BETWEEN:

HERMAN LUKS ..... APPELLANT;

AND

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

1958

Jun. 16 & 17

Dec. 5

Revenue—Income tax—Deductions—Expense of "travelling in the course of his employment"—"Supplies"—"Consumed in the performance of the duties of employment"—The Income Tax Act, R.S.C. 1952, c. 148, ss. 5, 11(9),(10)(c), (11).

The appellant, an electrician, in his 1954 income tax return deducted from the wages of his employment expenses incurred in travelling and carrying his tools in his motor car to and from his home and place of employment, including operating, maintenance and capital

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cost allowance with respect to the car. He also deducted the cost of replacing tools he was required to provide for use in his work. The deductions were disallowed by the Minister and the assessment in that regard affirmed by the Income Tax Appeal Board. Upon appeal to this Court

Held: That neither the appellant's travelling nor the carrying of his tools was "travelling in the course of his employment" within the meaning of s. 11(9) of *The Income Tax Act* and the claim for deduction for travelling expenses was properly disallowed. *Ricketts v. Colquhoun* [1926] A.C.1; *Mahaffy v. Minister of National Revenue* [1946] S.C.R. 450, followed.

2. That the articles which the appellant under his contract was required to provide were all tools falling within the general category of equipment and none of them could properly be regarded as "supplies" within the meaning of that term as used in s. 11(10)(*c*) of the Act, and even assuming that they could be so regarded, the claim for deduction was defeated by appellant's failure to show that the tools were consumed in performing the duties of employment.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Thurlow at Toronto.

John B. Tinker for appellant.

W. R. Latimer for respondent.

THURLOW J. now (December 5, 1958) delivered the following judgment:

This is an appeal from the judgment of the Income Tax Appeal Board,[1] dated June 25, 1956, allowing in part the appellant's appeal against an income tax re-assessment for the year 1954. The matter in issue is the right of the appellant, in computing his income for income tax purposes, to deduct from the wages of his employment certain expenses incurred by him in travelling and carrying his tools from his home to his place of employment and back each day and the cost of replacing tools which he was required to provide for use in his work.

The appellant is an electrician and throughout the year in question he resided in the Township of North York. From January 1, 1954 to the end of June, 1954 he was employed by Eastern Electrical Construction Ltd. of Oshawa, for whom he worked on premises of General Motors at Oshawa in connection with the construction of a new building. For this work the appellant was paid at

[1] 56 D.T.C. 345; 15 Tax A.B.C. 264.

an hourly rate for the time he was engaged on the work and from January 1, 1954 to March 11, 1954 he was also paid a travelling allowance of $14 per week. Under the terms of a union contract governing the employment, the appellant was required to provide certain tools for use in his work. The list of tools so required was a lengthy one, and it is obvious that they would make a load that could not be conveniently carried without a vehicle of some sort. The appellant might have left them on the premises where he worked, but he would have done so at his own risk of loss, and no place to store them was provided. What he did was to carry them in his car which he used each day in travelling from his home to the place where he worked, a distance of 47 miles, and return. In June, 1954 he terminated this employment and secured employment on the same terms with Leslie Electric Co., an electrical contractor of Toronto. For this contractor the appellant worked on alterations to a building at Sunnyside, some 9½ miles from his home. This employment lasted until the end of August. From September 2 to December 8, 1954, the apellant was employed on the same terms by Standard Electric Co. of Toronto, for whom he worked on the construction of a new building in Toronto, eight miles from his home. In each of these jobs, the appellant was paid at an hourly rate for the time during which he was engaged on the work, not including any of the time spent in travelling to or from his work. He received no travelling allowance from any of the employers except as previously mentioned.

In computing his income in his income tax return for 1954, the appellant deducted from the wages received in these employments $1,239.06 as travelling expenses incurred in travelling as above mentioned. The $1,239.06 was made up of $373.06 for gasoline, oil, repairs, and sundry automobile expenses, and $866 for capital cost allowance in respect of the automobile. He also deducted $44.34 for the expense of replacing worn-out or broken tools. The Minister, in assessing the appellant's income, disallowed as deductions both the claim in respect of the travelling expenses and the claim in respect of the expense of replacing tools. The appellant thereupon appealed to the Income Tax Appeal Board, where the disallowance of these deductions was upheld.

