BETWEEN:

PURE SPRING COMPANY LIMITED,... APPELLANT,

AND

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

1944
Oct. 2, 3
1946
Aug. 26

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, secs. 6 (a), 6 (2), 59, 65 (2), 66, 75 (2)—Disallowance of excessive expense—Scope and nature of Minister's discretionary power under sec. 6 (2)—Difference between judicial and quasi-judicial decisions—Minister's discretion under sec. 6 (2) not a judicial discretion but an administrative one—Minister's discretionary determination under sec. 6 (2) an administrative act with quasi-legislative effect—Exercise of discretion on proper legal principles—Difference between Minister's discretionary determination under sec. 6 (2) and assessment—No right of appeal from Minister's discretionary determination under sec. 6 (2)—Determination of excessiveness of expense exclusively within discretion of Minister—Limited nature of Court's jurisdiction in respect of sec. 6 (2)—Difference between Minister's discretionary determination under sec. 6 (2) and decision under sec. 59—Minister need not give reasons for discretionary determination under sec. 6 (2)—Presumption of proper exercise of discretion under sec. 6 (2)—Question of fact whether directors' fees wholly, exclusively and necessarily laid out or expended for the purpose of earning the income.

Part of the salary paid to the president and general manager of the appellant was disallowed as a deductible expense by the Commissioner of Income Tax under the authority of sec. 75 (2) and sec. 6 (2) of the Income War Tax Act, as being in excess of what was reasonable or normal expense for the business carried on by it. Under the authority of sec. 6 (*a*) the Commissioner also disallowed the deduction of the directors' fees paid to the president and his three sons as being not exclusively and necessarily laid out or expended for the purpose of earning the income. The amounts disallowed were added as taxable income to the amounts shown on the appellant's returns.

Held: That section 6 (2) brings any expense within the possible purview of the Minister's discretionary power of disallowance.

2. That the Minister's discretion under sec. 6 (2) extends to a determination both of what is reasonable or normal expense for the business carried on by the taxpayer and what is in excess thereof. The test of the correctness of the disallowance of an expense is not whether it is in excess of what is reasonable or normal as a matter of fact but whether it is in excess of what the Minister determines in his discretion to be reasonable or normal. The standard of correctness is the opinion of the Minister; it is a subjective one belonging exclusively to him; the Court has no right, in the absence of specific statutory authority, to measure it by any standard of its own or by any objective standard such as that of the "ideal reasonable man". Whether an expense is excessive or not is not a question of fact; it is made dependent on the Minister's discretionary opinion.

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3. That the Minister's discretion under section 6 (2) is not a judicial discretion but an administrative one.

4. That the Minister's discretionary determination under section 6 (2) is not a judicial decision but an administrative act with quasi-legislative effect done in the course of administration and definition of public policy. *Board of Education* v. *Rice* ((1911) A.C. 179) and *Local Government Board* v. *Arlidge* ((1915) A.C. 120) distinguished.

5. That the Minister's discretionary determination under section 6 (2) and the assessment made by him are quite separate and distinct operations in point of time and scope of substance and the Minister's functions in respect of them are fundamentally different in character.

6. That the assessment is the summation of all the factors representing tax liability, ascertained in a variety of ways, and the fixation of the total after all the necessary computations have been made.

7. That the appeal provided by the Income War Tax Act is an appeal from the assessment and that there is no right of appeal from the Minister's determination in his discretion under section 6 (2). *Nicholson Limited* v. *Minister of National Revenue* ((1945 Ex. C.R. 191) followed and *Dobinson* v. *Federal Commissioner of Taxation* ((1935) 3 A.T.D. 150) distinguished.

8. That the determination of the excessiveness of all or part of an expense has been left by Parliament exclusively to the discretion of the Minister; it is his opinion and not that of the Court or of any one else that governs.

9. That the Minister in making his discretionary determination under section 6 (2) is not restricted to the same consideration as would govern a court of law in arriving at a judicial decision; he is not confined to provable facts or admissible evidence, but may obtain his information from any source he considers reliable; he may use his own knowledge and experience or that of his officers in his department and he may take the benefit of their advice; in the field exclusively assigned to him by Parliament he is as free to act as Parliament itself; he may use his own judgment and be guided by the intuition of experience; he may use all the aids which will enable him to carry out honestly the administration and definition of the policy that Parliament has entrusted to him.

10. That neither the opinion of the Minister nor the material on which it was based is open to review by the Court; it has no right to examine into or criticize the reasons that led the Minister to his opinion or question their adequacy or sufficiency; it is not for the Court to lay down the considerations that should govern the Minister's discretionary determination; Parliament requires the Minister's opinion, not that of the Court; the Court has nothing to do with the question whether the Minister's opinion was right or wrong; nor has it any right to decide that it was unreasonable. The accuracy or correctness of the Minister's discretionary determination is outside the Court's jurisdiction.

11. That the jurisdiction of the Court in respect of section 6 (2) is limited to intervening only when it has been shown that the Minister has not applied proper legal principles and in such cases its intervention is limited to sending the matter back to the Minister under section 65 (2). The Court has no other powers.

12. That the respective functions of the Minister under section 6 (2) and section 59 are fundamentally different; when he acts under section 59 his function is solely judicial and his decision is a purely judicial decision.

13. That when the Minister makes a determination in his discretion under section 6 (2) he is not required by law to give any reasons for such determination. *Wrights' Canadian Ropes Ltd.* v. *Minister of National Revenue* ((1946) S.C.R. 139) discussed.

14. That where the appellant has not shown that the Minister has not applied proper legal principles in arriving at his discretionary determination under section 6 (2) and the Minister has not given any reasons for it, the Court should assume that he acted properly; that the presumption of proper exercise of his discretionary power should be applied in his favour until rejected by clear proof to the contrary; that the onus of showing that the Minister did not apply proper legal principles is on the appellant taxpayer and that if he does not discharge it his appeal must be dismissed. No assumption that the Minister acted arbitrarily or improperly should be drawn from the fact that he did not give reasons. He is not required to do so.

15. That the appeals in respect of the disallowance of salaries must fail.

16. That directors' fees paid by a company are not necessarily deductible expenditures for income tax purposes merely by reason of their having been validly paid; it is a question of fact in each case whether or to what extent such fees were wholly, exclusively and necessarily laid out or expended for the purpose of earning the income of the company. *Copeman* v. *Flood (William) & Sons Ltd.* ((1941) 1 K.B. 202) followed.

17. That the appeals in respect of the disallowance of directors' fees should be allowed.

APPEALS under the Income War Tax Act.

The appeals were heard before The Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

J. Mirsky for appellant.

H. H. Stikeman and *Miss M. J. Phillips* for respondent.

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

The President now (August 26, 1946) delivered the following judgment:

These appeals are from assessments under the Income War Tax Act, R.S.C. 1927, chap. 97, and The Excess Profits Tax Act, 1940, Statutes of Canada, 1940, chap. 32, in respect of the appellant's taxation years ending October

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1940 and 1941. Its returns showed losses of $147.04 and $45.16 respectively, but for each year two items of expense, totalling $2,800, were disallowed, rendering it taxable under each Act. The items consisted of $2,000 in respect of the salary of David Mirsky, the president and general manager, and $800 for directors' fees paid to him and his three sons. The appellant served notices of appeal on the Minister, who affirmed the assessments, and then, being dissatisfied with the Minister's decision, brought its appeals from the assessments to this Court. The appeals were heard together.

The facts are not disputed. The appellant deals in soft drinks. The business was originally owned by Sadie Mirsky, wife of David Mirsky. In 1927 she sold it to the appellant, receiving 397 out of 400 shares issued in payment, and became its president, her son, Norman Lionel Mirsky, becoming vice-president and general manager and her other two sons, John Mirsky and Mervin Mirsky, becoming directors. In December 1939 Sadie Mirsky died, having bequeathed her 397 shares to her son, Norman Lionel Mirsky. Between 1937 and 1939 the appellant paid the sum of $9,500 per year in salaries to Sadie Mirsky and her three sons. During this time David Mirsky looked after his wife's interests and gave some help at the appellant's plant but drew no salary. After Sadie Mirsky's death a reorganization in management took place. In February 1940 David Mirsky was elected president and made general manager with his salary fixed at $7,000 per year as from October 31, 1939; Norman Mirsky remained as vice-president with an increase in annual salary from $2,760 to $4,000; and John Mirsky and Mervin Mirsky, although remaining as directors, ceased to draw salaries; the total of the annual salaries paid to the directors was thus increased to $11,000. In addition, directors' fees of $200 per year for each of the four directors, which had never previously been paid, were also paid.

David Mirsky and Norman Lionel Mirsky divided the duties of management between them, the former being responsible for the factory and production and the latter for the office. David Mirsky's duties included the blending and mixing of the extracts, acids and oils that went into

the various syrups used by the appellant in its products, management generally of production in the factory and supervision of the machinery. Norman Lionel Mirsky helped occasionally in the factory and with the mixing of syrups, but his main duties were those of office manager, looking after advertising, sales and accounts. The volume of sales, which had grown from $97,093 in 1937 to $105,227 in 1939, continued to grow, after the reorganization, to $120,628 in 1940 and $147,377 in 1941. Yet, notwithstanding such increases, the operations of the appellant, after payment of expenses, including those disallowed, showed the losses mentioned, although the next two years, 1942 and 1943, showed profits.

The disallowance of $2,000 in respect of David Mirsky's salary will be dealt with first.

Before any disallowance was made, the Inspector of Income Tax at Ottawa, on August 28, 1942, wrote to the appellant, referring to David Mirsky's salary of $7,000 in 1940 and 1941 and the fact that in the previous year he had received no salary; stating that, in the opinion of the division, such salary was excessive; giving notice that the discretionary powers under the Act were about to be exercised and that it was proposed to recommend the allowance of a salary of $5,000; and inviting the appellant to submit whatever evidence it thought appropriate to be considered in the exercising of the discretion. On September 23, 1942, Mirsky and Mirsky, solicitors for the appellant, who were also two of its directors, replied to this letter outlining the changes in management after Mrs. Mirsky's death; pointing out that David Mirsky had taken over the duties of Mrs. Mirsky, Mervin Mirsky and John Mirsky; and giving particulars of David Mirsky's duties and responsibilities. Reference was also made to the increasing volume of sales and it was contended that the salary of $7,000 together with the salary presently paid to Norman Lionel Mirsky was not considerably in excess of the total executive salaries paid in 1937. There is also evidence that John Mirsky, in addition to writing the letter referred to, made personal representations to the Department. The evidence also shows that a report was made by the Ottawa inspector but no request was made on

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behalf of the appellant to have it produced. On November 24, 1942, the Commissioner determined in respect of each year "that the salary of $7,000 paid to the President, David Mirsky, is in excess of what is reasonable for the services performed and in assessing the taxpayer $2,000 of the said salary is disallowed as a deduction from income". Later, when the assessments were made the amount of the disallowance was added as taxable income to the amounts respectively shown on the appellant's returns.

These disallowances were made by the Commissioner of Income Tax under section 6 (2) of the Income War Tax Act which provides:

6. (2) The Minister may disallow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the income.

and section 75 (2) which reads:

75. (2) The Minister may make any regulations deemed necessary for carrying this Act into effect, including regulations designed to facilitate the assessment of tax in cases where the right of taxpayers to deductions or exemptions has varied during any taxation year, and may thereby authorize the Commissioner of Income Tax to exercise such of the powers conferred upon the Minister, as may, in the opinion of the Minister, be conveniently exercised by the Commissioner of Income Tax.

Under section 75 (2) the Minister, on August 8, 1940, authorized the Commissioner of Income Tax, now the Deputy Minister of Taxation, to exercise the powers conferred upon him by the Act. This authorization was general in nature: *vide Canada Gazette,* September 13, 1941, page 852. In my judgment, the discretionary power conferred by section 6 (2) remains vested in the Minister, although authorized to be exercised by the Commissioner; in any event, for purposes of convenience I shall refer to it as the Minister's power and to its exercise as the Minister's determination.

The subject of the Minister's discretionary power under section 6 (2) presents problems of great importance and considerable difficulty. It is essential that its scope and nature should be clearly understood if the respective jurisdictions of the Minister and the Court in respect thereof are to be defined.

