ROBERT M. RANDALL ..... APPELLANT;

AND

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

1967

*Mar. 1, 2
May 23

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income Tax—Managing out-of-town business—Whether living and travelling expenses deductible—Income Tax Act, R.S.C. 1952, c. 148, ss. 12(1)(a), (h), 139(1).

The appellant was engaged in the business of managing horse racing activities at a number of race tracks in British Columbia where he resided. In 1958, the appellant was also managing under a contract the business of a company carrying on horse race meetings in Portland, Oregon, in return for a share of profits. The appellant sought to deduct from his income from this source a sum of $5,241 as his expenses in travelling from Vancouver to Portland and his living expenses at Portland during the racing season. The Minister allowed a

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

deduction of $1,200 and disallowed the rest. The Exchequer Court maintained the Minister's assessment. The taxpayer appealed to this Court.

Held (Judson J. *dissenting*): The appeal should be allowed.

Per Martland, Ritchie, Hall and Spence JJ.: The expenses were deductible. The appellant's expenses of travelling to Portland and his expenses of living there were in the performance of his agreement and were not purely personal to him and outside the agreement. If the appellant was going to fulfil the obligations he undertook to fulfil under the agreement, it was necessary for him to travel to and from Portland. On the evidence, it was clear that the whole operation, whether at Vancouver or at Portland, was in fact one business being conducted by the appellant and the income of that business from the various geographic bases was income from the business as a whole.

Per Judson J., *dissenting*: Section 12(1)(*a*) of the *Income Tax Act* prohibits the deduction of these expenses because they were not incurred in the course of carrying on the Portland business but were personal or living expenses.

Revenu—Impôt sur le revenu—Gérant d'une entreprise hors de la ville où il réside—Déduction des frais de subsistance et de déplacement—Loi de l'Impôt sur le Revenu, S.R.C. 1952, c. 148, arts. 12(1)(a), (h), 139(1).

L'appelant s'occupait de gérer les activités d'un certain nombre de champs de courses de chevaux en Colombie-Britannique où il avait son domicile. En 1958, l'appelant avait aussi la gérance, en vertu d'un contrat, de l'entreprise d'une compagnie qui s'occupait de concours de courses de chevaux à Portland, Oregon, moyennant une part des profits. L'appelant a tenté de déduire de son revenu lui provenant de cette source une somme de $5,241 comme étant ses frais de déplacement entre Vancouver et Portland ainsi que ses frais de subsistance à Portland durant la saison des courses. Le Ministre a permis la déduction de $1,200 seulement. La Cour de l'Échiquier a maintenu la cotisation du Ministre. Le contribuable en appela devant cette Cour.

Arrêt: L'appel doit être maintenu, le Juge Judson étant dissident.

Les Juges Martland, Ritchie, Hall et Spence: Les dépenses en question étaient déductibles. Les frais de voyage à Portland et les frais de subsistance à cet endroit ont été encourus dans l'exécution de son contrat et n'étaient pas purement personnels et en dehors du contrat. Pour que l'appelant puisse remplir les obligations qu'il s'était engagé à remplir par son contrat, il lui était nécessaire d'aller à Portland et d'en revenir. En se basant sur la preuve, il est clair que toute l'opération, soit à Vancouver ou à Portland, était en fait une seule entreprise dirigée par l'appelant et le revenu de cette entreprise provenant de différents endroits géographiques était un revenu d'une entreprise prise comme un tout.

Le Juge Judson, *dissident:* L'article 12(1)(*a*) de la *Loi de l'Impôt sur le Revenu* ne permet pas la déduction de ces frais parce qu'ils n'ont pas été encourus dans l'exercice des affaires de l'appelant à Portland, mais étaient des dépenses personnelles ou de subsistance.

1967

RANDALL v. MINISTER OF NATIONAL REVENUE

APPEL d'un jugement du Juge adjoint Sheppard de la Cour de l'Échiquier du Canada[1], dans une matière d'impôt sur le revenu. Appel maintenu, le Juge Judson étant dissident.

APPEAL from a judgment of Sheppard, Deputy Judge of the Exchequer Court of Canada[1], in an income tax matter. Appeal allowed, Judson J. dissenting.

