1962
Sept.17-21, 24-27
1964
Sept. 18

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

LYON HENRY APPLEBY ..... RESPONDENT.

Revenue—Income—Income tax—Misrepresentation or fraud on part of taxpayer—Meaning of "with all due despatch" as used in s. 58(3) of the Income Tax Act—Income War Tax Act, R.S.C. 1927, c. 97, s. 55 as amended by S. of C. 1944-45, c. 43, s. 15— Income Tax Act, R.S.C. 1952, c. 148, ss. 4, 46(4) and 58(3); S. of C. 1956, c. 39, s. 11.

The appellant is a general surgeon who has practiced in Vancouver, B.C. since 1924, by himself until 1947, in partnership from 1947 to 1954, and by himself again since 1954. His taxable income for the years 1941 to 1954 inclusive was reassessed, the notices of reassessment being dated November 20, 1957. The notices of objection were received by the appellant on January 10, 1958 and confirmations of the reassessments were dated November 4, 1959, some twenty-two months later. The reassessments were made under s. 46(4) of the *Income Tax Act*, R.S.C. 1952, c. 148, which authorizes the appellant to reassess the tax payable by a taxpayer at any time in the event of misrepresentation or commission of fraud by the taxpayer in filing his return or supplying information under the *Income Tax Act*.

Held: That it has been shown that wilful misrepresentation occurred repeatedly throughout the fourteen material years, not only, as would suffice, according to the balance of probability, but beyond a reasonable doubt.

2. That if misrepresentation on the part of the taxpayer is established, as it has been in this case, the Minister's right to ascertain the true situation becomes coextensive with the origin of the misrepresentation.

3. That although the lapse of twenty-two months between the receipt by the Minister of the notices of objection and the delivery of the confirmation of the reassessment exceeds even a very liberal interpretation of the words "all due despatch" as used in s. 58(3) of the *Income Tax Act*, the otherwise unwarrantable delay can be overlooked because of the period of fourteen years that had to be gone over, the piles of accountancy records, deposit slips and clients' cards and the extensive

dealings in ranching and horse races that had to be investigated, sorted and classified before the definite confirmation of the reassessments could be made.

4. That the appeal is allowed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Dumoulin at Victoria.

A. W. Mercer, L. A. Williams and *R. L. Radley* for appellant.

John L. Farris, Q.C. and *P. W. Butler* for respondent.

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

DUMOULIN J. now (September 18, 1964) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board dated November 23, 1960, respecting an income tax assessment for the 1946 taxation year of the respondent.

Before I begin writing my reasons for judgment, some preliminary particulars are required.

The respondent, Lyon Henry Appleby, is and was at all material times a medical doctor practicing his profession of general surgery in the City of Vancouver, B.C., since 1924.

Following an exhaustive examination of Dr. Appleby's professional earnings, in the course of which his bank accounts, stock investments, and a hobby of considerable pecuniary importance, breeding and raising thoroughbred horses, were investigated, the Minister of National Revenue, on November 20, 1957, issued Notices of Reassessments for the period 1941 to 1954 inclusive, covering fourteen taxation years.

The case at bar may well be divided in three chapters, corresponding, respectively, to the years 1941-1945, for which Dr. Appleby is the appellant; 1946-1952, during which the Minister of National Revenue is appellant; and 1953-1954, with Dr. Appleby as appellant.

To all practical intents, the written averments of both parties throughout these long proceedings are identical, save for minor allegations of suitability according to their status as appellant or respondent.

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It was understood at the start of the hearing that the whole matter should be disposed of on a joint evidence applicable to all fourteen cases, no specific record being singled out but most if not all of them referred to whenever necessary.

A lucid and exact outline of the preliminary steps taken by the departmental officers can be read in the two first pages of the Memorandum of Argument prepared by Mr. A. W. Mercer, counsel for the Department of National Revenue. These introductory paragraphs, on pages 1, 2 and 3 of the Memorandum, entitled "Historical Background", relate that:

> The Reassessments were made as a result of certain discoveries and subsequent investigations by the Vancouver Division of the Department of National Revenue. In October 1955, the witness MacGregor, then a Group Supervisor of Assessment in the Vancouver Division of the Income Tax Department, made a routine examination of tax returns for Dr. Appleby for the period 1953 to 1954. This examination resulted in a field audit being made for those years The field audit was conducted by the witness, Miss Lock. As a result of the information discovered during the audit, the matter was turned over to the Special Investigation Branch of the Vancouver Office of the Department of National Revenue
>
> The Special Investigation Branch was then under the direction of the witness, A. C Collins. An order of search and seizure was obtained on January 25th, 1956, from this Honourable Court. The search was conducted on February 15th, 1956, and resulted in the seizure of all the books and records of Dr. Appleby found in the Doctor's office and his home In addition to the search, both before and after the field audit, investigations were carried on through Dr. Appleby's Bank, Stockbroker, Accountant and others with whom he had dealings relating to his personal finances The Department found evidence of unreported income and schedules of these findings were prepared.