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On his appeal to this Court, the appellant contended that because, under each of the contracts of employment, tools were "to be supplied" by the employee, the carrying of them to and from the place where he was employed was part of the duties of his employment and that he was entitled to deduct the travelling expenses and capital cost allowances so claimed under s-ss. (9) and (11) of s. 11 of the *Income Tax Act*, R.S.C. 1952, c. 148, and further that he was entitled under s. 11(10)(*c*) to deduct the cost of replacing tools as an expense for supplies that were consumed directly in the performance of the duties of his employment.

For the purposes of the *Income Tax Act*, income from an office or employment is defined by s. 5 as the salary, wages and other remuneration, including gratuities, received by the taxpayer (plus certain additions not material in this case and with certain exceptions also not material in this case) minus the deductions permitted by certain provisions which include s-ss. (9), (10)(*c*), and (11) of s. 11. Subsections (9) and (11) of s. 11 provide as follows:

(9) Where an officer or employee, in a taxation year,

(*a*) was ordinarily required to carry on the duties of his employment away from his employer's place of business or in different places,

(*b*) under the contract of employment was required to pay the travelling expenses incurred by him in the performance of the duties of his office or employment, and

(*c*) was not in receipt of an allowance for travelling expenses that was, by virtue of subparagraph (*b*) of section 5, not included in computing his income and did not claim any deduction for the year under subsection (5), (6) or (7),

there may be deducted, in computing his income from the office or employment for the year, notwithstanding paragraph (*a*) and (*h*) of subsection (1) of section 12, *amounts expended by him in the year for travelling in the course of his employment.*

(11) Where a deduction may be made under subsection (6) or (9) in computing a taxpayer's income from an office or employment for a taxation year, notwithstanding paragraph (*b*) of subsection (1) of section 12, there may be deducted, in computing his income from the office or employment for the year, such part, if any, of the capital cost to the taxpayer of an automobile used in the performance of the duties of his office or employment as is allowed by regulation.

It will be observed that under ss. (9), when the preliminary conditions for the application of the subsection are met what may be deducted is "amounts expended by the taxpayer in the year for *travelling in the course of his*

employment". This raises the question whether any of the travelling expenses claimed by the appellant were "for *travelling in the course of his employment*".

In *Ricketts v. Colquhoun*[1] the House of Lords considered the case of a London barrister who held the office of Recorder of Portsmouth and who had sought to deduct from the emoluments of that office his expenses of travelling several times each year from London to Portsmouth for the purpose of carrying out his duties as Recorder. He also sought to deduct the cost of transporting his robes of office as Recorder, which he required for the performance of the duties of that office. The section of the statute provided as follows:

> 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.

With respect to the travelling expenses and the cost of conveying the robes, Viscount Cave said at p. 4:

> 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.
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> 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.

[1] [1926] A.C. 1.

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In *Mahaffy v. Minister of National Revenue*[1] the Supreme Court of Canada dealt with a claim for travelling expenses incurred by a member of a legislative assembly in travelling from his home to the provincial capital and back on week-ends during the legislative session. Rand J. said at p. 455:

> The question is whether the items deducted are travelling expenses "in the pursuit of a trade or business"; or "disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income." and in my opinion they are neither. Whether or not attending a session of a Legislative Assembly can be deemed "business" which I think extremely doubtful, certainly making the extra trips and lodging in a hotel in Edmonton cannot be looked upon as "in the pursuit" of it. That expression had been judicially interpreted to mean "in the process of earning" the income: *Minister of National Revenue v. Dominion Natural Gas Co.*, [1941] S.C.R. 19. The sessional allowance is specifically for attendance by members at the legislative proceedings: it has no relation to any time or place or activity outside of that. The "pursuit" of a business contemplates only the time and place which embrace the range of those activities for which the allowance is made: the "process of earning" consists of engaging in those activities. To treat the travelling expenses here as within that range would enable employees generally who must, in a practical sense, take a street car or bus or train to reach their work to claim these daily expenses as deductions. Employees are paid for what they do while "at work"; and the legislators receive the allowance for their participation in the sessional deliberations: up to those boundaries, each class is on its own. For the same reason it cannot seriously be urged that the expenses are "wholly, exclusively and necessarily" laid out for the purpose of earning the allowance: they are for acts or requirements of the member as an individual and not as a participant in the remunerated field.