David A. Freeman, for the appellant.

G. W. Ainslie and *B. Verchere,* for the respondent.

The judgment of Martland, Ritchie, Hall and Spence JJ. was delivered by

HALL J.:—The appellant and his brothers William and John for many years prior to 1957 were engaged in the business of managing horse racing activities at a number of race tracks in British Columbia at which pari-mutuel wagering was authorized. They conducted the business as managers of horse racing operations through the medium of a company incorporated in British Columbia as a private company named "Ascot Jockey Club Ltd.". The appellant and his brothers, while using the Ascot Company as their parent instrument, controlled a number of other companies which leased different race tracks in British Columbia. This procedure was followed to meet the requirements of British Columbia legislation limiting the racing each season to 14 days per track. In 1958 which is the year in question in this appeal, the racing season at the several tracks in which he was interested was 56 days in the Vancouver area and 14 days at Sandown on Vancouver Island. The functions of the appellant and his brothers included control of finances, selection of horses and personnel, arrangements for current and capital expenditure on plant and negotiations with horse owners. The appellant and his brothers were in full control at that level of management and they each received a salary of $12,000 for the year 1958. The appellant and his two brothers were also engaged along with two others called Geohegan in the management of a catering business, the partnership being responsible for all the catering at both Exhibition Park, Vancouver and Sandown on Van-

[1] [1966] Ex. C.R. 966, [1966] C.T.C. 249, 66 D.T.C. 5202.

couver Island. From this partnership the appellant earned the sum of $7,904.58 in 1958 and included this income in his 1958 return.

In 1957 the appellant and his brother John entered into an agreement with the Portland Turf Association, an incorporated company in the State of Oregon to manage the business affairs and transactions of the association arising out of the horse race meetings at Portland, Oregon, for a share of the profits and reasonable expenses. The agreement contained the following provisions:

1. The Randalls covenant and agree that they will faithfully, honestly and diligently manage the business affairs and transactions of the Association arising out of the conducting and holding of horse race meetings for a term of ten (10) years from this date and will devote such time, labour, skill and attention to such employment as may be necessary.

2. All horse race meetings shall be conducted and held in the name of the Association.

3. All the business affairs and transactions arising out of the conducting and holding of the said horse race meetings shall be managed and taken care of by the Randalls, subject always to the control and direction of the Association so far as financial matters are concerned.

4. The Association shall pay and bear all expenses arising out of the conducting and holding of the said horse race meetings and the Randalls shall not be required to assist in any way in the financing of the race meetings. Arrangements shall be made so that all cheques shall be signed by one of the Randalls and a person appointed by the Association.

5. Each year, ninety (90) days prior to the opening of the racing season of the Association, the Randalls shall submit a budget to the Association and on approval thereof adequate funds shall be supplied by the Association.

6. The Association covenants and agrees with the Randalls to conduct races on as many days as it is reasonably possible to do so and not in any event on less than forty (40) days each year.

7. It is the intention of both the Association and the Randalls that the said race meetings shall be conducted in a similar manner to race meetings conducted by the companies in which the Randalls are associated at Hastings Park, in the City of Vancouver, in the Province of British Columbia, and the Randalls shall be allowed by the Association to manage the said race meetings in such a manner.

8. The Randalls shall be entitled to receive and be paid for their services as Managers one-half of one per cent (1/2 of 1%) of all horse racing pools on races conducted at the race track owned or controlled by the Association, the said sum to be payable at the end of each week, and in addition thereto, the Randalls shall be allowed reasonable expenses, not to exceed Five Thousand ($5,000.00) Dollars per year.