The next move consisted in three meetings at the Income Tax Office, in May and June, 1956, with the Taxpayer, his Accountant and Solicitor, when the Department officials disclosed their intention of pursuing their inquiries back to the year 1940, as there were indications of misrepresentation to that time. The taxpayer was offered ample freedom to examine the detailed lists of apparent discrepancies, prepared by Miss Alma Lock, an Assessor, and I must say, a most diligent one, at the Vancouver Taxation Office. This checking was done, eventually, by Miss Annabelle MacGowan, an accountant, who, in February of 1953, entered Dr. Appleby's service as a bookkeeper. Miss MacGowan attended "at the Vancouver offices of the Department of National Revenue, from the month of June through to the month of December, 1956".

She testified that Miss Lock exhibited to her the schedules of supposedly unreported revenue and the Doctor's income tax returns for the corresponding years. Discussions ensued on that score between these ladies but Miss MacGowan ignores what measures, if any, were taken in consequence of those talks, whilst Miss Lock explained that the records seized and the discrepancies noted were made available to Dr. Appleby's employee, whose occasional objections to items for undeclared income were carefully probed and the matter put aside in the event of reasonable doubt.

The Minister's authority to look so far back as 14 years and decide upon as many reassessments totalizing, according to exhibit 60 (hereafter called Schedule "A"), in "Tax and Interest on Unreported Income", a sum of $126,030.75, derives from s. 46(4) of the *Income Tax Act,* R.S.C. 1952, c. 148, as amended, which reads:

(4). The Minister may at any time assess tax, interest or penalties and may

(*a*) at any time, if the taxpayer or person filing the return has made any misrepresentation or committed any fraud in filing the return or supplying information under this Act, and

(*b*) within 6 years from the day of an original assessment in any other case,

reassess or make additional reassessments

In 1956, but effective only from January 1, 1957, s. 46(4) was amended by c. 39, s. 11, substituting "four years" to the erstwhile period of "six years". Consequently, the assessment time limitation, prior to January 1, 1957, was six years, a delay that equally applies to s. 55 of the *Income War Tax Act,* 1927, R.S.C. c. 97, as amended in 1944-45 by S.C., c. 43, s. 15.

This statutory enactment, then, imposed upon the Minister, as a condition precedent to the reopening of taxation files beyond the prohibited limit of six years, the obligation of alleging and proving fraud or misrepresentation.

The text, in its absolute clarity (a rare and refreshing instance let it be said) speaks by itself, still, *ex majore cautela,* should confirmative authority be apropos, I could rely upon none better than Mr. Justice Cameron's dictum in *Minister of National Revenue v. Taylor*[1], where he says:

After giving the matter the most careful consideration, I have come to the conclusion that in every appeal, whether to the Tax Appeal Board or to this Court, regarding a re-assessment made after the statutory period

[1] [1961] Ex. C.R. 318 at 320-321-322.

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of limitation has expired and which is based on fraud or misrepresentation, the burden of proof lies on the Minister to first establish to the satisfaction of the Court that the taxpayer has made any misrepresentation or committed any fraud in filing the return or in supplying any information under this Act . . .

Further, on p. 322, the learned Judge concludes in these terms:

> Finally, on this point I think that when the Minister has satisfied the Court that "any fraud has been committed or any misrepresentation made", he has done all that he is then required to do. He will thereby have fulfilled the statutory requirement which alone authorizes him to make a re-assessment beyond the statutory period of limitation.

Regarding the nature or extent of the proof in civil proceedings to establish allegations of fraud or misrepresentation, Mr. Justice Cameron opined that:

> A further question arose as to the standard of proof applicable in considering the evidence as to whether a fraud had been committed or a misrepresentation made. In my opinion, the standard to be applied is not that applicable in criminal proceedings, namely, proof beyond reasonable doubt, but that applicable in civil proceedings, namely, the standard of balance of probability.

To meet this onus, the Department produced the T-1 General Income Tax forms for the 14 years, 1941-1954, under attack, and Schedules "B" and "C" prepared by Miss Alma Lock, assisted, I believe, by Messrs. Howard W. Kellond and Lewis Alexander O'Leary, respectively Supervisor of Accounts and Special Investigation Officer in the Vancouver Bureau.