The scope of the power is very wide. In the present case we are concerned only with the first part of section 6 (2) which empowers the Minister to disallow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer. No exception is made for any class or kind of expense and no distinction is drawn between items of expense that are within the control of the taxpayer and those that are not. The fact that the taxpayer has paid the expense under a contractual obligation does not remove it from the scope of the power; there is no such limitation in the section. The obligation to pay the expense results from the contract; the right to deduct it is quite a different thing, for it depends on whether the statutory power of disallowance is exercised; if the Minister disallows an expense within his statutory power to do so, then whatever right there might otherwise have been to deduct it no longer exists, for it has been extinguished pursuant to the Act. It is no answer to the disallowance to say that the item of expense is not "net profit or gain" within the meaning of section 3 of the Act, for section 6 must be read with section 3 before taxable income can be ascertained, and disallowance of it under section 6 (2) makes it taxable. Nor is it any answer to say that the expense was wholly, exclusively and necessarily expended for the purpose of earning the income and, therefore, outside the exclusions of section 6 (*a*); if it were not such, it would be excluded from deduction by section 6 (*a*) itself and there would be no need for resort to section 6 (2); section 6 (2) clearly contemplates the disallowance of an expense that is not excluded by section 6 (*a*); to be deductible an expense must fall not only outside the exclusions of section 6 (*a*) but also outside the exclusion resulting from its disallowance under section 6 (2). Section 6 (2) brings *any* expense within the possible purview of the Minister's discretionary power.

The extent and nature of the discretion were dealt with in *Nicholson Limited* v. *Minister of National Revenue* (1). Counsel for the appellant in that case contended that the Minister's discretion extended only to what is in excess of reasonable or normal expense but that what is reasonable or normal expense is a question of fact in respect of which

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

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the Minister has no discretion. This contention was rejected. It seems obvious that there cannot be any such limitation. There would be no sense in requiring the Minister to ascertain what is reasonable or normal expense as a matter of fact and confining his discretionary power of disallowance to what is in excess thereof, for that would permit the deductibility of such part of the excess as the Minister did not disallow, and no such absurd result could have been contemplated. The Minister's discretion must go further. Parliament clearly intended as a matter of policy that excessive expense should be disallowed as a deduction from taxable income. It is obvious that in a great many cases it would be very difficult, if not impossible, to determine as a matter of fact that a particular expense is in excess of what is reasonable or normal for the business carried on by the taxpayer. Parliament realized this fact and decided to meet it by entrusting the Minister with the power to determine in his discretion in each case the amount of expense to be disallowed as being excessive; it is the determination of the excessiveness of an expense that is left to his discretion. It must, therefore, be within his discretion to determine whether an expense is reasonable or normal for the business carried on by the taxpayer, for otherwise he cannot determine whether it is excessive or not. In my opinion, the Minister's discretion under section 6 (2) extends to a determination both of what is reasonable or normal expense for the business carried on by the taxpayer and what is in excess thereof. The test of the correctness of the disallowance of an expense is not whether it is in excess of what is reasonable or normal as a matter of fact but whether it is in excess of what the Minister determines in his discretion to be reasonable or normal. The standard of correctness is the opinion of the Minister; it is a subjective one belonging exclusively to him; the Court has no right, in the absence of specific statutory authority, to measure it by any standard of its own or by any objective standard such as that of the "ideal reasonable man". Whether an expense is excessive or not is not a question of fact; it is made dependent on the Minister's discretionary opinion.

The Minister's power is a very important one; a basis for it can be found in the view that without some such power the revenue would in many cases be at the mercy of the ingenuity of the taxpayer, and profits that really ought to be taxed would escape taxation through being absorbed by items of expense, that could not be proved as a matter of fact to be in excess of reasonable or normal expense. It was to meet such a situation, no doubt, that section 6 (2) was enacted.

When the Minister makes his discretionary determination that an expense is to be disallowed as excessive he does an administrative act, but, in my view, his determination is more than that. He is acting in respect of a policy which Parliament has indicated but not defined. It has left the limits of the field in which he is to operate to be defined by him in his discretion; the Minister's determination is thus really a definition of policy. The effect is that his determination renders the expense which he disallows subject to tax, which otherwise would be deductible and free from tax. Parliament has thus, in effect, conferred a power of tax imposition upon the Minister. This makes his determination not only an administrative act but also a quasi-legislative one. This must not be overlooked in considering the Court's duty of supervision over it.

The Minister's discretion under section 6 (2), although very wide, has limits, which are inherent in the concept of discretion itself, as indicated by the House of Lords in *Sharp* v. *Wakefield* (1) where Lord Halsbury L. C. said:

> "Discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be according to the rules of reason and justice, not according to private opinion: *Rook's Case* (5 Rep. 100, A); according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself: (*Wilson* v. *Rastall* (4 T.R. at p. 754)

This statement is relative and must be read with reference to the nature of the discretion and the responsibility of the person to whom it has been entrusted. Here Parliament has vested an important discretion of a policy nature in the Minister of National Revenue who is responsible to it for the administration of his department and the Acts

(1) (1891) A.C. 173 at 179.

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entrusted to it. That such considerations have an important bearing on the construction of the extent of a discretionary power was stressed in the House of Lords in *Liversidge* v. *Anderson et al* (1), where Lord Macmillan said of the discretionary power there involved:

> The statute has authorized it to be conferred upon a Secretary of State, one of the high officers of state, who, by reason of his position, is entitled to public confidence in his capacity and integrity, who is answerable to Parliament for his conduct in office, and who has access to exclusive sources of information,

And then stated as a principle:

> In a question of interpreting the scope of a power, it is obvious that a wide discretionary power may more readily be inferred to have been confided to one who has high authority and grave responsibility.

It cannot be too strongly emphasized that the Minister's discretion under section 6 (2) is not a judicial discretion. His determination is not a judicial decision; the most that can be said of it is that it is quasi-judicial.

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 direction of (or by persons or bodies appointed specially by) Ministers of the Crown by way of (*a*) delegated legislation and (*b*) judicial or quasi-judicial decision, and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law. The Committee made its report on March 17, 1932, and it was presented to Parliament the next month. At page 73 of the Report the Committee said:

> The word "quasi", when prefixed to a legal term, generally means that the thing, which is described by the word, has some of the legal attributes denoted and connoted by the legal term, but that it has not all of them. For instance, if a transaction is described as a quasi-contract it means that the transaction has some of the attributes of a contract but not all. Perhaps the best translation of the word "quasi", as thus used by lawyers, is "not exactly". A "quasi-judicial" decision is thus one which has some of the attributes of a judicial decision, but not all. In order, therefore, to define the term "quasi-judicial decision", as it is used in our terms of reference, we must discover which of the attributes of a true judicial decision are included and which are excluded.

(1) (1941) 3 All E.R. 338 at 367

A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites:—

(1) the presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law.

A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3), and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice.

While this statement has no judicial authority it is reasonably correct. The basic difference between a judicial and a quasi-judicial decision is that no question of policy can arise in respect of a judicial decision; the judicial authority must apply the law to the facts as it has ascertained them and give its decision accordingly; whereas a quasi-judicial decision involving an administrative discretion is in the last resort an administrative act based on policy. 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 statutory direction to the Minister to apply the law of the land to the facts and act accordingly, but by a statutory direction 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 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 considerations of public policy with no judicial or even quasi-judicial aspects. If it is also definitive of such policy with legislative or quasi-legislative effect, I am unable to see in principle how even any quasi-judicial duties are involved, whether antecedent to the determination or

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otherwise. This was the view of Isaacs J., later Chief Justice of Australia, in the *Moreau* case (*infra*) to which I shall later refer.

As administrative discretionary powers have been increasingly conferred by Parliament the Courts have shown an increasing understanding of the fundamental distinction between the duties of a quasi-judicial nature that may be involved in the exercise of an administrative discretion and the actual exercise of the discretion itself. They have assumed a duty of supervision over discretionary powers with a view to determining as far as possible whether the quasi-judicial duties involved have been performed, but there is no case of which I am aware in which the Court has gone beyond such supervision and assumed a right of review of the actual exercise of the discretion itself, in the absence of specific statutory authority enabling it to do so. The supervision by the Court has been mainly, but not entirely, in cases of applications for mandamus or certiorari.

The principles that should govern a person entrusted with administrative discretionary powers affecting rights have been laid down with varying degrees of precision and clarity. He must not exercise his discretion "in an oppressive manner, or from any corrupt or indirect motive"—Tindal C. J. in *The Queen* v. *Governors of Darlington School* (1). He should act as "a reasonable man desirous of doing justice"—Knight Bruce V. C. in *In re Fremington School* (2). There should be a fair investigation of the facts and just means of explanation and defence should be afforded—Lord Langdale M. R. in *Willis* v. *Childe* (3). The discretion should be exercised "with an entire absence of indirect motive, with honesty of intention, and with a fair consideration of the subject"—Lord Truro L.C. in *In re Beloved Wilkes' Charity* (4). If the authorities charged with discretionary duties have acted in an unreasonable manner, such as acting on a preconceived general resolution when they should have dealt with the particular case before them, they have not exercised their discretion—

(1) (1844) 6 Q.B. 682 at 715
(2) (1847) 11 Jur. 421 at 424.
(3) (1850) 13 Beav. 117 at 130
(4) (1851) 3 MacN. & G. 440 at 447

Wightman J. in *The Queen* v. *Sylvester* (1). In *Hayman* v. *Governors of Rugby School* (2) Sir R. Malins V. C. laid it down that discretionary powers, or arbitrary powers as he described them, should be "fairly and honestly exercised". In *Spackman* v. *Plumstead Board of Works* (3) the House of Lords dealt with a case where an architect had been given power to fix the general line of buildings in a road and the Earl of Selborne, at page 240, thus defined his duty:

> No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice.

In *The Queen* v. *Vestry of St. Pancras* (4) Lord Esher M. R. said of members of a vestry who had a discretion to grant a superannuation allowance:

> They must fairly consider the application and exercise their discretion on it fairly, and not take into account any reason for that decision which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.

A person entrusted with the formation of an opinion must honestly exercise his judgment—Lord Herschell in *Allcroft* v. *Lord Bishop of London* (5). In *Leeds Corporation* v. *Ryder* (6) Lord Loreburn L.C. said, in the House of Lords, that justices of the peace who had a discretionary power to grant licences "must act honestly and endeavour to carry out the spirit and purpose of the statute" and added:

> The justices . . . act administratively, for they are exercising a discretion which may depend upon considerations of policy and practical good sense—they must of course, act honestly. That is the total of their duty.

and the Earl of Halsbury, at page 424, applied the same test of "an honest desire to carry out what the Act of Parliament intended to be done". The importance and

(1) (1862) 31 L.J. (N.S.) (M.C.) 92 at 95
(2) (1874) 18 Eq. 28 at 68
(3) (1885) A.C. 229
(4) (1890) 24 Q.B.D. 371 at 375
(5) (1891) A.C. 666 at 680
(6) (1907) A.C. 420 at 423

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relevancy of this case lies in its emphasis on the fact that the exercise of administrative discretion may depend on considerations of policy and that the administrative officer entrusted with it must honestly carry out the intention of Parliament. In *R.* v. *London County Council* (1) Lord Reading C. J. thought that the Council, which had discretion as a licensing authority, must exercise their discretion "in a judicial spirit" and not allow "extraneous considerations to affect their decisions", and Bray J. said, at page 479, that "they must exercise it fairly and impartially and must act according to the rules of reason and justice." And in *Roberts* v. *Hopwood* (2), where the House of Lords dealt with the discretion of a borough council to allow to servants such wages as the council may think fit, it was held that the discretion conferred upon the council must be exercised reasonably and that fixing an arbitrary sum for wages without regard to existing labour conditions was not an exercise of the discretion.

There are two cases to which reference should be made in view of the fact that certain statements in them have been cited as authoritative pronouncements on the subject of administrative discretion. In *Board of Education* v. *Rice* (3) Lord Loreburn L. C. said of the Board:

> They must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

and this statement was cited with approval by Davis J. in *The King* v. *Noxzema Chemical Company of Canada, Ltd.* (4). These remarks were made in respect of the duties of the Board as an arbitral tribunal dealing with a question in dispute between a local education authority and the managers of a non-provided school, the question being whether the local education authority had fulfilled its statutory duty of maintaining and keeping efficient the non-provided school. The Board purported to give its decision in a document which failed to deal with the

(1) (1915) 2 K.B. 466 at 475.
(2) (1925) A.C. 578
(3) (1911) A.C. 179 at 182
(4) (1942) S.C.R. 178 at 180

matters in issue and on an application for certiorari and mandamus it was held that since the Board had not decided the question referred to it, its decision must be quashed by certiorari and a mandamus must issue commanding it to determine the question. It was in respect of such a situation that Lord Loreburn said, at page 182:

> The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon facts. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari

There was a controversy between two parties; the question in issue was a legal one of law and fact; and the decision required of the Board was a judicial one. The case dealt with a matter quite different from that under review; it did not touch the subject of administrative discretion at all. When the Minister makes his determination under section 6 (2) he is not deciding a legal question in a *lis inter partes* and is not acting in a judicial capacity; his action is an administrative one in a matter of public policy which he defines. Similar remarks apply to *Local Government Board* v. *Arlidge* (1). There Lord Haldane L. C. was speaking of the duties of the Board in deciding an appeal against a closing order made by a local authority and its refusal to determine such order when he said, at page 132:

> When the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice.

and then, later, agreed with the view expressed by Lord Loreburn in *Board of Education* v. *Rice* (*supra*), which he described as an analogous case. Lord Moulton had the same subject in mind when he said, at page 150:

> The legislature has provided an appeal, but it is an appeal to an administrative department of State and not to a judicial body. It is said, truthfully, that on such an appeal the Local Government Board must act judicially, but this, in my opinion, only means that it must preserve a judicial temper and perform its duties conscientiously, with a proper feeling of responsibility, in view of the fact that its acts affect the property and rights of individuals.