The $5,000 expense allowance provided for in para. 8 above was not dealt with as a separate item in the courts below nor was it referred to in this Court. It apparently is not relevant in these proceedings. In 1958 the appellant reported an income of $17,626.71 under this agreement and

1967

RANDALL v. MINISTER OF NATIONAL REVENUE

Hall J.

he claimed to deduct the sum of $5,241.53 as his expenses in travelling to and from Portland and his living expenses at Portland while there to manage the race track meetings and the business of the Portland Turf Association as called for in the agreement. The Minister of National Revenue allowed him $1,200 but disallowed the remainder. No details of how the $5,241.53 were made up were given nor were any details given showing how the $1,200 so allowed was computed. The appellant filed his income tax return for the year 1958 and by Notice of Re-Assessment dated August 4, 1964, the net amount of $4,011.63 of the expenses claimed by the appellant in connection with the Portland racing operation was disallowed. The appellant gave Notice of Objection to this re-assessment. The assessment was confirmed by the Minister and on September 15, 1965, his appeal was dismissed. The appellant then appealed to the Tax Appeal Board. His appeal was heard by Mr. Cecil L. Snyder, Q.C., who dismissed the appeal. An appeal was then taken to the Exchequer Court[1] and the case was heard by the Honourable F. A. Sheppard, Deputy Judge of the Exchequer Court of Canada at Vancouver who upheld the Tax Appeal Board. As appears from the judgment of the Tax Appeal Board, the amount of the expenses claimed as a deduction is not in dispute.

The appeal involves (1) whether the allowance of the expenses in question were excluded by s. 12(1)(*a*) of the *Income Tax Act* and (2) if not so excluded, whether the deduction of the expenses is allowable elsewhere.

Mr. Justice Sheppard found that the appellant was engaged in a business within the meaning of ss. 12(1)(*a*) and 12(1)(*h*) of the *Income Tax Act*. That finding was a correct one and was not disputed by counsel for the Minister in this Court. Section 12(1)(*a*) reads 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,

and s. 12(1)(*h*) reads:

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

[1] [1966] Ex. C.R. 966, [1966] C.T.C. 249, 66 D.T.C. 5202.

"Income" is defined by s. 4 which reads:

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

The evidence was that the appellant made some 30 trips from Vancouver to Portland and back in 1958, and while at Portland lived part of the time at an hotel and part of the time in an apartment which the brothers had rented and which they occupied and used as an office when one or the other was in Portland looking after the operation there. The Portland race season in 1958 was 50 days and overlapped in part the British Columbia season.

The Minister contended that the appellant's expenses of travelling to Portland and his expenses of living there were not in the performance of any undertaking in the agreement but, on the contrary, were purely personal to him and outside the agreement. I am unable to accept that contention. It seems to me that if the appellant was going to fulfil the obligations he undertook to fulfil under the agreement in question, it was necessary for him to travel to and from Portland as the exigencies of the business there required him to do. The Minister relied on *Bahamas General Trust Company et al v. Provincial Treasurer of Alberta*[1], in which it was held that the expenses of a member of the Board of Directors of Canadian National Railways who being in Shanghai, China, on his own business and for pleasure when a meeting of the Canadian National Railways Board of Directors was called travelled from Shanghai to Montreal and back to Shanghai and claimed those expenses as deductible from his income. There is, in my view, no similarity between the two cases. The Minister also relied on *Mahaffy v. The Minister of National Revenue*[2], in which the question was whether a member of the Legislative Assembly of Alberta was entitled to his travelling and living expenses in attending a session of the Legislature under s. 5(1)(*f*) of the *Income War Tax Act* which was the same section as was dealt with in the *Bahamas General Trust* case, *supra*. Again I can see no similarity between the *Mahaffy* case and the present one. Rinfret C.J. in the *Mahaffy* case said in part: "The occupation of Members of Provincial Legislative Councils and Assemblies is neither a trade nor a business."

[1] [1942] 1 W.W.R. 46, 1 D.L.R. 169.
[2] [1946] S.C.R. 450, [1946] C.T.C. 135, 3 D.L.R. 417.

1967

RANDALL v. MINISTER OF NATIONAL REVENUE

Hall J.