A minute and protracted sifting of these and other exhibits—the trial lasting eight whole days—revealed, as will be more amply seen later on, numberless omissions, incomplete entries in the Doctor's very simple method of accountancy, in his annual income tax reports, cash books and system of dual deposit slips.

The probative value of exhibits 19 (hereafter referred to as Schedule "B") and 62 (hereafter called Schedule "C"), convincingly established, with the deletion of some errors, by the testimonies of Miss Alma Lock and Mr. L. A. O'Leary, consists in itemizing the alleged unreported income of the taxpayer in the course of the total revision of his medical earnings. In the Department's own words, sworn to in Court and repeated in its Memorandum of Argument (pp. 5 & 6) this was the line of action adopted:

> It commenced its investigation by a review of the Doctor's records relating to his medical practice which are:

(a) Patients' cards showing fees charged and amounts paid; (*inter alia* Schedule B, pages 8 to 18, inclusive, Schedule C, exhibits 29-30-31);
(b) Cash books for the sole proprietorship (of the medical clientele) and the partnership (from 1947 onwards);
(c) Bank deposit books and bank records similarly for the Doctor's sole proprietorship and for the period of his partnership;
(d) Original and duplicate receipts issued for fees;
(e) Correspondence and records for the collection of accounts receivable.

Having reviewed all these sources of income, the Department compared the individual items disclosed by each different record, one to the other and eliminated any duplications; the Department checked the bank deposits against the income tax returns to eliminate income from investments.

2. A review was made of the records found in Dr. Appleby's office relating to the monies received by him for prizes, purses and sales of horses and the disposition of such monies was traced and found to have gone to his bank accounts or to have been paid out for expenses and all these items were eliminated from the Schedules of alleged income. In this respect the Schedule prepared by the witness, O'Leary, ex. 74, shows certain items marked with an asterisk (21 in number). These were amounts deposited to Dr. Appleby's Savings Account which, by reason of the size of the payment, were also eliminated even though these may have been payment of medical fees.

As to the sport deeply indulged in by the taxpayer, the Minister's intention to exclude the proceeds and inherent expenditures, for instance the costs of maintaining Appleby's Running Horse Ranch and remuneration of experienced trainers, is categorically repeated on page 16 of the Argument, thus:

So far as purses, prizes and the sale of horses is concerned the Department's examination of Dr. Appleby's own records in this regard shows that $81,473 20 was traced to expenses of horse racing activities; $77,637 60 was traced to Dr. Appleby, his bank accounts or the Running Horse Ranch and this total sum was not treated as income in the preparation of Schedules "B" and "C". The total income from this source accounted for by the Department is $150,110 80 . . . and it is not proven that any proceeds from racing or the sale of horses has been included in Schedules "B" and "C" of unreported income.

Returning now to page 6, we are told that in the preparation of the schedules of discrepancies:

3. All monies received by Dr. Appleby in cash from whatever source, whether deposited in his bank or not, were eliminated. This may have included a considerable amount of fees paid in cash, but these cash items have not been treated as income from medical practice in compiling the schedules. In Dr. Appleby's own evidence he admitted he had received fees in cash (an exact statement).

The concluding paragraph to this explanatory recital submits that:

. . . the result of the precautions taken, the checks and cross-checks made, and eliminations of duplications is that Schedules "B" and "C" are

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a compilation of gross income received by Dr. Appleby for each of the years under review (1941-1954) from his medical practice only, with the sole exception of monies paid in cash, which as a precaution, have not been credited to the Doctor as income from his practice.

The unbroken trend of the evidence fully bears out both the methodical compilation and consequent findings listed in the two master schedules just described.

For the sake of convenience, I have chosen for this "pattern" decision applicable, *mutatis mutandis,* to the whole series of claims, the taxation year 1946, with, according to exhibit 60 (hereafter called Schedule A), the largest unreported income, and in which the Minister of National Revenue is appellant and Dr. Appleby, respondent. Henceforward, the litigants, to avoid confusion, will be designated by their procedural status, when occasion allows.