(1) (1915) A.C. 120.

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The only issue before the Court was whether the Board had validly dealt with the appeal. There had been a public inquiry by the Board's inspector, pursuant to the statute, at which the owner of the house and his solicitor attended and evidence was adduced on his behalf. The inspector, after inspecting the house, submitted his report, together with the shorthand notes of the proceedings to the Board. After consideration of the facts, the evidence given at the inquiry and the report of the inspector, the Board confirmed the refusal of the local authority to determine the closing order. The owner of the house then obtained an order nisi for a writ of certiorari for the purpose of quashing the order of the Board on the ground that it had not determined appeal in the manner provided by law. Three objections were made, (1) that the order of the Board did not disclose by which officer of the Board the appeal had been decided, (2) that the owner was entitled to be heard orally by the Board, and (3) that the owner was entitled to see the report of the inspector. The House of Lords, reversing the Court of Appeal, dismissed all three objections and held that the Board had validly performed its appellate duties. The essence of the judgment is that, although the Board was required to perform a judicial function and must, therefore, act judicially or preserve a judicial temper, it did not, under the statute, have to follow the procedure of a court of law. The Court did not deal with the subject of administrative discretion at all; that question was not before it. It was concerned with entirely different matters. Under the circumstances, my conclusion is that neither *Board of Education* v. *Rice* (*supra*) nor *Local Government Board* v. *Arlidge* (*supra*) can be considered as an authority applicable to the exercise of the Minister's discretion under section 6 (2). The remarks cited might well be applicable to his duty when he considers an appeal from an assessment under section 59, for he is then acting as a judicial officer, and his function in that capacity is fundamentally different from that which he performs under section 6 (2).

Reference may also be made to *Wilson* v. *Esquimalt and Nanaimo Railway Co.* (1), where Duff J., as he then was, delivering the judgment of the Judicial Committee, ex-

(1) (1922) 1 A.C. 202 at 211.

pressly adopted Lord Moulton's statement in the *Arlidge case* (*supra*) as the proper test for the discharge of judicial duties by an authority other than a judge.

It is, I think, clear that the authorities requiring fairness or reasonableness on the part of an administrative officer in his discretionary decision must be read in the light of the nature of the discretion and the position of the person to whom it has been entrusted. It is not to be assumed that the standard by which such attributes should be measured must necessarily be that of the Court, for the nature of the discretionary power may be such that only the person entrusted with it is in a position to be able to judge of the fairness or reasonableness of its exercise, in which case the Court is precluded from passing on the question of the fairness or reasonableness of the decision and is confined in its duty of supervision to an examination of other considerations. In my judgment, the discretionary power conferred by section 6 (2) is of such a nature.

Then there is the decision in *Pioneer Laundry and Dry Cleaners, Limited* v. *The Minister of National Revenue* (1). There Davis J. in the Supreme Court of Canada in dealing with the Minister's discretion in the matter of depreciation under section 5 (*a*) of the Act said, at page 5:

> The appellant was entitled to an exemption or deduction in "such reasonable amount as the Minister, in his discretion, may allow for depreciation". That involved, in my opinion, an administrative duty of a quasi-judicial character—a discretion to be exercised on proper legal principles.

and this statement, in which the Chief Justice, Sir Lyman P. Duff, concurred was expressly adopted by Lord Thankerton in delivering the judgment of the Judicial Committee. What is meant by "proper legal principles" is not stated, but it may, I think, be assumed that the term covers the relevant principles indicated in the cases referred to, and it will be used in this judgment with that understanding. The fact that access is had to the Court by way of an appeal from the assessment and not on an application for certiorari or mandamus does not alter the nature of the court's duty of supervision or the principles to be applied.

Where there is no right of appeal from the decision of an administrative authority, the decision is binding. This

(1) (1939) S.C.R. 1; (1940) A.C. 127.

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fundamental principle was settled by the House of Lords in *Spackman* v. *Plumstead Board of Works* (1), where the Earl of Selborne L.C. said:

> If the legislature says that a certain authority is to decide, and makes no provision for a repetition of the enquiry into the same matter, or for a review of the decision by another tribunal, prima facie, especially when it forms, as here, part of the definition of the case provided for, that would be binding.

Where the administrative decision involves the exercise of a discretion and it has not been shown that proper legal principles have not been applied the courts have recognized from very early times that in the exercise of his discretion an administrative officer is not governed by the same considerations as those that apply to a court of law in coming to a judicial decision. He need not be confined to provable facts or admissible evidence, but may use his own knowledge and such information as he can obtain. The considerations that may properly influence him depend upon the nature of the function he must perform. Thus, in *The King* v. *Archbishop of Canterbury and Bishop of London* (2) the Court discharged a rule for a mandamus to the Bishop of London to license a clerk to an endowed lectureship in a certain parish church where it was provided by statute that before any lecturer might lawfully preach he had to be approved and licensed by the Bishop or Archbishop. Lord Ellenborough C. J. said, at page 146:

> What scales have we to weigh the conscience of the Bishop? And how are we to know whether he properly or improperly disapproves? May he not properly disapprove of the candidate for a lecturer's license on account of many matters which cannot be conveniently stated to a court of justice? May he not disapprove for matters within his own personal observation and knowledge: for the habits of life and conversation of the person, which might be known to him from residing in the same university or society with him; from his conduct in life down perhaps to the very time when the Bishop is called upon to signify his approbation? Is he to exclude his own knowledge, the most material of any? Does the law say upon what proof he is to act, or that he is to have witnesses upon oath to the facts by which his judgment is to be guided? What authority has he to compel the attendance of witnesses before him? The word of the statute is *approve;* and he must exercise that approbation according to his conscience, upon such means of information as he can obtain; and everything that can properly minister to his conscientious approbation or disapprobation, and fairly and reasonably induce his conclusion on such a subject, though it might not be evidence that would be formally admitted in a court of law, may, I am of the opinion, be fitly taken into his consideration.

(1) (1885) A.C. 229 at 235. (2) (1812) 15 East 117.

And in *The Queen* v. *Governors of Darlington School* (1), where the governing body of a grammar school had power to remove the master according to their sound discretion, Lord Denman C. J. said, at page 697:

> The power of the governors so to remove justifies their so doing; and it is not to be restricted by any opinion which we may form of the reasons on which they may have been induced to exert it.

The inability of the court to control or interfere with the exercise of the discretion, if it has been fairly and honestly exercised, is repeatedly stated by Sir R. Malins V.C. in *Hayman* v. *Governors of Rugby School* (2). That the court has no right to examine or criticize the grounds upon which an administrative discretion has been exercised was emphasized in *Julius* v. *Lord Bishop of Oxford* (3), where the House of Lords had to deal with a discretion vested in the Bishop to issue a commission of inquiry to investigate charges against a clerk in holy orders. Earl Cairns L. C. said, at page 228:

> If I am right in holding that the bishop has, under the statute, a discretion as to proceeding or not proceeding, in the way in which the Appellant calls upon him to do, your Lordships have not, as it seems to me, any occasion or indeed any right to examine into the manner in which, or the principles upon which, that discretion has been exercised. For the exercise of that discretion the bishop, and the bishop alone, is responsible, and it would, in my opinion, be inconsistent to hold that his discretion is an answer to the application for a mandamus, and at the same time, on that application, to criticize the grounds upon which that discretion has been exercised.

Lord Penzance also declined to inquire whether the Bishop's discretion had been well exercised; it was a discretion without appeal and "free from legal control". Lord Blackburn was of the same view; at page 238, he said:

> But if the Legislature gave the bishop power to grant farther inquiry in one of those two ways, trusting that he would always do so where it was proper, but leaving it open to him, when convinced that it was not proper, to decline to act; if, in short, the intention of the Legislature was to make it lawful for him to act, if convinced that it is expedient, but to leave it to his discretion to say whether it is expedient, the mandamus will not lie.

These last remarks are, in my opinion, particularly pertinent to the case under review, for Parliament has left the question of the expediency of disallowing an expense in any given case as being excessive, where perhaps it cannot be proved in fact to be such, to the discretion of

(1) (1844) 6 Q.B. 682.
(2) (1874) 18 Eq. 28.
(3) (1880) 5 A C. 214.

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the Minister. And in *The Queen* v. *Vestry of St. Pancras* (1) Lord Esher M.R. said that if the members of the vestry exercised their discretion there was no right to interfere with what they did.

The governing principle that runs through the cases is that when Parliament has entrusted an administrative function involving discretion to an authority other than the Court it is to be performed by such authority without interference by the Court, either directly or indirectly. Where a person has been given jurisdiction to form an opinion and act accordingly, the Court has no right to review such opinion or the considerations on which it was based; the accuracy of the opinion is quite outside its jurisdiction. These principles were strikingly stated by the House of Lords in *Allcroft* v. *Lord Bishop of London* (2), where the right of the Court to review the opinion of the Bishop as to whether certain proceedings should be taken was considered. At page 674, Lord Halsbury L.C. said:

> The bishop, if he had thought proper, might have taken proceedings thereon as provided by the Act; but the bishop has been of opinion that proceedings should not be taken, and the bishop is the only person who by law has jurisdiction to form an opinion on the subject. There is no right of appeal from his judgment. It is a jurisdiction confined by the Legislature to the bishop himself, and there is no power by law to interfere with the judgment which the bishop may form on the subject.

and at page 675:

> Your Lordships have nothing to do with the question whether his judgment is right or wrong. Your Lordships would be exceeding your own jurisdiction if you were attempting to review a judgment, the jurisdiction to form which the Legislature has confined to the bishop and to the bishop alone.

and at page 676:

> Rightly or wrongly, the bishop thinks that there is nothing of any importance in the reredos in question to distinguish it from that which was held to be lawful. My Lords, I only use that phrase "rightly or wrongly" to emphasize the fact that I am not presuming to enter into the question of the accuracy of the bishop's judgment, over which, as I have said, I have no jurisdiction.

And Lord Bramwell said, at page 678:

> Then it is said that there was something he had considered which he ought not to have considered, and something he had not considered which he ought to have, and so he had not considered the whole circumstances and them only. It seems to me that this is equivalent to saying that his opinion can be reviewed. I am clearly of opinion it

(1) (1890) 24 Q.B.D. 371. (2) (1891) A.C. 666.

cannot be. If a man is to form an opinion, and his opinion is to govern, he must form it himself on such reasons and grounds as seem good to him.

Lord Herschell, at page 680, expressed similar views:

I dissent entirely from the view that it is for the Courts or your Lordships to determine what are the considerations which ought to govern the bishop's opinions. If a dozen persons told to consider all the circumstances of a given case, and to form their opinion thereon, were required to state what considerations they have taken into account, I do not believe that any two of them would precisely agree in their statements.

In my opinion, this case should be closely followed in defining the respective jurisdiction of the Minister and the Court with regard to the Minister's powers under section 6 (2).

A similar view is expressed in *R.* v. *London County Council* (1), where Lord Reading C. J. said:

It seems to me to be entirely a matter for the Council in their discretion to say whether or not it is desirable in the interest of the public that licenses should be granted to a company controlled by alien enemies. It is not, in my opinion, an extraneous consideration. The Legislature has thought fit to leave it to the Council to say whether the applicants are fit persons, and we cannot direct them to hear and determine the matter because we might think—and I am far from saying I do so think—that these were fit persons.