On the hearing of this appeal, counsel for the Minister took a further objection that neither the income nor the expenses arising out of the Portland operation could be considered in arriving at the appellant's income, relying on the wording of s. 139(1)(*az*) which reads:

> (*az*) a taxpayer's income from a business, employment, property or other source of income or from sources in a particular place means the taxpayer's income computed in accordance with this Act on the assumption that he had during the taxation year no income except from that source or those sources of income and was entitled to no deductions except those related to that source or those sources;

Counsel argued that the Portland operation had to be considered separate and apart from the British Columbia operations. I do not think that this follows because on the evidence that was before the Tax Appeal Board and before the learned Deputy Judge of the Exchequer Court of Canada it becomes clear that the whole operation, whether at Vancouver or Sandown or at Portland, was in fact one business being conducted by the appellant and his brothers and that the income of that business from the various geographic bases was income from the business as a whole just as the business of a bank or any other enterprise which has branches in many areas remains one business and not many separate businesses, each to be dealt with separately.

Locke J. in *Interprovincial Pipe Line Company v. Minister of National Revenue*[1] said at pp. 772-3:

> Paragraphs (*av*) of s. 127(1) and (*az*) of s. 139(1) were intended, in my opinion, to prevent a taxpayer who might be engaged in two separate businesses not related to each other by reason of their nature from taking into account losses or expenses incurred in one in computing the taxable income of the other. By way of illustration, if a person engages in business as a hardware merchant in a country town and, at the same time, engages in farming or ranching, losses sustained or expenditures incurred in operations of the latter nature may not be taken into account in computing the taxable income from the hardware business, and vice-versa. The reason is that these operations are not related one to the other in the sense intended. The taxpayer's income from the hardware business is to be reckoned as if he had during the taxation year no income except from that source, according to the subsection. If, on the other hand, the merchant's business was that of the sale of produce and he should operate a truck farm for the purposes of obtaining supplies for his business, presumably these businesses would be considered to be related, within the meaning of the subsection.

I accept this statement as the correct interpretation to be given to the subsection in question. The subsection has no

[1] [1959] S.C.R. 763, [1959] C.T.C. 339, 59 D.T.C. 1229, 20 D.L.R. (2d) 97.

application where businesses are so related even if carried on at different locations.

I would allow the appeal and direct that the income tax assessment of the appellant for the 1958 taxation year be remitted to the Minister of National Revenue for re-assessment by allowing as a deduction from income of the appellant the sum of $4,011.63. The appellant is entitled to his costs in this Court and in the Exchequer Court.

JUDSON J. (*dissenting*):—Both the Tax Appeal Board and the Exchequer Court have held that the appellant, Robert M. Randall, along with his brother, was carrying on business under the Portland agreement. Both tribunals, for identical reasons, have upheld the Minister's ruling that the travelling and hotel expenses were not deductible because they came within the prohibitions in ss. 12(1)(*a*) and 12(1)(*h*) of the *Income Tax Act*. These sections read:

> 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.

Section 12(1)(*a*) prohibits the deduction of these expenses because they were not incurred in the course of carrying on the Portland business. The Chairman of the Board correctly states the principle in the following conclusion taken from his reasons:

> There was no evidence that, when in Vancouver, the appellant did anything to benefit the Portland business nor did he carry on the business of either company while travelling between the two cities. It is not enough that expenses were incurred while the taxpayer was away from his home. They must also have been incurred in the course of carrying on his business. If a deduction could be granted the expense must have been incurred in the course of carrying on the business of horse racing at the Portland track. It cannot be found that, in travelling from Vancouver to Portland and return or in eating and sleeping at a Portland hotel or in an apartment rented in that city, the appellant was carrying on the business from which he seeks to deduct these expenses. He commenced carrying on that business when he arrived in Portland and ceased to do so when he left the city. Expenses of board and lodging are common to all taxpayers and the appellant incurred expenses "away from home" for these purposes only because he maintained his residence in Vancouver rather than in Portland.

1967

RANDALL v. MINISTER OF NATIONAL REVENUE

Judson J.

Section 12(1)(*h*) prohibits the deduction because these are personal or living expenses and do not come within the exception in s. 12(1)(*h*) because, for the reasons stated above, they were not incurred in the course of carrying on business. These expenses were obviously incurred while away from home. But that is not enough. To qualify for deduction, they must also have been incurred in the course of carrying on business.

I would dismiss the appeal with costs.

Appeal allowed with costs, JUDSON J. *dissenting.*

Solicitors for the appellant: Freeman, Freeman, Silvers & Koffman, Vancouver.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.