In the present case, travelling between the appellant's home and the several places where he was employed was not part of the duties of his employment, nor was it any part of the duties of his employment to take his tools from the place of employment to his home each day, nor to carry them each day from his home to the place of employment. This may well have been the practical thing for him to do in the circumstances, but the fact that it was a practical thing to do does not make it part of the duties of his employment. Both travelling from his home to the place of employment and carrying his tools from his home to the place of employment were things done before entering upon such duties, and both travelling home and carrying his tools home at the close of the day were things done after the duties of the employment for the day had been

[1] [1946] S.C.R. 450.

performed. The journeys were not made for the employer's benefit, nor were they made on the employer's behalf or at his direction, nor had the employer any control over the appellant when he was making them. The utmost that can be said of them is that they were made in consequence of the appellant's employment. That is not sufficient for the present purpose. In my opinion, neither the appellant's travelling nor the carrying of his tools was "travelling in the course of his employment" within the meaning of s. 11(9). It follows that the claim for the deduction of $1,239.06 for travelling expenses cannot be sustained and that it was properly disallowed.

The claim to deduct the $44.34 expended by the appellant in replacing tools is made under s. 11, s-s. (10)(*c*), by which it is provided as follows:

> (10) Notwithstanding paragraphs (*a*) and (*h*) of subsection (1) of section 12, the following amounts may, if paid by a taxpayer in a taxation year, be deducted in computing his income from an office or employment for the year
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> * * *
>
> (*c*) the cost of *supplies that were consumed directly in the performance of the duties of his* office or *employment* and that the officer or employee was required by the contract of employment to supply and pay for,
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> * * *
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> to the extent that he has not been reimbursed, and is not entitled to be reimbursed in respect thereof.

The deductions permitted by this subsection are strictly limited to such amounts as meet all of the several requirements of the subsection. In order to qualify, they must first be amounts paid by the taxpayer in the year. They must be amounts for the cost of supplies. The supplies must have been consumed directly in the performance of the duties of the taxpayer's employment and they must have been supplies that the taxpayer was required by the contract to supply and pay for. Even when all these qualifications have been met, the amount is deductible only to the extent that the taxpayer has not been reimbursed and is not entitled to be reimbursed therefor.

In the present case, no question is raised as to the $44.34 having in fact been paid by the appellant in 1954, nor of his having been required by his several contracts of employment to provide certain tools at his own expense, nor of

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his having been reimbursed, nor of his being entitled to reimbursement in respect of any of the $44.34 so paid. But issue is raised as to the extent to which the $44.34 was for *supplies that were consumed* directly in the performance of the duties of the appellant's employment.

"Supplies" is a term the connotation of which may vary rather widely, according to the context in which it is used. In s. 11(10)(*c*) it is used in a context which is concerned with things which are consumed in the performance of the duties of employment. Many things may be consumed in the sense that they may be worn out or used up in the performance of duties of employment. The employer's plant or machinery may be worn out. The employee's clothing may be worn out. His tools may be worn out. And materials that go into the work, by whomsoever they may be provided, may be used up. "Supplies" is a word of narrower meaning than "things", and in this context does not embrace all things that may be consumed in performing the duties of employment, either in the sense of being worn out or used up. The line which separates what is included in it from what is not included may be difficult to define precisely but, in general, I think its natural meaning in this context is limited to materials that are used up in the performance of the duties of the employment. It obviously includes such items as gasoline for a blow torch but, in my opinion, it does not include the blow torch itself. The latter, as well as tools in general, falls within the category of equipment.