The conclusiveness of an administrative determination of policy within discretionary powers was tersely put by Audette J. in this Court in *The King* v. *Imperial Bank of Canada* (2):

The Minister having deemed it advisable to expropriate, as provided by the Expropriation Act, has exercised his statutory discretion, and the Court has no jurisdiction to sit on appeal or in review of such decision. These questions are political in their nature and not judicial. Lewis on Eminent Domain, sec. 239. The Courts cannot inquire into the motives that actuate the executive or governmental authorities or into the propriety of their decision.

and reference may also be made to the judgment of the British Columbia Court of Appeal in *Literary Recreations Ltd.* v. *Sauve* (3), where it was held that since the Post Office Act had given the Postmaster-General the right to determine what is "mailable matter" and he had discretion to prohibit the use of the mails for the sending of non-mailable matter his discretion was not open to review by a Court.

(1) (1915) 2 K.B. 466 at 480.
(2) (1923) 3 D.L.R. 345 at 346.
(3) (1932) 4 D.L.R. 553.

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The conclusiveness of a decision made by the Australian Commissioner of Taxation within his statutory powers was clearly recognized by the High Court of Australia in *Moreau* v. *Federal Commissioner of Taxation* (1). Under section 37 of the Income Tax Assessment Act 1922-1925 it was provided that an alteration or addition shall not be made in or to an assessment after the expiration of three years from the date when the tax payable on the assessment was originally due and payable "unless the Commissioner has reason to believe that there has been an avoidance of tax owing to fraud or attempted evasion." The Australian Act contains provisions for appeal from an income tax assessment similar to those in the Canadian Act. In a strong statement Isaacs J. stressed the conclusiveness of the Minister's decision. After expressing his own opinion that Moreau was not guilty of fraud or attempted evasion, he said, at page 67:

> But that in no way shakes the Commissioner's official conclusion that there had been an attempted evasion, and even fraud, on the part of Moreau. His function is to administer the Act with solicitude for the Public Treasury and with fairness to the taxpayers. He is necessarily armed with great powers. Up to three years an assessment is open to his unreserved consideration. After that time it is—as I assume for the purposes of this case and as it certainly is now as a rule—closed, unless he has "reason to believe" the taxpayer has defrauded or attempted to evade the revenue law. If he has such reason, he has the power, and, I would add, it is his duty, to reopen the door and demand the amount legally owing. His conclusion is not a judicial decision, but an administrative decision. It does not determine anything but the Commissioner's own official duty to proceed so as to obtain what the taxpayer was always bound to pay, if the increase is justified at all. The decision is not to be preceded by any judicial or quasi-judicial inquiry; it is not, and could not be, subject to any appeal. His "reason" may be the result of official information, or his own investigation, or may come from any source he considers reliable. He may, if he thinks right, call upon the taxpayer for an explanation, or he may think that unnecessary, inadvisable or useless. Fair play would of course, usually induce him to give the taxpayer the fullest opportunity to explain, but that is not legally inexorable. In this case, having regard to the many communications that had taken place, I do not consider the Commissioner unreasonable in not giving any new opportunity to explain before amending the assessment. The Commissioner is not bound to look for corroboration or further tests. His reason is not to be judged of by a Court by the standard of what the ideal reasonable man would think. He is the actual man trusted by the Legislature and charged with the duty of forming a belief, for the mere purpose of determining whether he should proceed to collect what is strictly due by law; and no other tribunal can substitute its standard of sufficient reason in the circumstances or its opinion or belief for his. Unless

(1) (1926) 39 C.L.R. 65.

the ground or material on which his belief is based is found to be so irrational as not to be worthy of being called a reason by any honest man, his conclusion that it constitutes a sufficient reason cannot be overridden.

In my opinion this clear cut statement is applicable to the exceptional power vested in the Minister by section 6 (2). In *Federal Commissioner of Taxation* v. *Clarke* (1) Isaacs A.C.J., (as he had become), pointed out that the Act trusts the Commissioner and "does not contemplate . . . a curial diving into the many official and confidential channels of information to which the Commissioner may have recourse to protect the Treasury".

That the Court has no right to inquire into the mental operations of the administrative tribunal charged with a particular function was clearly recognized by the Supreme Court of the United States in *Chicago, Burlington & Quincy R. Co.* v. *Babcock* (2), where Mr. Justice Holmes, delivering the judgment of the Court, held that it was wholly improper to cross-examine the members of an assessment board in an attempt to exhibit confusion in their minds as to the method by which the result of their decision was reached. At page 593 he said:

> The members of the Board were called, including the Governor of the State, and submitted to an elaborate cross-examination with regard to the operation of their minds in valuing and taxing the roads. This was wholly improper.

and it is quite clear, in his opinion, that the members of such a board are not confined to facts provable in a court of law but are entitled to use their own judgment and knowledge. At page 598, there is this important passage:

> Various arguments were addressed to us upon matters of detail which would afford no ground for interference by the court, and which we do not think it necessary to state at length. Among them is the suggestion of arbitrariness at different points, such as the distribution of the total value set upon the Chicago, Burlington and Quincy system, among the different roads making it up. But the action does not appear to have been arbitrary except in the sense in which many honest and sensible judgments are so. They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth. The Board was created for the purpose of using its judgment and its knowledge . . . Within its jurisdiction, except as we have said, in cases of fraud or a clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The State has confided those

(1) (1927) 40 C.L.R. 246 at 276. (2) (1906) 204 U. S. 585.

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rights to its protection and has trusted to its honour and capacity as it confides the protection of other social relations to the courts of law. Somewhere there must be an end.

Counsel for the appellant strongly contended that the provisions for appeal in the Income War Tax Act gave the Court a wider power of supervision over the Minister's discretionary powers under the Act than it would have had if it had been confined to supervision by way of the prerogative writs of mandamus or certiorari; that the aggrieved taxpayer was always entitled to the protection afforded by the Court's power to issue such writs, but that his right of appeal under the Act gave him a statutory right in addition to his rights at common law; and he argued that under its appellate jurisdiction the Court was vested with the same discretionary power as the Minister, could review its actual exercise by him and substitute its own discretion for his. In my view, no support can be found for these propositions.

Counsel cited *Pioneer Laundry and Dry Cleaners Limited* v. *Minister of National Revenue* (1), but it is quite clear that in that case the Court was not required to decide, and did not decide, whether the Court could review the actual exercise of the Minister's discretion and substitute its opinion for his; that question was not argued before either the Supreme Court or the Judicial Committee, and was not before either court at all. All that was decided was that the Commissioner had applied wrong principles of law in his purported exercise of discretion and that, in so doing, he had not exercised the discretion contemplated by the Act at all. It was held that he had erred in two respects; he had misconstrued the effect of section 5 (*a*) in that, while he had a discretion as to the amount to be allowed for depreciation, he had no discretion to decide whether any depreciation should be allowed or not, since the taxpayer had a statutory right to some depreciation; and he had disregarded the fundamental rule that a company has a separate legal existence from that of its shareholders and that it was the company, and not its shareholders, that was the taxpayer. It was decided that in such cases the proper course for the Court to take is to refer

(1) (1939) S.C.R. 1; 1940 A.C. 127.

the matter back to the Minister for the exercise of his discretion on proper legal principles, or as Davis J. put it in the Supreme Court of Canada, at page 8:

> It is the duty of the Court in such circumstances to remit the case, as provided by sec. 65 (2) of the Act, for a re-consideration of the subject-matter, stripped of the application of these wrong principles.

The assessment was accordingly set aside and referred back to the Minister. Further than this the judgment did not go, but in the Court's action in sending the matter back to the Minister for the exercise of his discretion, "stripped of the application of these wrong principles", there is an implication that the exercise of the discretion on proper legal principles is exclusively the function of the Minister and not that of the Court; so far, therefore, as the case has a bearing on the question, it is rather an authority that there is no appeal from the valid exercise of the Minister's discretion than the reverse, but this is a matter of inference only for the question was not before the Court for judicial decision.

The question did, however, arise squarely for the first time in *Nicholson Limited* v. *Minister of National Revenue* (1), now under appeal to the Supreme Court of Canada. In that case it was not argued before this Court that the Minister, in making his determination in his discretion under section 6 (2), had not exercised his discretion on proper legal principles and there was nothing in the case to indicate or suggest that he had not done so. It was argued on the facts that the Minister did not correctly exercise his discretion, in that he did not give proper consideration to the increase in the appellant's business and profits and did not make a fair allowance for overtime work by the directors. It was the conclusion reached by the Minister, and not any principle applied by him in reaching it, that was under attack. Counsel for the appellant in that case contended that the decisions in certiorari or mandamus cases limiting the Court's right of supervision of discretionary powers to the manner of their exercise had no applictaion since an appeal was provided by the Income War Tax Act and that the Court under its appellate jurisdiction was not restricted to supervision over the manner of exercise of the Minister's discretion under section

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

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6 (2) but might, and should, review such exercise itself, and substitute its own opinion of the amount of expense to be disallowed, if any, for the determination by the Minister; that the appeal under the Act involved an appeal from the exercise of the Minister's discretion; that the purpose of the appeal to the Minister was to enable him to review such exercise and that he must do so; that his failure to do so would deprive the appellant of a right to which he was entitled under the Act and make the assessment before the Court an improper one, and that the Court under its appellate jurisdiction had the same power of review, and was under the same duty to exercise it, as the Minister, since it was the same appeal that was carried throughout; and that the appeal to the Court was in the nature of a trial *de novo* and that it might examine all the facts that were before the Minister prior to his determination in his discretion since such facts were connected with the assessment, draw its own conclusion from them and substitute such conclusion for the discretionary determination made by the Minister. These arguments were all carefully considered by the Court and rejected. After a review of the provisions of the Act relating to appeals the Court held that the appeal provided by the Income War Tax Act is not an appeal from any decision of the Minister but an appeal from the assessment made by him in the course of his functions in respect thereof; and that the right of appeal to the Court conferred by the Act does not carry with it any right of appeal from the Minister's determination in his discretion under section 6 (2). The reasons given for these conclusions need not be re-stated, but the importance of the subject warrants further observations.

Counsel for the appellant relied mainly on the decision of the Supreme Court of New South Wales in *Dobinson* v. *Federal Commissioner of Taxation* (1). In that case the Commissioner was of the opinion that a partnership which the appellant had entered into with his wife had been formed for the purpose of relieving him from a liability to which he would have been otherwise subject and assessed the partnership as if it were a single person. He had statutory authority for forming such opinion under section

(1) (1935) 3 A.T.D. 150.

29 (2) of the Commonwealth of Australia Income Tax Assessment Act, 1922-33, which also provided that when the Commissioner was of such opinion, the partnership should be assessed as if it were a single person. At the hearing, the appellant, his wife and their accountant, gave evidence that the partnership was not entered into for the purpose of relieving the husband of any liability to taxation to which he would otherwise have been subject. Jordan C.J. accepted this evidence, came to a conclusion different from the opinion formed by the Commissioner and allowed the appeal. This decision was rendered under a state of law quite different from that obtaining in Canada. Sections 50, 51 and 51A of the Australian Act contain provisions for an appeal in several respects similar to those in the Income War Tax Act and it is as clear in the Australian Act as it is in the Canadian one that the appeal is from the assessment. But in 1930 a special section was enacted as section 51B, for which there is no counterpart in Canada.

Section 51B reads as follows:

51B. Notwithstanding anything contained in this Act a taxpayer who is dissatisfied with any opinion, decision or determination of the Commissioner under section twenty-one A, paragraph (*n*) of subsection (1) of section twenty-three, or subsection (2) of section twenty-nine of this Act (whether in the exercise of a discretion conferred upon the Commissioner or otherwise) and who is dissatisfied with any assessment made pursuant to or involving such opinion, decision or determination shall, after the assessment has been made, have the same right of objection and appeal in respect of such opinion, decision or determination and assessment as is provided in sections fifty, fifty-one and fifty-one A of this Act.

This section specifically gave a right of appeal in a limited number of cases from an opinion, decision or determination of the Commissioner, in addition to the right of appeal from the assessment already conferred. It is quite clear from the judgment of Jordan C.J. that it was only because of this specific provision in section 51B that the Court had any right to review the opinion of the Commissioner and substitute its own opinion for his and that without it the Court would have had no such power. At page 151, he said:

In certain special cases, however, the fact that the Commissioner entertains a particular opinion is made the criterion of the existence of liability. In such cases there can, obviously, be no appeal from his opinion unless the Act gives an appeal, although the opinion may be examined within certain limits.

