4) (1924) 8 T.C. 589.
(5) (1926) A.C. 1
(6) (1930) 15 T.C. 380.
(7) (1945) 2 All E.R. 655.

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If aid is to be obtained from decisions under the United Kingdom Act, such aid should be sought from decisions rendered, not under Schedule E, Rule 9, but under Schedule D, Cases I & II, Rule 3 (*a*), which reads as follows:

> 3. In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—
>
> (a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation.

And even then such decisions should be read with care in interpreting section 6 (*a*) of the Canadian Act, as indicated in *Siscoe Gold Mines Ltd.* v. *Minister of National Revenue* (1).

In *Strong & Co. Limited* v. *Woodifield* (2) the House of Lords dealt with the corresponding rule under the Income Tax Act, 1842. At page 453, Lord Davey said of the words "for the purposes of the trade",

> These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, &c. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits.

And in *Robert Addie & Sons' Collieries* v. *Inland Revenue* (3) the Lord President (Clyde) of the Scottish Court of Session laid down the following test:

> What is "money wholly and exclusively laid out for the purposes of the trade" is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend to the true nature of the expenditure, and to ask oneself the question, Is it a part of the Company's working expenses; is it expenditure laid out as part of the process of profit earning.

and this test was approved by the Judicial Committee of the Privy Council in *Tata Hydro-Electric Agencies, Bombay* v. *Income Tax Commissioner, Bombay Presidency and Aden* (4).

In section 6 (*a*) of the Income War Tax Act, the words "for the purpose of earning the income" take the place of the words "for the purposes of the trade, etc.," in the corresponding English rule under Schedule D, but their effect is, I think, the same. It was so held by the Supreme

(1) (1945) Ex. C.R. 257 at 262.
(2) (1906) A.C. 448.
(3) (1924) S. C. 231 at 235.
(4) (1937) A.C. 685 at 696.

Court of Canada in *Minister of National Revenue* v. *Dominion Natural Gas Co. Ltd.* (1), where the test laid down in the *Addie* case (*supra*) for the English rule was expressly adopted as applicable to section 6 (*a*). In the *Addie* case (*supra*) Lord Clyde approved the statement of Lord Davey in *Strong & Co., Limited* v. *Woodifield* (*supra*). The two cases should, I think, be read together and the words "for the purpose of earning the income" in section 6 (*a*) dealt with in the same way as Lord Davey dealt with the words "for the purposes of the trade". It is obvious that the making of an expenditure cannot by itself serve the purpose of earning the income but it may enable the maker of it to earn it, and thus be a working expense and part of the process of earning the income, and, therefore, be made for the purpose of earning it.

Section 6 (*a*) is an excluding section. It prohibits the deduction of disbursements or expenses "not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income". Can it reasonably be said that the amount paid by the appellant to the Law Society falls within the exclusions of the section? I do not think so. The appellant had to pay this amount in 1943 in order to be entitled to practise law in that year. It was an annual practising fee. If he did not pay it he would be suspended and then struck off the rolls. Any attempt on his part thereafter to perform his duties would be contrary to law and constitute an offence for which he would be subject to a penalty and also to an injunction preventing him from continuing his attempt at practice. The payment of the amount was, therefore, necessary to the lawful and continuous performance of his duties and the earning of the income. Moreover, I think it was inherent in the contractual relationship between the appellant and the City of Winnipeg that he should continue to be a lawyer in good standing since his duties could not be performed without such standing. The maintenance of good standing was essential to the valid performance of his contract without which he could not earn the income. In my view, he had to pay the fees to earn the income and could not do so without paying them. The expenditure was an annual one which he could not escape but had to

(1) (1941) S.C.R. 19.

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make. It constituted a working expense as part of the process of earning the income. Likewise, it was clearly made for the purpose of enabling him to carry on his duties and earn the income. That it was necessarily made for such purpose is quite clear, and there is nothing to indicate that it was made otherwise than wholly and exclusively for such purpose. In my view, the payment by a practising lawyer to his law society of his annual practising fees or an obligatory annual assessment is not a disbursement or expense "not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" and is not excluded as a deduction from his remuneration by section 6 (*a*) of the Act. Moreover, it meets the test of deductibility of expense laid down in the cases referred to. The appellant is, therefore, entitled to a deduction of the amount claimed by him unless he is excluded therefrom for some other reason such as the one advanced by counsel for the appellant.

It was contended that since the appellant had a salary of a fixed amount there could be no deduction of any expenses from it, and that the amount of the income being fixed it was of itself "net" income and, therefore, taxable income. I have already referred to the admission made by counsel that the department has allowed the deduction of the annual fees paid by practising lawyers to their law societies where their remuneration is by way of fees, but has not allowed any such deduction where it is by way of fixed salary. I am unable to see any justification in principle for any such discrimination of treatment, and it ought not to be approved by the Court unless the law clearly so demands. In disallowing the deduction in the case of the lawyer in receipt of a fixed salary the department has consistently relied upon a dictum of Audette J. in the case of *In re Salary of Lieutenant-Governors* (1). In that case the appellant sought to deduct from the amount of his salary the amounts of the sums expended by him as Lieutenant-Governor for social entertainments. Audette J. held against him and it is clear that the *ratio decidendi* of the judgment was that the appellant was under no legal obligation, contractual or otherwise, to make the expenditures sought to be deducted and they were, therefore, "not