The distinction between supplies and equipment was considered in *The D'Vora*[1], where the problem was whether or not the supplying of fuel oil to a ship fell within the meaning of the expression "building, equipping or repairing a ship". Willmer J. said at p. 1127:

> Clearly, the supplying of fuel oil could hardly come within the words "building" or "repairing". The argument, however, is that it comes within the word "equipping". To my mind, there is, prima facie at least, a wealth of difference between the meaning of the word "equipping" and the meaning of the word "supplying". At my suggestion reference has been made to the OXFORD DICTIONARY, but I confess that a perusal of that work has not thrown any great light on the problem which I have to determine. It is to be observed, however, that when I look through the synonyms given for "supply" in the OXFORD DICTIONARY the one word

[1] [1952] 2 All E.R. 1127.

which I do not meet is "equip". In my judgment, the important difference between "equip" and "supply" is that "supply" is a word which is appropriate for use in connection with consumable stores, such as fuel oil, whereas "equip" connotes something of a more permanent nature. I can well understand that anchors, cables, hawsers, sails, ropes, and such things, may be said to be part of a ship's equipment, although they may have to be renewed from time to time, but such things as fuel oil, coal, boiler water, and food appear to me to be in quite a different category.

The problem before Willmer J. was not the same as that in the present case, for he was considering whether providing fuel oil, which could readily be regarded as supplying the ship, could also be regarded as equipping it, while what has here to be determined is whether tools, which are readily classed as equipment, can also be classed as supplies. But the passage quoted indicates that, in general, the two categories are quite distinct from each other.

The tools which the $44.34 was spent to replace included a blow torch, screw drivers, pliers, and a chalk line, all of which were items which the appellant was bound by the contract to provide, and on the evidence it may also have included some small items which the employer was bound by the contract to provide. There was evidence that a blow torch can be expected to last more than a year, that screw drivers and pliers are of uncertain duration, sometimes requiring replacement in the course of a year and sometimes more often, and that a chalk line is a type of thing that is used up completely in the course of a year. There was no evidence, however, as to when any of these items, or for that matter any other tools which the appellant was required by the contract to provide and which were included in the $44.34, in fact ceased to be useful.

In this situation, the appellant's claim to deduct the $44.34 fails on two grounds.

The first is that, regardless of how long they may last while in use or how often it may be necessary to replace them, the articles mentioned as having been included in the $44.34, as well as the other articles which, under the contract, the appellant was required to provide were all tools falling within the general category of equipment, and in my opinion none of them can properly be regarded as "supplies" within the meaning of that term as used in s. 11(10)(*c*).

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Secondly, even assuming that the tools purchased with the $44.34 were supplies of the kind contemplated by s. 11(10)(*c*) it has not been established that they were consumed or worn out in the performance of the duties of any of the three employments in which the appellant was engaged in 1954. Nor was it established that they were consumed or worn out by the end of 1954. For aught that appears, they may not yet be worn out or consumed.

The language of s. 11(10)(*c*) is definite in limiting the deduction to the cost of supplies *"that were consumed"* in performing the duties of the employment. In the French text, it is perhaps even more definite, for the expression there used is "qui ont été consommées". In order to succeed in obtaining the deduction, the taxpayer must show that the amount sought to be deducted meets the requirement. It is not difficult to see how readily it can be met when supplies such as gasoline for a blow torch are involved, for if a record is kept the taxpayer will know how much of the commodity was consumed in the year, but difficulty will inevitably be experienced in attempting to apply this limitation in the case of tools, and this confirms me in the opinion already expressed that tools are not supplies at all within the meaning of the subsection. For the present purpose, however, it is sufficient to say that the claim for the deduction is defeated by the failure to show that the tools purchased with the $44.34 were consumed in performing the duties of the employment.

The appeal fails as to both of the deductions claimed, and it will be dismissed with costs.

Judgment accordingly.