In his Notices of Appeal and Statements of Facts, or in his Replies to similar Notices, the Minister puts forward that: "The Respondent wilfully made misrepresentations by concealing from the Appellant (or Respondent as the situation requires) or alternatively made innocent misrepresentations by failing to include in the said return of income certain amounts received during the . . . taxation year in the course of his business, . . . which made the statements contained in the said return of income false and misleading . . ." The wording varies somewhat in the Department's Replies for the years 1953, 1954; it is attenuated in its allegation that: "The Appellant (Dr. Appleby) failed to include in his said return of income his share of amounts received by the partnership known as Dr. L. H. Appleby and Associates . . ." At least, then, everything points to a reproach of misrepresentation which as quoted in *Minister of National Revenue v. Taylor* (*supra,* at 324):

> . . . may be either fraudulent or innocent. A fraudulent misrepresentation is a false representation made with the knowledge that it is false, or without an honest belief in its truth, or recklessly without caring whether it is true or false. An innocent misrepresentation is one which is not fraudulent; it is a false statement made in the honest belief that it is true. (*Derry v. Peek* (1889), 14 A.C. per Lord Herschell).

The quotation above deals with positive or affirmative misrepresentation, but it is equally true that it may lie in an omission, as held by Mr. Justice Walsh of the Alberta Supreme Court, in *Stearns v. Stearns*[1]; I cite:

> A misrepresentation may consist just as well in the concealment of that which should be disclosed as in the statement of that which is

[1] 56 D.L.R. 700 at 708.

false, for misrepresentation unquestionably may be made by concealment. If the non-disclosure of a material fact which the representor is bound to communicate is deliberate the misrepresentation is a fraudulent one; if it is unintentional it is nonetheless a misrepresentation though an innocent one.

In the case more especially examined presently, that of taxation year 1946, let it be said for the last time, the appellant introduced a proof of misrepresentation by resorting to evidence of similar facts, an unnecessary precaution in my mind. For so doing, counsel relied on Ex. 77, a handwritten Cash Book, containing entries of medical fees from January, 1935, to December, 1938, and Ex. 20, a typed Cash Book covering the period from January, 1937, carefully enough up to January of 1948, and, desultorily from then on until June, 1954.

The "pedigree" of these books, if I may be permitted the expression, was given by Mrs. Alice Herring (formerly Miss Aspell) who, from 1941 to 1953 remained in the respondent's service as a doctor's nurse and receptionist, also keeping her employer's books of accounts. When Miss Aspell (as she then was) took over in 1941, she continued the bookkeeping practices of the departing nurse, Miss Sadd, which the new incumbent describes in these terms, more or less: "There was a handwritten Cash Book (filed as exhibit 77) and when the correspondence arrived, I would slit open the letters, give them to Dr. Appleby who handed back the cheques to me. I then carried on payments on the clients' cards with corresponding entries in a black Cash Book. I put the cheques in a box and when they were in sufficient quantity, I wrote duplicate slips and made a deposit at the Nova Scotia Bank. I had a Power of Attorney for the Doctor's bank affairs and paid all expenses".

The witness identifies exhibit 20 as a Cash Book typewritten by herself in 1944 when, on Dr. Appleby's instructions, she recopied receipts dating back to 1937. The Doctor told her, at the time, that some names inscribed in the handwritten Cash Book (ex. 77) should not be there and directed nurse Aspell to delete them from the record book she would type. Dr. Appleby handed to Miss Aspell "many patients' cards from 1941 to 1944" which she was not to list in the new book (ex. 20).

Correlated with the preceding testimony was that of Miss Alma Lock, the Vancouver Tax Assessor, who, in an evidence of many hours, singled out as typical of dozens of

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others, this specific instance of omissions in the respondent's accountancy. On Schedule B, itemizing Dr. Appleby's supposedly unreported income during sole proprietorship, the witness points out, at page 1, the first entry under the name of Mrs. George Major, credited with a payment of $100. The treatment to this patient, says Miss Lock, really cost $200 in deduction of which a cash previous payment of $100 had been made and although the client's card eventually mentions full acquittance, noted in nine entries, only four of these were transcribed in the Cash Book, ex. 20. Against the notation of $100, as corrected by Miss Lock, there appears in ex. 20 an entry of $35, dated August 15, 1941.

This selfsame habit of inscribing only part of the payments received in cash book, ex. 20, and never reporting the omitted instalments in the corresponding income tax returns obtained throughout the material times at issue, concludes the witness, and is particularly noticeable on exhibits 27, 28, 29, 30, 31, five series of patients' cards.

A fair résumé of Dr. Appleby's explanations about this aspect of the case is that in 1941 and some years after, Miss Alice Aspell "was primarily a nurse instructed to look after my patients during my absences from the office. I took no part in the accountancy business of my practice. I did not attend to my bills, did not receive payments, did not write up my cash books, neither did I supervise the bank deposits, nor check my ledgers, nor prepare my income tax returns, since from 1941 to 1946 my books were kept by a Mr. Wild".

Exhibit 20 (typewritten cash book) declares the respondent, was first seen by him at his examination on Discovery, held June 27, 1962, and he had just lately been shown exhibit 77, the handwritten record for January, 1935, to December, 1938.