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Jordan C.J. is here clearly referring to such an opinion as that formed by the Commissioner under section 29 (2) and its binding effect in the absence of a right of appeal from it. Then he continued:

> Section 51B provides in terms that a taxpayer shall have the same right of appeal in respect of any opinion of the Commissioner under s. 29 (2) and in respect of any assessment made pursuant to or involving such opinion as is provided in ordinary cases. I think it follows from this that the appellate tribunal must consider for itself such material as is placed before it with respect to matter as to which the Commissioner's opinion was formed, and that it is intended that the opinion of that tribunal should be substituted for that of the Commissioner as a criterion of liability if it forms an opinion different from his.

It is clear that, without the specific provision in section 51B, the appellant would have been confined to an appeal from the assessment and the Court could not have reviewed the Commissioner's opinion. The decision recognizes the difference between the Commissioner's opinion and the assessment and, in my opinion, supports the conclusion that the right of appeal provided by the Income War Tax Act, being specifically from the assessment, does not include a right of appeal from the Minister's exercise of discretion under his statutory powers. Before there could be such a right there would have to be specific provision for it, as was found necessary in Australia. There is no such provision in the Income War Tax Act; the appeal there provided is from the assessment; there is no provision for an appeal from the Minister's exercise of his discretion—which is quite a different thing from the assessment.

In the *Nicholson case* (*supra*) I referred briefly to the difference between the Minister's discretionary determination under section 6 (2) and the assessment levied by him under the powers conferred by Part VII, particularly section 55. This difference requires further elaboration. The two operations are quite separate and distinct in point of time and scope of substance and the Minister's functions in respect of them are fundamentally different in character. The Minister's discretionary determination must be made before the assessment operation can be performed. It is, of necessity, antecedent in point of time, for the amount of excessive expense to be disallowed in the assessment cannot be taken into account in the computations involved in it,

until after such amount has been determined by the Minister under his statutory power. The amount so determined is only one of many items entering into the assessment. These are dealt with in a variety of ways. The items of income and deductions in the taxpayer's returns must be checked and verified where necessary. In respect of the amounts claimed as deductions the Minister may have to decide whether they are permitted by the Act. Such decisions involve no exercise of discretion but are either administrative applications of the law to the claims made, or they may involve, as in the case of the disallowances of the directors' fees in the present case, findings of fact to which the law is then applied, in which case the function is really a judicial one which the Minister must perform with a "judicial temper". The Minister may require further information from the taxpayer under several sections. He may have to decide whether a refund should be made under 53. There are many other things that may have to be done before there can be an assessment and many persons may be involved in such various tasks. Then when all the items have been settled there must be a computation of the amount of profit and gain to be assessed less the allowable deductions before the total amount of tax liability can be ascertained and fixed. The two operations are thus distinctly different in point of time and scope of substance involved. In the present case the discretionary determinations were made in respect of each year on November 24, 1942, whereas the assessments were not made until considerably later, as appears from the assessment notices dated respectively January 30, 1942, and February 2, 1943. The two functions also differ fundamentally in character. In so far as the Minister's determination may involve duties of a quasi-judicial nature such as, for example, giving the taxpayer an opportunity to make his representations, he must perform them. In the assessment operation, on the other hand, there are no quasi-judicial duties of any kind to be performed. The operation is solely administrative. There is an even more vital difference. The determination involves the exercise of a discretion of a policy nature, that is legislative in effect. When that function is finished, all that the

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Minister need consider in respect of this item, when he comes to the assessment operation, is the amount of his statutory determination. The assessment operation is quite different; no exercise of discretion is involved. When the Minister has exercised his discretion under section 6 (2), he does not exercise it over again when he makes his assessment under section 55; indeed, he cannot do so, for once he has exercised it he is functus officio in respect thereof. Moreover, the assessment operation does not depend upon considerations of policy to be defined by the Minister. He makes it according to the facts as ascertained and the application of the Act thereto.

The assessment is different from the notice of assessment; the one is an operation, the other a piece of paper. The nature of the assessment operation was clearly stated by the Chief Justice of Australia, Isaacs A.C.J., in *Federal Commissioner of Taxation* v. *Clarke* (1):

> An assessment is only the ascertainment and fixation of liability.

a definition which he had previously elaborated in *The King* v. *Deputy Federal Commissioner of Taxation (S.A.); ex parte Hooper* (2):

> An "assessment" is not a piece of paper: it is an official act or operation; it is the Commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount he sends by post a notification thereof called "a notice of assesment".... But neither the paper sent nor the notification it gives is the "assessment". That is and remains the act or operation of the Commissioner.

It is the opinion as formed, and not the material on which it was based, that is one of the circumstances relevant to the assessment. The assessment, as I see it, is the summation of all the factors representing tax liability, ascertained in a variety of ways, and the fixation of the total after all the necessary computations have been made.

The Court ought not to construe the appeal provided by the Act, which is specifically an appeal from the assessment, as extending to such a different operation as the Minister's discretionary determination under section 6 (2), in the absence of a clear indication that Parliament so intended. Not only is there no such indication, but quite the contrary is the case; it is clear from section 66 that the

(1) (1927) 40 C.L.R. 246 at 277 (2) (1926) 37 C.L.R. 368 at 373.

Court's appellate jurisdiction is made subject to the provisions of the Act; section 6 (2) is one of such provisions and binds the Court. Nor is it necessary to the Court's discharge of its appellate jurisdiction to read into it discretionary powers of a policy nature. The right of appeal is a substantive right and the Court must not extend it beyond the purpose for which it was conferred. The purpose of providing an appeal from the assessment is to ensure to the taxpayer that it shall be correct in fact and in law. If an item involved in it has been determined by the Minister within his statutory power, how can it be said that, in respect of such item, it is incorrect either in fact or in law? It is not to be assumed, in the absence of clear words to the contrary, that Parliament intended the correctness of such an item to be measured by the Court by a different standard from that required of the Minister, as would be the case if the Court's discretionary determination were substituted for that of the Minister. And certainly it should not be assumed, without most explicit terms, that Parliament intended that the administration and definition of a policy, which it had left to the discretion of a Minister responsible to it, should be left to the discretion of the Court, which is in no way responsible to it. In my opinion, it is quite clear that, under the Income War Tax Act as it stands, there is no right of appeal to the Court from the Minister's determination in his discretion under section 6 (2).

There being no such right of appeal, the respective jurisdictions of the Minister and the Court with regard to section 6 (2) must be defined within the limits indicated by the authorities referred to. As I see it, everything pertaining to the actual function of determining in his discretion the disallowance of an expense as being in excess of what is reasonable or normal for the business carried on by the taxpayer is exclusively within the jurisdiction of the Minister. It is for him to decide whether there should be any disallowance or not; he is not restricted to any kind or class of expense; nor bound by the fact that it was paid under a contractual obligation. The determination of the excessiveness of all or part of an expense has been left by Parliament exclusively to the discretion of the Minister;

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it is his opinion, and not that of the Court or of any one else, that governs. Such discretion is not the same thing as an inference to be drawn from proved facts. It was precisely because it was difficult to put the excessiveness of an expense on the basis of its excessiveness in fact that Parliament left its determination to the discretion of the Minister. Under such circumstances, the authorities make it quite clear, in my opinion, that the Minister in making his discretionary determination under section 6 (2) is not restricted to the same consideration as would govern a court of law in arriving at a judicial decision; he is not confined to provable facts or admissible evidence, but may obtain his information from any source he considers reliable; he may use his own knowledge and experience or that of his officers in his department in whom he has confidence and he may take the benefit of their advice if it commends itself to him; in the field exclusively assigned to him by Parliament he is as free to act as Parliament itself; he may use his own judgment and in so doing be guided by the "intuition of experience which outruns analysis", as Mr. Justice Holmes put it; he may use all the aids which will enable him to carry out honestly the administration and definition of the policy that Parliament has entrusted to him.

The authorities are equally clear as to the limited function of the Court in such a case. Before the Minister makes his determination under section 6 (2) he must come to an opinion that the expense in question is excessive and ought to be disallowed. Since it is his opinion that governs, "he must form it himself on such reasons and grounds as seem good to him." In the field exclusively assigned to the Minister, there is no room for the Court; neither the opinion of the Minister nor the material on which it was based is open to review by it; the Court has no right to examine into or criticize the reasons that led the Minister to his opinion or question their adequacy or sufficiency; it is not for the Court to lay down the considerations that should govern the Minister's discretionary determination; Parliament requires the Minister's opinion, not that of the Court; the Court has nothing to do with the question whether the Minister's opinion was right or

wrong; nor has it any right to decide that it was unreasonable; it is the Minister's reason, not that of the Court, that Parliament relies upon, and "no other tribunal can substitute its standard of sufficient reason or its opinion or belief for his"; the accuracy or correctness of the Minister's discretionary determination is quite outside the Court's jurisdiction and it must not interfere with it in any way. This limitation of the Court's function is not only settled by authority but is consistent with principle; the Minister's discretionary determination depends, not on an issue of fact, but on his opinion in a matter of administration and definition of a difficult public policy for which Parliament holds him responsible; it has not sought the opinion of the Court or its aid in the administration or definition of such policy; with such matters the Court is not concerned and ought not to interfere; its duties are solely judicial. The Court is concerned only with the question whether the Minister has actually exercised the discretion that Parliament has vested in him. If it appears that the Minister has applied proper legal principles in arriving at his determination the Court has no further supervisory duty in the matter. If, on the other hand, it is shown that he has acted on improper legal principles, as in the *Pioneer Laundry* case (*supra*), it is the duty of the Court to send the matter back to him for reconsideration "stripped of such wrong principles". But this is the full limit of its power. In the *Pioneer Laundry* case (*supra*) Davis J. made the following statement, at page 5:

> The exercise of the discretion will not be interfered with unless it was manifestly against sound and fundamental principles.

and this was expressly adopted by Lord Thankerton in the Judicial Committee. While the statement is not precisely put, the meaning is quite clear. If the discretion has actually been exercised it cannot be interfered with at all; what is meant is that if the purported exercise of discretion is manifestly against sound and fundamental principles it is not the exercise of discretion contemplated by the Act. It is, therefore, not accurate to describe the Court's action in referring the matter back to the Minister on the ground that he has not applied proper legal principles as an interference with his discretion, for it is no such

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thing; the action is consequent on the Court's finding that, in applying improper legal principles, the Minister has not actually exercised the discretion vested in him at all. Further than that the Court cannot go. It cannot itself exercise the discretion; only the Minister can do so. There is still a third situation. Where it is not shown that proper legal principles have not been applied, then it seems clear, from the authorities, that the Court has no ground for interference. As I see it, the Court may intervene only when it has been shown that the Minister has not applied proper legal principles and, even in such cases, its intervention is limited to sending the matter back to him under section 65 (2): the Court has no other powers.

What is the situation where the Minister has not given any reason for his discretionary determination under section 6 (2) and the appellant is unable to show that improper legal principles were applied or that proper legal principles were not applied? It was easy for the Judicial Committee in the *Pioneer Laundry* case (*supra*) to refer the matter back to the Minister, for it was there clearly disclosed that the Minister had misconceived the limits of his discretion under section 5 (*a*), and had applied a wrong principle of law in his disregard of the fact that the company and its shareholders were separate legal entities, and the Court could refer the matter back to him "stripped of such wrong principles". In that case the Minister, when giving his reasons in his decision on the appeal to him, did not confine himself to saying that he had exercised his discretion under section 5 (*a*) but also stated his reasons for his conclusion. Similarly in the second case, *Pioneer Laundry & Dry Cleaners Limited* v. *Minister of National Revenue* (1) it was easy for Robson J. to determine that the allowance of the nominal sum of one dollar for depreciation could not have been arrived at as the result of any exercise of discretion at all. But since then in the cases involving the exercise of discretion that have come to my attention, the Minister has not given any reasons for the exercise of his discretion, but has merely relied upon the ground that it has been exercised. In the present case, the Minister gave the following reason for his decision on the appeals to him:

(1) (1942) Ex. C. R. 179

The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notices of Appeal and matters thereto relating hereby admits the Appeal in respect of the item of $186.97 written off by the taxpayer as a bad debt and will amend the 1940 Assessment accordingly, and hereby affirms the said Assessments for the years 1940 and 1941 in respect of salary and director's fees as claimed on the ground that Subsection 2 of Section 6 of the Act provides that the Minister may disallow any expense which he in his discretion may determine to be in excess of what is reasonable for the business carried on by the taxpayer; that in the exercise of such discretion he has determined that the salary paid to David Mirsky is to the extent of $2,000 in excess of what is reasonable for the business carried on by the taxpayer and has disallowed as an expense the said amount so determined and further that the directors' fees of $800.00 paid or credited to four of the directors of the taxpayer in each of the years 1940 and 1941 were not expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income according to Section 6 (*a*) of the Act and are properly disallowed for Income Tax purposes. Therefore by reason of the provisions of the said Section 6 (2), 6 (*a*) and other provisions of the Income War Tax Act in that respect made and provided the Assessments are affirmed.