(1) (1931) Ex. C.R. 232.

disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income", within the meaning of section 3 (8), now section 6 (*a*), of the Income War Tax Act. Further than this it was not necessary for the Court to go. The dictum upon which the department relies appears on page 235, where Audette J. says of section 3 (8);

> It is quite obvious that this section does not apply to a case of this kind. The disbursements that must be made to earn profit are those in connection with unascertained incomes, unlike a case of salary, where disbursements are made at the discretion and the will of the taxpayer,—and after all are not these disbursements measured by the hospitable disposition of each Lieutenant-Governor, and are they not freely and voluntarily incurred and so not enforceable by law.
>
> What that section means is that in "a trade or commercial or financial or other business or calling," before the amount upon which the tax is to be levied is ascertained, the amounts expended to earn the same must be deducted.

and then the dictum follows:

> But it is otherwise in the case where a person received an annual salary from any office or employment—an amount which is duly ascertained and capable of computation, and which constitutes of itself a net income.

In *Samson* v. *Minister of National Revenue* (1) I expressed the opinion that the dictum of Audette J. in the *Lieutenant-Governor's* case (*supra*), namely, that an annual salary from any office or employment, being an amount which is duly ascertained and capable of computation, is, therefore, "of itself" a "net" income, was not necessary to the determination of the issue before the Court; that it went beyond the *ratio decidendi* of the judgment, namely that there was no legal obligation of any kind on the part of the Lieutenant-Governor to incur the expenses for social entertainments; and that it was, as a matter of law, *obiter*; and I held that the decision is not authority for the view that sums of money received by a taxpayer, "as being wages, salary, or other fixed amount", are necessarily "net" or taxable income. Notwithstanding this statement, the department has continued its practice of disallowing the deduction of the annual practising fees in the case of lawyers receiving a salary of a fixed amount on the ground that it was settled law by the *Lieutenant-Governor's* case (*supra*) that such salary, being duly ascertained and capable of computation, is of itself net income. The law is not so

(1) (1943) Ex. C.R. 17.

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settled; not only is the dictum referred to *obiter*, but it is also, in my opinion, at variance with the definition of "income" in section 3 of the Act, and it ought not to be followed. Section 3 reads in part as follows:

> 3. For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, ...

On the hearing before me counsel for the respondent relied upon the dictum, and contended that under the definition "wages, salary or other fixed amount", being ascertained and capable of computation, was net income. I do not agree. In the *Samson* case (*supra*), at page 24, the following appears:

> The term "net" is an integral part of the statutory definition of taxable income. It is the annual "net" profit or gain that is "income" for the purposes of the taxing statute. The statement made by Audette J. in the *Lieutenant-Governor's* case to the effect that an income, such as an annual salary, which is duly ascertained and capable of computation, constitutes "of itself" a "net" income, is in my opinion at variance with the statutory definition in that it does not give proper effect to the relationship of the word "net" in the statutory definition to the words that follow. The statement assumes that it is only with respect to "unascertained" income that there is any necessity to consider deductions in order to arrive at the amount of the annual "net" profit or gain or gratuity that is taxable income. The statute, in my opinion, shows clearly that it is the "net" profit or gain or gratuity that is taxable income whether the profit or gain or gratuity, of which only the "net" is taxable income, is ascertained or unascertained. The test of taxability of an annual gain or profit or gratuity is not whether it is "ascertained" or "unascertained", but whether it is "net". The word "net" in the statutory definition of taxable income is just as referable to what is ascertained as it is to what is unascertained.

I see no reason for departing from the views thus expressed. Moreover, the words "ascertained" and "unascertained" appear in a parallel construction, namely, "whether ascertained and capable of computation as being . . . ., or unascertained as being . . . ."; and both equally relate to what precedes them. The adoption of the dictum would mean that "ascertained" would relate to "net profit or gain or gratuity" and be synonymous with it, whereas "unascertained" would relate only to "profit or gain or gratuity" or, in other words, that while "ascertained" would relate to "net" profit or gain or gratuity, "unascertained"

would relate to "gross" profit or gain or gratuity. Such a construction would be a distortion of plain language; both words relate to the same thing. There is no grammatical justification for differentiating between them and no ground of principle for doing so. In my view, it is clear that what is to be taxed is the annual "net" profit or gain or gratuity, regardless of whether the profit or gain or gratuity is "ascertained" as being one kind of income or "unascertained" as being a different kind. Such an interpretation is a sound grammatical one; it also removes the unfair discrimination of the present departmental practice. In my judgment, an income is not necessarily net annual profit or gain or gratuity and, therefore, taxable income merely because it is a salary of a fixed amount, and there is nothing in the Income War Tax Act that excludes the deduction of proper disbursements or expenses from such fixed amount in order to determine the amount thereof that is taxable.

That being so and the amount claimed by the appellant not being excluded from deduction by section 6 (*a*), I am of the opinion that the appellant is entitled to deduct it. His right to do so is not affected by the fact that his remuneration is by way of a fixed salary instead of by way of fees. The appeal will, therefore, be allowed with costs.

Judgment accordingly.