"In 1944", adds the Doctor, "I gave Miss Aspell certain amounts of cards I did not want extended in the cash book and suggested she should therefore re-type it. Never did I ask her to re-write the book in going so far behind as 1935, neither did I instruct her to destroy some stacks of cards. Exhibit 20 was removed to the basement of my home with piles of other papers. I never gave instructions to anyone to omit or falsify entries in my books".

From 1941 to 1946, this leading Vancouver surgeon averaged between 50 and 60 operations a month passed on to

him by doctors, mainly by one William John MacKenzie, who describes himself as a "contract doctor". "I, therefore, told my office nurse", says Dr. Appleby, "to deduct from my income the pay-off share since no tax was due on such sums".

Cross-examined by Mr. Mercer, on another symptomatic indication of the unreliability of his office bookkeeping, a payment of $250 from one Alfred Westerlund, dated September 19, 1950, the witness replies that it was made to his hospital nurse, Miss Anabelle McGowan, who signed a receipt, by a patient anxious to settle his bill on leaving the hospital, adding that occurrences of this sort or payments made to him personally at the hospital would account for omissions in the office ledgers. A reasonable explanation in fact, possibly, but of no avail as a justification in law.

At the beginning of his testimony, the afternoon of September 26, the respondent mentioned giving Miss Aspell patients' cards to be deleted from exhibit 20, the cash book she was to typewrite. The next morning, referring to that matter, Dr. Appleby motivated this request by stating that "he wished to take out all cards of clients sent to him by other doctors to whom he should hand back a proportion of fees; one third to Dr. MacKenzie, one half to Dr. Moffatt, and to some others proportions ranging between one-third and one-quarter." Even so, all that precedes leaves us far away from the hard unrebutted facts, revealed on this particular point by Mr. O'Leary's findings, that from 1941 to 1954 inclusively, the total sum of fees to Dr. MacKenzie, the respondent's most regular "purveyor" of patients, amounted to $3,652.29. It leaves us farther still from the figures on Schedule C, the recapitulatory tableau of Dr. Appleby and Associates' unreported income, wherein, after deduction of the respondent's percentages of fees, he is charged for the period 1947-1954, with unreported income of no less than $22,706.96. On the part of a medical man who, from 1921 to 1962, in England and Canada, performed 31,800 major operations, something like two and a fraction a day, fiscal oversights—to a degree—are understandable, but I repeat, nonetheless unexcusable legally, and, in the instant cases, seem of criticizable inspiration and persisting frequency.

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Disinterestedness from practical concerns should wear a different aspect and, above all, cannot be condoned if derogatory to a statutory obligation.

However busy one may be, it is imperative to remember that in the unrelenting gaze of the Revenue Department, he or she merely becomes thereby a taxpayer of enlarged proportions. If so, then, the respondent's avowed unconcern for material matters verged on actual imprudence. Not only does he ignore everything of items 6, 7 and 8 of Schedule B, but when asked in cross-examination "if he agrees that Schedules B and C offer accurate computations of his income for the relevant years", he replies: "I neither deny nor admit that statement having no personal knowledge of those schedules." Had he deemed it worth while to look at those exhibits, it can be presumed he could have done so, as Schedule B was deposited in Court on September 18, Schedule C two days later, the trial lasting until September 27 inclusively. The recurring excuse for such aloofness was: "I had engaged people, particularly Mr. Hopkins, to attend to that."

Some words now about this gentleman's evidence. Mr. Ronald William Hopkins is a chartered accountant practicing his profession in Vancouver. In June, 1946, he began working as accountant and "income tax advisor" for Dr. Appleby, "who wished to be kept out of trouble." He personally prepared the Doctor's income tax returns for the years 1937 to 1945 and, we are told, "included all amounts received." Despite this assurance, Mr. Hopkins, shortly afterwards admitted that, for 1950, he left out "payments obtained belatedly from the years of sole proprietorship of the clientele, because they were offset by certain expenses which the Department subsequently disallowed." The witness, required to elucidate item 12 of Schedule C "Payment to accountant debited to fees account in General Ledger not allowable as an expense: $500", answers that this was an advance to him for fees and travelling expenses. The accountant winds up his testimony by this declaration: "I take full responsibility for Dr. Appleby's income tax returns during the years 1946 to 1954"; but a few moments previously, Hopkins had also said that which might suggest a solution to many things so painstakingly reported in Schedules B and C: "I attended to the bookkeeping *except the Cash Book.*"

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At this stage, the groundwork had been laid for itemized proof of the respondent's allegations and it was forthcoming mainly in three documents, two already known, Schedules B and C, and a third one, exhibit 60 (Schedule A) a general recapitulation labelled "Increase in Income Taxes, Penalties and Interest." It would be an unwarrantable waste of time to quote at length from the 54 sheets of "B" and the 44 of "C", replete with names, dates, figures and minutiae appended to them. Significant notations gleaned here and there will suffice for the purpose of my notes.