It will be noticed that the reason given for disallowing part of David Mirsky's salary is that the Minister determined the matter in his discretion under section 6 (2); but no reason for the exercise of the discretion itself is given. A very important question thus arises—does the Minister have to give any reasons for his discretionary determination under section 6 (2)? In *Wrights' Canadian Ropes Ltd.* v. *Minister of National Revenue* (1) Kellock J. expressed the view that since under section 59 the Minister is required to notify the appellant of his "decision", reasons are intended to be given, and seemed to assume that the Minister should give reasons for the exercise of his discretion under section 6 (2), although this is not expressly stated. Here it is essential, I think, to draw a clear distinction between the respective functions of the Minister under sections 59 and 6 (2). His decision under section 59 is quite a different thing from his discretionary determination under section 6 (2); perhaps the difficulty arises from the use of the word "decision" to cover both conclusions. When the Minister is acting under section 59 he must duly consider the notice of appeal from the assessment served upon him in pursuance of section 58 and notify the appellant of his decision. Before the appellant can take his appeal from the assessment to the Court, he must first take

(1) (1946) S.C.R. 139 at 169.

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it to the Minister. Section 59 thus constitutes the Minister an appellate authority with respect to the assessment "appealed against". When he duly considers the notice of appeal his function is solely judicial, as much so as that of the Court, and his decision on the appeal is a purely judicial decision. No exercise of discretion is involved and the decision has nothing to do with any matter of policy. It may well be, therefore, that when he gives his decision under section 59 he must give reasons for it. But it by no means follows that he must also give reasons for his discretionary determination under section 6 (2). When the Minister acts under that section he is not performing a judicial function and his determination is not a judicial decision. It is an administrative act with legislative effect done in the course of administration and definition of a public policy. The respective functions of the Minister under section 59 and section 6 (2) and their conclusions in respect of each are thus fundamentally different in character. I am quite unable to conclude that because he must give reasons for his judicial decision under section 59 he must also give reasons for such a different thing as his discretionary determination under section 6 (2). Moreover, the weight of authority is overwhelming that an administrative officer exercising an administrative discretion need not, unless he chooses to do so, give reasons for the exercise of such discretion. This was recognized as early as 1704 in *R.* v. *Bailiffs of Ipswich* (1). And in *The King* v. *Bishop of London* (2) Lord Ellenborough C. J. clearly indicated that the Bishop did not have to specify his reasons for exercising his discretion under the Act of Uniformity. At page 422, he said:

> Suppose he should return non idoneus, generally; can we compel him to state all the particulars from whence he draws his conclusion? Is there any instance of a mandamus to the Ordinary to admit a candidate to holy orders, or to specify the reasons why he refused? If indeed it had appeared that the Bishop had exercised his jurisdiction partially or erroneously; if he had assigned a reason for his refusal to license, which had no application, and was manifestly bad, the Court would interfere: but the difficulty that I feel is, that the Bishop, as it now appears, stands only upon his objection to the fitness of this party, of which the statute meant that the Bishop should be the judge.

(1) (1704) 2 Ld. Raym 1232 (2) (1811) 13 East 418

And in *The King* v. *Archbishop of Canterbury and Bishop of London* (1) there is a statement to the same effect. Later, in *In Re Beloved Wilkes's Charity* (2) it was held that where Trustees are appointed to execute a trust according to discretion, they are not bound to state reasons for their conclusion. Lord Truro L.C. said, at page 448:

> If, however, as stated by Lord Ellenborough in *The King* v. *The Archbishop of Canterbury* (15 East 117), Trustees think fit to state a reason, and the reason is one which does not justify their conclusion, then the Court may say that they have acted by mistake and in error, and that it will correct their decision; but if, without entering into details, they simply state, as in many cases it would be most prudent and judicious for them to do, that they have met and considered and come to a conclusion, the Court has then no means of saying that they have failed in their duty, or to consider the accuracy of their conclusion.

And later, at page 449:

> I should say, as a general rule, that the Court ought not to require persons to state reasons for conduct which they are authorized to pursue, because such a statement made in one case, where it may possibly be done without evil and mischief, has a tendency to create an objection against those who, in other cases, do not make it, where a statement of reasons might be most mischievous.

And in *Hayman* v. *Governors of Rugby School* (3), which counsel for the appellant cited, Sir R. Malins V.C., at page 68, summarized the effect of the authorities up to that time in a striking passage:

> I think the clear result of the numerous authorities cited on both sides in the argument of this case is that all arbitrary powers, such as the power of dismissal, by exercising their pleasure, which is given to this governing body, may be exercised without assigning any reason, provided they are fairly and honestly exercised, which they will always be presumed to have been until the contrary is shown, and that the burthen of shewing the contrary lies upon those who object to the manner in which the power has been exercised. No reason need be given, but if they are given the Court will look at their sufficiency.

And later, at page 87, he said of the governing body:

> They are not obliged to give any reason whatever, and the Court must presume that they exercise their discretion properly unless the contrary can be distinctly shewn.

It is quite clear from the judgment that when Sir R. Malins referred to "arbitrary" powers he had in mind "discretionary" powers of various kinds and did not intend to confine his remarks to the power of dismissal at pleasure. Then

(1) (1812) 15 East 117 at 141
(2) (1851) 3 McN. & G. 440
(3) (1874) 18 Eq. 28

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the House of Lords dealt with the matter in *Sharp* v. *Wakefield* (1), where Lord Bramwell stated quite clearly:

> The magistrates have a discretion to refuse; they are not bound to state their reason, and therefore their decision cannot be questioned.

And *Allcroft* v. *Lord Bishop of London* (2) also strongly supports the same view. In that case the Bishop was required by the statute to state in writing the reason for his opinion, but it is abundantly clear that in the absence of such a statutory requirement the Bishop would not have been required to state the reasons for his opinion. The citations which I have already given from this case leave such a conclusion free from doubt.

It might be argued that it would be desirable as a matter of policy that an administrative officer should give reasons for the exercise of his administrative discretion. Indeed, the Committee on Ministers' Powers recommended that every Minister exercising a judicial or quasi-judicial function and every Ministerial Tribunal exercising a judicial function should give the decision in the form of a reasoned document. Whether the Minister should give reasons for his discretionary determination under section 6 (2) is a matter of policy for Parliament to determine, on which I express no opinion, but I can see no ground of principle, under the law as it stands and in view of the nature and extent of the power which Parliament has entrusted exclusively to the Minister, on which the Court has any right to require the Minister to give reasons for his discretionary determination or to allow an appeal from an assessment for his failure to do so. If the striking language of the House of Lords in *Allcroft's* case (*supra*) is applied to the present one, as it might well be, the conclusion is clear that the Minister need give no reasons for his discretionary determination under section 6 (2). It is his opinion that Parliament relies upon; it governs and he is empowered to act on it. If, as Lord Halsbury put it, the Court has nothing to do with the question whether his judgment is right or wrong and has no jurisdiction over its accuracy, how can the Court require reasons for it? If, as Lord Bramwell said, he is the person whose opinion is to govern and he must form it himself on such reasons and grounds as seem good to him, what use can the Court

(1) (1891) A.C. 173 at 183 (2) (1891) A.C. 666

make of the reasons if given? If, as Lord Herschell said, the Court has no right to determine the considerations that ought to govern him, what bearing could his reasons have? The same idea is the basis of the judgment of the High Court of Australia in *Moreau* v. *Federal Commissioner of Taxation* (1). If, as Isaacs J. put it, the Minister's reason is not to be judged by a Court by the standard of what the ideal reasonable man would think and no other tribunal can substitute its standard of sufficient reason or its opinion or belief for his, why should he submit his reason to the Court? And a similar idea runs through the judgment of the Supreme Court of the United States in *Chicago, Burlington & Quincy Ry. Co.* v. *Babcock* (2). If it was improper, as Chief Justice Holmes said, to cross-examine the members of an assessment board with regard to the operations of their minds in valuing and taxing the roads, how can it be proper to insist that the Minister tell the Court why he exercised his discretion as he did?

That an administrative officer cannot be required to disclose the grounds upon which he based his opinion where Parliament has vested him with discretion in the matter was dealt with fully by the House of Lords in *Liversidge* v. *Anderson et al* (3). In that case the appellant brought an action for a declaration that his detention by the Secretary of State was unlawful and damages for false imprisonment. The detention was justified on the ground that it had been made under the Defence (General) Regulations, 1939, reg. 18B, which provided:

> If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations.... and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.

and the detention order recited that the Secretary of State had had such reasonable cause to believe. The appellant applied for particulars of the grounds upon which the Secretary of State had reasonable cause to believe that he was of hostile origin or associations and that it was necessary to exercise control over him. His application was refused by the Master who was confirmed in his decision by Tucker J., the Court of Appeal, and the House of Lords, Lord Atkin dissenting. It was held that the

(1) (1926) 39 C.L.R. 65
(2) (1906) 204 U.S. 585
(3) (1941) 3 All E.R. 338.

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Secretary of State did not have to disclose the grounds of his belief, that the question whether he had reasonable cause to believe was a matter for him to determine and that the Court had no right to inquire into it. The administrative discretion was vested in the Home Secretary and belonged exclusively to him without any right of review by the Court. Viscount Maugham approved the judgment of the Court of Appeal in *The King* v. *Secretary of State for Home Affairs, ex parte* Lees (1), which negatived the idea that the Court had any power to inquire into the grounds for the belief of the Secretary of State, or to consider whether there were grounds on which he could reasonably arrive at his belief, and held, at page 348, that there was no preliminary question of fact which could be submitted to the Courts and that, in effect, there was no appeal from the decision of the Secretary of State in these matters provided only that he acts in good faith. Lord Macmillan put the question whether the standard of reasonableness which must be satisfied was an impersonal standard independent of the Secretary of State's own mind or the personal standard of what the Secretary of State himself deemed reasonable, and in construing the regulation, concluded that it was the latter standard that governed. And he drew a sharp distinction between the sphere in which the Court could intervene and that in which it could not. At page 367, he said:

> How could a court of law, however, deal with the question whether there was reasonable cause to believe that it was necessary to exercise control over the person proposed to be detained, which is a matter of opinion and policy, and not one of fact. A decision on this question can manifestly be taken only by one who has both knowledge and responsibility which no court can share.

Lord Wright was of the view that the matter was one of executive discretion beyond the purview of a Court of law. At page 378 he said:

> As the administrative plenary discretion is vested in the Home Secretary, it is for him to decide whether he has reasonable grounds, and to act accordingly. No outsider's decision is invoked, nor is the same within the competence of any Court.

Lord Romer was also of the view that the Secretary of State could not be compelled to disclose the grounds upon which his belief was founded. At page 384, he said:

(1) (1941) 1 K.B. 72.

The materials upon which the Home Secretary founded his opinion would be wholly irrelevant, and could not be inquired into by a court of law.

And further, at page 387:

Not only is the belief to be his, but the estimate of the reasonableness of the causes which have induced such belief is also to be his, and his alone.

And in *Greene* v. *Secretary of State for Home Affairs* (1), Lord Macmillan took the same view:

The Secretary of State is not bound to disclose or justify to any court the grounds on which he conceived himself to have reasonable cause to believe that the appellant was a person of hostile associations and that by reason thereof it was necessary to exercise control over him.

In my opinion, this reasoning, although applied to an emergency regulation involving the safety of the state, is equally applicable in principle to the special discretionary power vested in the Minister by section 6 (2).

That the Court has no right to question the conclusion of the Minister in the exercise of his statutory discretion was stressed by the Court of Appeal in *Point of Ayr Collieries, Ltd.* v. *Lloyd-George* (2). There control of the appellant's undertaking was taken by the Minister of Fuel and Power by an order under the Defence (General) Regulations 1939, reg. 55 (4). The appellants contended that there were no adequate grounds upon which the Minister could find as he stated he had found, namely, that it was necessary to take control in the interests of the defence of the realm and the efficient prosecution of the war and for maintaining supplies and services essential to the community. It was held that there was no jurisdiction to interfere with what was an admittedly *bona fide* decision of the Minister within his delegated authority and that the exercise of executive power under such a regulation cannot be questioned in the courts and can be questioned only in Parliament. Lord Greene, M.R. said, at page 547:

We cannot investigate the adequacy of his reasons. We cannot investigate the rapidity or the lack of investigation, if it existed, with which he acted. We cannot investigate any of these things because Parliament in its decision has withdrawn those matters from the courts and has entrusted them to the Ministers concerned, the constitutional safeguard being, as I have said, the supervision of Ministers exercised by Parliament. That being so, that is the end of the case. The Minister

(1) (1941) 3 All E R. 388 at 396 (2) (1943) 2 All E R. 546

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put in no evidence. He was not bound to put in any evidence, because his case rested on the basis that even accepting the evidence put in by the appellants, there was no call for him to answer.

and, at page 548:

We do not know the facts, we do not know what matters may have impressed him and what matters of public interest may have made it very desirable to do what he did. In those circumstances I think it very undesirable that any comment should fall from the Bench which might be construed as a criticism of the action of a Minister who has not thought it necessary or right to come and tell the Court, quite unnecessarily, the facts known to him. There may or may not have been facts of great importance of which the appellants do not know. I do not know; we are not told. There was no need for us to be told.

This is a clear cut statement that a Minister entrusted with discretionary powers in a matter of public policy need not tell the Court the reasons for his action. There is no onus on him to justify his conduct.

With the exception of certain opinions expressed in the *Wrights' Canadian Ropes* case, to which I shall refer, I have not been able to find any case where the Court has required, or even suggested, that reasons for the exercise of an administrative discretion should be given. The authorities are the other way. I am, therefore, compelled by the weight of authority and on principle as well to hold that when the Minister makes a determination in his discretion under section 6 (2), he is not required by law to give any reasons for such determination.

What is the situation where the appellant has not shown that the Minister has not applied proper legal principles in arriving at his discretionary determination and the Minister has given no reasons for it, and it is impossible for the Court to determine whether proper legal principles have been applied or not? In my opinion, the law is quite clear that, in such circumstances, the Court should assume that the Minister has acted properly and dismiss the appeal for failure of the appellant to discharge the onus resting on him. I have already cited the views expressed by Sir R. Malins V.C. in *Hayman* v. *Governors of Rugby School* (*supra*) that it will be presumed that discretionary powers have been fairly and honestly exercised "until the contrary is shewn" and that "the burthen of shewing the contrary lies upon those who object to the manner in which the power has been exercised". The same presumption that persons entrusted with discretionary

powers will exercise them properly was stated by the Earl of Selborne L.C. in *Spackman* v. *Plumstead Board of Works* (*supra*). And in *Wilson* v. *Esquimalt and Nanaimo Railway Co.* (1), Duff J., speaking for the Judicial Committee, said:

> It cannot be suggested that he proceeded without any regard to the rights of the respondents and the procedure followed must be presumed, in the absence of some conclusive reason to the contrary, to have been adopted in exercise of his discretion under the statute as a proper mode of discharging the duty entrusted to him. His decisions taken in the exercise of that discretion are, in their Lordships' opinion, final and not reviewable in legal proceedings.

If that is true of a judicial discretion, it is *a fortiori* applicable to such a discretion as that of the Minister under section 6 (2). The same thought is implicit in the statement of Davis J. in the *Pioneer Laundry* case (*supra*) that the Court will not interfere with the exercise of the discretion unless it is "manifestly" against sound and fundamental principles. This must surely mean that departure from such principles is not to be assumed. The Supreme Court of the United States took the same view in *Sunday Lake Iron Company* v. *Township of Wakefield* (2), where it was held that the good faith of tax assessors and the validity of their acts are presumed and that when assailed the burden of proof is upon the complaining party. The same principle appears in *Liversidge* v. *Anderson et al* (*supra*). There Lord Maugham said, at page 348:

> In my opinion, the well known presumption *omnia acta rite esse praesumuntur* applies to this order, and, accordingly, assuming the order to be proved or admitted, it must be taken prima facie—that is, until the contrary is proved—to have been properly made, and it must be taken that the requisite as to the belief of the Secretary of State was complied with.

And later:

> his compliance with the provisions of the statute or the order in council under which he purports to act must be presumed unless the contrary is proved.

And Lord Wright, at page 374, quoted with approval the remarks of Lord Atkinson in *R.* v. *Halliday, Ex. p. Zadig* (3):

> It must not be assumed that the powers conferred upon the executive by the statute will be abused.

(1) (1922) 1 A.C. 202 at 214.
(2) (1918) 247 U.S. 350.
(3) (1917) A.C. 260 at 271.

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These authorities lead me to the opinion that where the appellant has not shown that the Minister has not applied proper legal principles in arriving at his discretionary determination under section 6 (2) and the Minister has not given any reasons for it, the Court should assume that he acted properly; that the presumption of proper exercise of his statutory power should be applied in his favour until rebutted by clear proof to the contrary; that the onus of showing that the Minister did not apply proper legal principles is on the appellant taxpayer and that if he does not discharge it his appeal must be dismissed. No assumption that the Minister acted arbitrarily or improperly should be drawn from the fact that he did not give reasons. He is not required to do so. Since Parliament has seen fit to trust the Minister with such extensive discretionary powers of a legislative nature, there is no reason, in my view, why the Court should mistrust him and assume, without clear proof, that he has acted arbitrarily or otherwise abused the trust that Parliament reposed in him.

It would not be proper to conclude this branch of the case without reference to the decision of the Supreme Court of Canada in *Wrights' Canadian Ropes Ltd.* v. *Minister of National Revenue* (1). The appellant had made an agreement with an English company to pay it a commission of 5 per cent upon all cash received in respect of the net selling price of certain products manufactured and sold after the date of the agreement. The appellant paid certain commissions in 1940, 1941 and 1942, but these were disallowed under section 6 (2) except as to $7,500 in each of such years. From the assessments made after these disallowances the appellant appealed to the Minister and then to this Court. Cameron, Deputy Judge, dismissed the appeals but his judgment was reversed by the Supreme Court of Canada, Kerwin J. dissenting, and the assessments were referred back to the Minister to be dealt with by him according to the reasons of the majority of the Court. The decision is not a satisfactory one by reason of the diversity of views expressed and the practical difficulty in which it places the Minister in determining what the reasons of the majority of the Court are and what course he should

(1) (1946) S.C.R. 139.

take accordingly. It does, however, support the view that the actual exercise of the discretionary power under section 6 (2) is exclusively a matter for the Minister and that there is no right of appeal to the Court therefrom.

One of the questions involved in the case was whether a report to the Minister by the Inspector of Income Tax at Vancouver should have been before the Court. The trial judge, relying upon *Local Government Board* v. *Arlidge* (1) had ruled that the report need not be disclosed and it was not produced at the hearing. Three of the judges of the Supreme Court, namely, Hudson, Kellock and Estey JJ., on the other hand, were agreed that it should have been filed in Court under section 63 (*g*) which provides:

> 63. Within two months from the date of the mailing of the said reply, the Minister shall cause to be transmitted to the registrar of the Exchequer Court of Canada, to be filed in the said Court, typewritten copies of the following documents:—
>
> (*g*) All other documents and papers relative to the assessment under appeal.

and that since this section had not been complied with the appeal should be allowed and the matter referred back to the Minister. This is the only ground in respect of which I have been able to find agreement by a majority of the Court for allowance of the appeal. I must confess that I am unable to understand how such majority, without knowledge of the contents of the inspector's report, could have concluded that it was relative to the assessment. Since the discretionary determination and the assessment are separate and distinct operations and different in character, as already indicated, it follows that there is a difference between what is relative to the discretionary determination and what is relative to the assessment. Thus, the facts, documents, information such as confidential reports, knowledge and experience of the Minister and his officers and other considerations of a policy nature that are before the Minister for the purpose of his discretionary determination are clearly relevant to it, but when such determination has been made they have served their purpose and are not before the Minister again when he performs the assessment operation and, that being so, are not relevant to the assessment. The evidence appears to be clear that the

(1) (1915) A.C. 120.

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inspector's report was before the Minister, or his deputy, when the exercise of the discretionary power under section 6 (2) was under consideration. That being so, it would appear that it was relevant to the discretionary determination; but if that is so, then I cannot see how it could be relevant to the assessment; I would have thought that its effect would be exhausted when the determination was made and that it would not be before the Minister again on the assessment; all that would then be before him in respect of the item of disallowance of excessive expense would be the amount of his statutory discretionary determination. If this had been put into writing such writing might well be a "document relative to the assessment", but a document having merely a bearing on the exercise of the discretion itself would not be; it would be relative, not to the assessment, but only to the discretionary determination. If, therefore, the inspector's report were made in connection with the exercise of the discretion, it was not a document relative to the assessment within the meaning of section 63 (*g*) and there is nothing to take it out of the rule laid down in the *Arlidge* case (*supra*) that such a report is not producible. If it were not relevant to the exercise of the discretionary power but dealt only with the assessment it could have had no effect on the amount of the discretionary determination under section 6 (2).

With respect to the other various grounds for allowing the appeal I have not been able to find agreement by a majority of the Court in respect of any of them. Rinfret C. J. was of the view that section 6 (2) did not apply at all in that the sums claimed as deductions were not expenses within the meaning of the section, but in such view he was alone. Hudson J. thought that the payments of commissions could not be considered as part of the "net profit or gain" of the appellant under section 3 of the Income War Tax Act, and that there should be special reasons to support such a departure from the general rule and then stated, at page 157:

> The ruling of the Minister does not disclose any reasons. No doubt he had what appeared to him perfectly sound reasons for his decision, but none are before us. It is not for the Court to weigh the reasons but we are entitled to know what they are, so that we may decide whether or not they are based on sound and fundamental principles.

I have already expressed the opinion that it is no answer to the disallowance of an item of expense to say that it is not "net profit or gain" within the meaning of section 3 of the Act, for section 6 must be read with section 3 before taxable income can be ascertained and the disallowance of the item under section 6 (2) makes it taxable, although otherwise it would not be so. That is one of the facts that gives the Ministerial power of disallowance of expense its quasi-legislative character. Nor can I, for reasons already given, agree with the statement that the Court is entitled to know the Minister's reasons for the exercise of his discretion with the implication involved therein that if the Minister does not give such reasons the Court will allow the taxpayer's appeal from the assessment and refer it back to the Minister even without any proof that proper legal principles have not been applied. Kellock J. also made much of the fact that the Minister had not given reasons for his disallowance; he went further, however, than Hudson J. and expressed his view of the Minister's conduct positively in his conclusion that the disallowance could only have been based on unreasonableness and that since the ground of the decision was unexplained the decision itself was made to appear as a purely arbitrary one; but in such conclusion he was alone. Kellock J. took the view that the appellant by section 6 (*a*) was given a statutory right to have deducted in the computation of its "net" profits or gains, "expenses wholly, exclusively and necessarily laid out or expended" for the purpose of earning those profits or gains and that in order that the Minister might disallow any excess over what was reasonable or normal for the appellant's business, he first had to determine what was reasonable or normal. These views must be read subject to the fact that section 6 (*a*) cannot be read as conferring any statutory right excluding the exercise of the Minister's power under section 6 (2), but that an item of expense to be deductible must fall outside not only the exclusions of section 6 (*a*) but also the disallowance under section 6 (2), and also subject to the qualification that the Minister's determination of what is reasonable or normal expense is to be made not on the basis of what is reasonable or normal in point of fact but on what the Minister in his discretion determines to be such. The

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difference is fundamental. Kellock J. also stated that it was not open to the Minister to ignore the agreement or its legal consequences and, after certain observations, concluded that the disallowance could only have been based on unreasonableness. Then, after commenting on some of the evidence and on the lack of explanation by the Minister or evidence in support of his action, he held that the ground of the decision was unexplained and the decision itself was made to appear as a purely arbitrary one. Then, at page 168, he made this statement:

> If the present were a case of disallowance of expenses for advertising or for travelling or of similar items within the control of the taxpayer, the grounds of disallowance might more readily suggest themselves. The present case is not of that sort and there is nothing which displaces the agreement and the legal consequences which flow from it. Therefore, where there is nothing before the Court which enables it to see any ground or principle upon which the decision appealed from can be supported, but on the contrary where the evidence substantiates the deduction claimed and therefore the decision appears as a purely arbitrary one, which the Statute does not permit, the appellant, in my opinion, has met the onus resting upon it of showing that the exercise of discretion involved has been "manifestly against sound and fundamental principles" or based upon "wrong principles of law".