In this line of thought the comparison of Dr. Appleby's annual earnings entered by Miss Aspell in the typed ledger (ex. 20) with their mention in the corresponding income tax returns, signed by the respondent, for the 1941-1946 period, is indubitably revealing:

	Exhibit 20—Respondent's Cash Book	*Income Tax Returns*
1941:	$16,445.48	$ 8,184 88 (ex. 1)
1942:	23,471 33	17,346 25 (ex. 2)
1943:	30,355.68	24,414.79 (ex. 3)
1944:	35,017.16	26,265 78 (ex. 4)
1945:	53,543 25	40,997 82 (ex. 9)
1946:	36,411.49	33,588 91 (ex. 7)

For the ensuing years up to 1954, the comparison is between Schedule A and the yearly reports:

	Schedule A (ex. 60) Revised Taxable Income	*Income Tax Returns of Respondent*
1947:	$34,854 24	$29,932.17 (ex. 15)
1948:	45,386.59	41,305.25 (ex. 49)
1949:	27,999.71	25,269 68 (ex. 50)
1950:	41,744.31	37,145 00 (ex. 51)
1951:	$49,841.00	$45,743.39 (ex. 52)
1952:	56,272.43	51,599 39 (ex. 53)
1953:	50,102 23	46,552.63 (ex. 54)
1954:	39,724 36	38,820 05 (ex. 55).

The unreported income for the whole 14 years, reconstituted from the tax returns, the office bookkeeping, clients' receipts, duplicate deposit slips and sundry other data, reproduced meticulously in the master schedules B and C reaches a grand total of $119,122.24.

The protracted evidence heard so far vindicated on all points the appellant's averments of misrepresentation,

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which, whatever its subjective qualification might be, did not impress the Court as technically innocent.

Due to their major probative significance, I will cite, as examples, two items listed on each of the master schedules B and C. There are nine such chapter heads on B and 12 on C, followed in the former case by 54 particularized explanatory pages and 44 in the latter. On Schedule B, paragraph (3), recapitulating the fourteen years, and this is so throughout, reads:

(3) Amounts credited on the Patients' account cards with no corresponding entry in the Cash Book

Total: $17,651.94

(6) Amounts shown in duplicate Bank Deposit Books as deposited to Dr. Appleby's personal Bank accounts for which there is no corresponding entry in the Cash Book. The duplicate deposit books show amounts only with no corresponding identifying annotation against each amount.

Total $53,331.32

On C, the partnership years, 1947 to 1954, the closely resembling titles are:

(4) Amounts credited on the Patients' account cards with no corresponding entry in the Cash Books:

Total $ 9,187.68

(7) Amounts shown on Duplicate Bank Deposit Books as deposited to Dr. Appleby's personal bank accounts for which there is no corresponding entry in the Cash Books. The duplicate deposit books show amounts with corresponding name against each amount:

Total $11,207.36

All the above totals were left out of the annual computations of income.

Misrepresentation convincingly established, the onus of disproving any of the entries charged against him devolved upon the respondent. His endeavours in this attempt were more tenacious than successful, and appear, faithfully related, at pages 14 and 18 of the appellant's Memorandum and are hereunder quoted:

7. Dr. Appleby himself has stated that he knew nothing about the books and therefore was not able to rebut the contention of the Minister except as to certain specific items which are found in Schedule C, page C-15:

1949			
Jan. 12	J. Farris	$ 50 00	(Dr. Appleby had testified this represented losses incurred at "snooker" games)
Jan. 18	H. R. Robertson ..	$122.00	
	Dom. of Canada ..	$179.52	(Savings Bond coupons)

July 14	J. D. Volen	$ 30.00	(repayment of loan)
Sept. 30	F. Kilroy	$ 66.78	(Kilroy's share of horse racing expenses)

These five entries amount to $448.30

On page C-18 of the Schedule "C" for the year 1950, the items referred to are:

April 15	George Sweny	$283.00	(Respondent excused this entry as gains made in poker games at the Vancouver Club)
July 31	W. H. West	$500.00	(sale price of a horse)
Sept. 15	N. Meeks	$ 19.00	(bridge winnings)
Sept. 19	Clay Pluett	$ 50.00	(his share of hunting excursion costs)
	Dom. of Canada ..	$600.00	($150 repeated four times)

A total of $1,452 and not $1,152 as stated in the Memorandum.

On page C-24 of Schedule C, for the year 1951, the items referred to are:

Nov. 6	F. Smith	$ 30.00	(losses at poker games)
	P. T. Soames	$157.50	(partial payment of loan)

A total of $187.50.

At page C-30 of Schedule "C" for the year 1952, the items referred to are:

Aug. 24	Trav. Ins.	$254.29	(readjustment of premiums)
Jan. 3	R. Henderson	$200.00	(refunding of a loan)
Feb. 22	Associated Courses .	$ 28.00	(refund of subscription to a magazine)

amounting to $482.29; an overall total of $2,570.09 for admissible deductions.

My numerous reviews of the literal and oral evidence brought to light some other items that should, I believe, be allowed to the respondent, thereby extending to him, and to the largest degree, the benefit of a reasonable doubt.

We are aware of the appellant's stand regarding Dr. Appleby's Running Horse Ranch and all correlated matters, that ". . . monies received by him for prizes, purses and sales of horses . . . and found to have gone to his Bank accounts or to have been paid out for expenses . . . were eliminated from the Schedules of alleged income" (cf. Memorandum, pages 5, 6, 16 and page 6 of the Reply). This "policy", adopted presumably after due reflection, should,

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then, obtain and prove decisive whenever doubt arises. Such would be the case with a charge of $1,975.74, listed on C-19 of Schedule C, entitled:

> Running Horse Ranch Ltd. Payments made on behalf of Running Horse Ranch Limited by Dr Appleby, credited by them (?) to Dr. Appleby's account. It was determined some cheques received in payment of fees were endorsed by Dr. Appleby and, in other cases, source of payment could not be determined.

Provided this amount of $1,975.74 is classified by the appellant as a payment on behalf of Running Horse Ranch, it should be excused. For similar reasons, a $635 charge on page C-26, said to be:

> Payments made to Gordon Campbell, horse trainer—source of payments could not be determined.

is also deleted from the final total on Schedule A. And I also strike out, at page C-43, an entry of March 26, 1954, reading: "Purity Feed, $500", admittedly a payment "on behalf of Running Horse Ranch Limited . . ."

Finally, counsel for the appellant, on the last day of the trial, September 27, formally withdrew a Penalty claim for $3,650.

These eight deductions add up to the sum of $9,330.83 against the recapitulative figure on Schedule A of $129,-793.70, leaving an outstanding balance of $120,462.87.

Shortly before the oral arguments, Mr. J. C. Farris, Q.C., the respondent's counsel, prepared for my use a "Schedule Showing that the Cash Book (exhibit 20) was not copied from exhibit 77 for the years 1937 and 1938". I need not comment on this document (not of record) for the obvious reasons that a proof of similar facts was not required; misrepresentation, in the Court's opinion, resulted overwhelmingly from a mass of other incidents. Furthermore both Cash Books, exhibits 77 and 20, were written, the former, and typed, the latter, by the Misses Sadd and Aspell, Dr. Appleby's employees, under his responsibility; lastly, no reassessment issued for those two years.

In reply to the appellant's generalized complaint of misrepresentation, based on the evidence analyzed *supra*, Farris, Q.C., rested his argument on six main grounds, which will be dealt with in order and succinctly:

> 1. The Minister of National Revenue did not establish any fraud or wilful misrepresentation.

On the contrary, it was shown that, at least, the second of the statutory faults just mentioned occurred repeatedly

throughout the fourteen material years, not only, as would suffice, according to the balance of probability, but beyond a reasonable doubt.

2. Innocent misrepresentation is not sufficient.

Presently, holding as I must, that the misrepresentation proved was anything but innocent, a discussion of the view taken on this point in the *Taylor* case (*supra*) would be purely academic.

3 Alternatively, if innocent misrepresentation is sufficient, the burden of proof rests upon the Minister to establish each misrepresentation alleged.

The Court agrees with this enunciation of the rules of evidence, but is satisfied that the Minister successfully acquitted himself of this condition precedent, with the possible exception of eight amounts juridically deleted.

4. In the further alternative that the burden of proof is on the Taxpayer, this obligation was discharged by proving that the method of assessment adopted brought into tax receipts for unassessable income.

The Court granted the taxpayer, to the extent of some $9,330.83, the largest benefit of doubt, and, for the surplus, it feels assured that no untaxable revenue entered in the computation of unreported income.

5 In exercising the powers conferred upon him by section 46(4)(a), the Minister, acting in a quasi-judicial capacity, must decide in accordance with legal principles and has failed to do so.

The permissive, optional, language of section 46(4) of the Act "The Minister may at any time . . ." is hardly reconcilable with the usually accepted notions, characterizing judicial or even quasi-judicial determinations, that ordinarily terminate contradictory debates aired in some sort of open Court. Mr. Justice Thorson, in the affair of *Pure Spring Company Limited v. Minister of National Revenue*[1] elaborating the differences between judicial, quasi-judicial and administrative decisions, wrote:

The difference between judicial and quasi-judicial decisions was dealt with in the Report of the Committee on Ministers' Powers. This Committee was appointed by the Lord High Chancellor of Great Britain on October 30, 1929, to consider the powers exercised by or under the directions of . . . Ministers of the Crown by way of (a) delegated legislation and (b) judicial or quasi-judicial decision ... It made its report on March 17, 1932 . . . The Committee, at page 88, puts the difference as follows: A quasi-judicial decision differs from a judicial decision in that it is governed, not by a stautory direction to the Minister to apply the law of the land to the facts and act accordingly, but by a statutory direction

[1] [1946] Ex.C.R. 471 at 480-481

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or permission to use his administrative discretion and to be guided by considerations of public policy, after he has ascertained the facts, and, it may be, the bearing of the law on the facts so ascertained.

The learned President was then discussing the discretional allowance or disallowance of operating expenses by the Commissioner of Income Tax under s. 6(2) of the *Income War Tax Act*; on page 481, the report continues thus:

> The Minister's discretionary determination, so far as it is an administrative act, and apart from whether it is quasi-legislative, may involve duties of a quasi-judicial nature to be discharged in the manner prescribed by law, but at most such duties relate to matters antecedent, ancillary or incidental to the determination, and when the Minister actually makes his determination he passes from the position of a quasi-judge to that of an administrator and his determination is an administrative act based on consideration of public policy with no judicial or even quasi-judicial aspects.

Independently of their specific nature, the Ministerial decisions at issue, even though tainted with irregularity, which is not the case here, were contradictorily and at great length revised before this Court, thereby remedying initial defects had any existed.

> 6. The Minister's failure to comply with section 58(3) concerning the use of "all due despatch" would of itself void these re-assessments.

The preceding objection would possibly, at first reading, give rise to a certain amount of doubt. A span of fourteen years is indeed a long stretch of time to tread back. Yet, at second glance, this hesitation cannot withstand the rebuttal of facts and law. Misrepresentation having been established, s. 46(4) empowers the Minister, if the taxpayer or person filing the return has made "any" misrepresentation, to assess, upon the infringer, tax, interest or penalties "at any time". This is the paramount delegation of authority inspired by the age-long maxim *"fraus omnia corrumpit"*. If misrepresentation there be, then, the Minister's right to ascertain the true situation becomes coextensive with the origin of the misrepresentation. The principle, however, is restricted by a procedural rule as to its exercise, enacted in s. 58(3) of the Act:

> 58. (3) Upon receipt of the notice of objection, the Minister shall with all due despatch reconsider the assessment and vacate, confirm or vary the assessment or re-assess, and he shall thereupon notify the taxpayer of his action by registered mail.

Receipt of the Notices of Objection was set at January 10, 1958, and all confirmations of re-assessments bear the date of November 4, 1959 (cf. exhibits 58-59).

A lapse of 22 months, in ordinary conditions, exceeds even a very liberal interpretation of "all due despatch".

The question raised, presently, seems of a different order; a period of fourteen years had to be gone over, piles of accountancy records, deposit slips, clients' cards, as also extensive dealings in ranching and horse races, were investigated anew, sorted and classified, before the definite confirmation of re-assessments destined to constitute eventually the basic essentials of judicial proceedings.

Discussing the scope of the statutory recommendation "with all due despatch", Mr. Justice North in *Colley v. Hart*[1] wrote at page 184:

> There is no doubt that the Minister is bound by time limits when they are imposed by the statute, but, in my view, the words "with all due dispatch" are not to be interpreted as meaning a fixed period of time. The "with all due dispatch" time limit purports a discretion of the Minister to be exercised, for the good administration of the Act, with reason, justice and legal principles.

Due to extraordinary circumstances prevalent here, and for that motive alone, I feel justified to overlook an otherwise unwarrantable delay.

Accordingly, for the reasons given, the Minister's appeal will be allowed, the decision of the Tax Appeal Board set aside, and the re-assessment made upon the respondent for 1946 affirmed, but without any penalty. The appellant is entitled to his costs after taxation.

Judgment accordingly.