The implications involved in these reasons, as I understand them, are startling, namely, that where an expense item has been paid by a taxpayer under a contract and is not the kind of item that is within his control, and such item or any portion of it is disallowed by the Minister under section 6 (2), then, if evidence is adduced that the expense is reasonable and the Minister gives no reason for his discretionary disallowance, the Court will assume that the disallowance was based on unreasonableness and must be regarded as purely an arbitrary decision, will allow the appeal from the assessment and refer it back to the Minister. With the utmost respect, I am unable to find any support in the authorities for such views. Kellock J. did not state specifically, as Hudson J. did, that the Court was entitled to have the Minister's reasons, but the consequences of his finding of unreasonableness and arbitrary decision resulting from their non-production are so serious that there is an implication that reasons must be given if such consequences are to be avoided. To that extent, therefore, Hudson J. and Kellock J. are in agreement as to the necessity for reasons, but their agreement on this point does not make it a pronouncement by a majority of

the Court. So far as I have been able to ascertain, these views are the first departure from the long line of authorities which I followed in coming to the conclusion that when the Minister makes a determination in his discretion under section 6 (2) he is not required by law to give any reasons for such determination. Many of the authorities referred to do not appear to have been brought to the attention of the Court. It may well be that reasons must be given for the exercise of a judicial discretion, as indicated by Jessel M.R. in *Ex parte Merchant Banking Company of London. In re Durham* (1), but the authorities already cited make it clear, in my view, that reasons for the exercise of an administrative discretion need not be given. If that is so generally, then *a fortiori* no reasons need be given for the exercise of such an administrative discretion as that under section 6 (2) with its quasi-legislative effect. I have already expressed my views as to the assumption that the Act contemplates reasons for the exercise of the Minister's discretion under section 6 (2). Even if the Minister must give reasons for his decision when he is acting in a purely judicial capacity under section 59 in considering an appeal from an assessment, it by no means follows that he must also give reasons for the exercise of his discretion under section 6 (2), which is not a judicial but an administrative and quasi-legislative act. There are other respects in which the reasons of Kellock J. require comment. In my view, the suggestion that evidence that a particular item of expense is reasonable can outweigh the statutory discretionary determination of the Minister that it is not, or that it will satisfy the onus cast upon the appellant to prove that the Minister did not act upon proper legal principles or that his action was "manifestly against sound and fundamental principles" is against the weight of the authorities cited. If the Court may not use the standard of reason of the "ideal reasonable man" in determining whether the Minister's discretionary determination was reasonable, how can it set the opinion of the taxpayer or a witness above that of the Minister? Moreover, this reasoning of Kellock J. seems to place the onus of justifying the disallowance on the Minister, which, in my opinion, is clearly against the intent of Parliament. Estey J. pro-

(1) (1881) 16 Ch. D. 623 at 635.

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ceeded on quite different lines. His view was that the Deputy Minister, when exercising his discretion, had only the income tax returns, the copy of the agreement and the inspector's report before him; that without a knowledge of the contents of the report it was impossible to determine its validity as a basis for the exercise of the discretion; that it might or might not have been the dominating factor in the exercise of the discretion; but that apart from the report the facts disclosed in the returns and the agreement did not provide a basis upon which a discretionary determination could be made. As I interpret his reasons they are to the effect that, so far as the Court could judge, in the absence of the inspector's report, the Minister had acted upon insufficient grounds. In discussing the respective jurisdictions of the Minister and the Court under section 6 (2) I have already held, for the reasons given and on the authorities cited, that neither the opinion of the Minister nor the material on which it is based is open to review by the Court and that it has no right to examine into or criticize the reasons that led the Minister to his opinion or question their adequacy or sufficiency. If that is so, then it was not open to Estey J. to challenge the sufficiency of the Minister's grounds for his discretionary determination. The Court did not know what considerations might have moved him to his conclusion and he did not have to tell them. Estey J. also expressed the opinion that upon principle it would seem that to act upon insufficient facts or information should in the result be the same as acting upon improper facts. With respect, I suggest that there is a difference. If it can be shown, as in the *Pioneer Laundry* case (*supra*), that the Minister applied wrong principles in his purported exercise of discretion then the Court may, and should, intervene, but where it is not so shown, the sufficiency of the grounds upon which an administrative officer has exercised his discretion is, in my view of the authorities, a matter for him to determine, and outside the jurisdiction of the Court. Estey J. was, no doubt, influenced in his views by his concept of the discretion under section 6 (2) as a judicial one and, indeed, at page 170, he so described it. If it were such a discretion,

then little, if any, exception could be taken to his views; but it seems to me to be clear that it is an administrative discretion, not a judicial one.

Counsel for the appellant quoted the passage from *Hayman* v. *Governors of Rugby School* (1), already cited, in support of his contention that the Minister did not have to give reasons for disallowing part of David Mirsky's salary but that, if they were given, the Court would look at their sufficiency, and argued that the Minister had given three reasons for his disallowance which were insufficient to justify it. The first of such alleged reasons was that David Mirsky had received no salary prior to 1941, and that this was an irrelevant consideration which the Minister should not have taken into account. The answer is that the only reference to this matter is contained in the inspector's letter to the appellant, dated August 28, 1942, where it is stated as a fact; nowhere is it stated or even suggested as a reason for the exercise of the Minister's discretion, for it is clear that before he exercised it he had the explanation given by the appellant's solicitors in their letter of September 23, 1942. The second alleged reason was that all the capital stock of the appellant was held by members of the Mirsky family and it was objected that this was also an irrelevant matter improperly taken into consideration by the Minister. This fact was referred to in one of the preambles to the Minister's decision on the appeal to him from the assessment but is nowhere stated as a reason for the exercise of his discretion. It would not have been possible for the Minister to close his eyes to such fact even if he had tried to do so and, even if he did take it into account as a fact, I see no reason for holding that this vitiates his decision when it is quite clear that he had before him many other facts and considerations on which he could properly form his opinion. The third reason complained of was that the Minister had determined that the salary was in execess of what was reasonable for the services performed; it was argued that this was not permitted by the Act; in that while section 6 (2) empowered the Minister to disallow any expense which he in his discretion might determine to be in excess of what is reasonable or normal "for the business carried on by the taxpayer",

(1) (1874) 18 Eq. 28 at 68.

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this did not extend to a determination of what is in excess of what is reasonable or normal "for the services rendered" to the taxpayer. I am unable to agree that there is any substance in this complaint. I would think it quite within the Minister's power to determine the excessiveness of a salary as an expense within the meaning of the section on the ground that such salary was more than the services of the recipient were worth. Counsel also put his client's complaint in another form and argued that the Minister had not exercised his discretion honestly and fairly in that he had not properly investigated the facts of David Mirsky's duties. This seemed to be the real substance of the appellant's complaint. Several of its witnesses gave evidence that the district office assessor who visited the appellant's plant had made no inquiries as to David Mirsky's duties, but it is clear that even if he did not do so the Minister had all the necessary and relevant facts and information before him when he was considering the exercise of his discretion. The appellant has not shown any breach of quasi-judicial duty on the part of the Minister. It had the fullest opportunity of presenting its case; it was invited to submit whatever evidence it thought appropriate and it availed itself of such invitation by making representations both by letter through its solicitors, Mirsky & Mirsky, and personally through John Mirsky, one of its solicitors and also its secretary. If this is not the kind of case in which the discretionary power under section 6 (2) is properly exercisable I am unable to see in what kind of case it could possibly be used. In my judgment, the appellant has no legal ground of grievance. It has not shown that the Minister has in any manner failed to apply proper legal principles or acted against sound and fundamental principles, or that the exercise of his discretion was in any respect otherwise than as contemplated by the Act. It has, therefore, failed to discharge the onus cast upon it and its appeals, so far as the disallowance of salary is concerned, must fail.

There remains the disallowance of the directors' fees. Before any disallowance was made the Inspector of Income Tax at Ottawa, on August 28, 1942, wrote to the appellant referring to the fact that directors' fees were paid or

credited to each of the directors in 1940 and 1941 and that in the previous year no such fees were paid or credited; giving notice that the discretionary powers of the Act were about to be exercised; stating the opinion of the division that the fees were not exclusively and necessarily laid out or expended for the purpose of earning the income; and inviting the appellant to submit whatever evidence it thought appropriate to be considered in the exercising of the discretion. On September 22, 1942, the appellant's solicitors replied stating that directors' fees were first paid for the year ending October 31, 1940; setting out the increase in gross sales from 1937 to 1941; contending that the Company was doing a business of major proportions and was considered one of the largest independent manufacturers of carbonated beverages in Canada; and giving specific information as to the meetings of the directors. On November 24, 1942, the Commissioner of Income Tax, acting under the authorization of the Minister under section 75 (2), determined in respect of each year that "the directors' fees of $800 paid to the Company's four directors were not exclusively and necessarily laid out or expended for the purpose of earning the income and in assessing the taxpayer, the above amount is disallowed in full as a deduction from income." Subsequently, when the assessments were made the amount of the disallowance was added as taxable income to the amounts respectively shown on the appellant's returns. The correctness of this item of the assessments is in dispute. While the letter of August 28, 1942, indicated that the directors' fees might be disallowed under section 6 (2) they were not so dealt with at all; instead, the Commissioner found as a fact that they were not exclusively and necessarily laid out or expended for the purpose of earning the income and, having so found, disallowed them under section 6 (*a*) 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;

Section 6 (*a*) is of general application and no exception is made for any particular kind of expense such as directors' fees. That directors' fees are not necessarily deductible expenses merely because they have been lawfully paid was

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clearly laid down in *Copeman* v. *Flood* (*William*) *and Sons*, Limited (1). The company was a private one consisting of a man, his wife, two sons and a daughter as sole shareholders and directors. The question involved was whether it could deduct the remuneration paid to two of the directors. This amounted to £2,600 for the daughter, who was 17 years of age and whose duties consisted in answering telephone enquiries, and a similar sum for one of the sons, who was 23 years of age and whose duties consisted in calling on farmers to purchase pigs. The appellant, the inspector of taxes, contended that it was open to the Commissioners to consider whether the sums paid were in fact money wholly and exclusively laid out or expended for the purpose of the company's trade under Schedule D, Case 1, Rule 3 of the United Kingdom Income Tax Act, 1918, which provides:

> 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 laid out or expended for the purposes of the trade, profession, employment, or vocation:

but the Commissioners decided that they could not interfere with the prerogative of the company to pay such sums as remuneration to the directors as it thought fit. On appeal their decision was reversed. Lawrence J. said at page 204:

> The Commissioners have nothing to do with the internal economy of the company, but they can find in a proper case that sums paid by a company as remuneration to its directors are not wholly and exclusively laid out or expended for the purposes of the company's trade, and it is their duty to direct their minds to that question. The Commissioners must see whether the sums deducted by the company in computing the amount of its profits or gains for income tax purposes are sums which the company is permitted to deduct by the Income Tax Acts. A company may have paid to its directors sums as remuneration for their services in accordance with the articles of association and a resolution of the company, but it does not follow that those sums are "money wholly and exclusively laid out or expended for the purposes of the trade" of the company so as to render them properly deductible.

and held, at page 205:

> The case must, therefore, be remitted to the Commissioners to find as a fact whether the sums in question were wholly and exclusively laid out or expended for the purposes of the company's trade, and, if they were not, to find how much of those sums was so laid out or expended.

(1) (1941) 1 K.B. 202.

A similar view was taken in New Zealand in *Aspro Limited* v. *Commissioner of Taxes* (1). Two persons were the sole shareholders and directors of the company. In 1924 it paid directors' fees of £1500 to each of them and each year it increased the amount paid until in 1928 it came to £5,000 each. For that year the Commissioner disallowed £8,000 out of the £10,000 paid. In so doing he acted under section 80 (2) of the New Zealand Land and Income Tax Act, 1923, which provided in part:

> 80. (2) In calculating the assessable income of any person deriving such income from one source only, any expenditure or loss exclusively incurred in the production of the assessable income for any income year may be deducted from the total income derived for that year.

A stipendiary magistrate upheld the Commissioners decision; an appeal from his decision was dismissed by the Court of Appeal of New Zealand, which held that the resolution of the company voting the sum for directors' fees did not *ipso facto* entitle it to the deduction claimed but that under section 80 (2) of the Land and Income Tax Act, 1923, the Commissioner was entitled to call for proof from the company that the expenditure of the fees was exclusively incurred in the production of its assessable income, which onus it had not discharged. The decision of the Court of Appeal was affirmed by the Judicial Committee of the Privy Council. Their judgment makes it clear that the fact that directors' fees are paid in accordance with a valid resolution of the company is not sufficient to exclude enquiry whether the moneys were in fact laid out wholly and exclusively for the production of the assessable income.

The same attitude was taken by the High Court of Australia in *Robert G. Nall Ltd.* v. *Federal Commissioner of Taxation* (2). There section 25 (*e*) of the Commonwealth Income Tax Assessment Act, 1922-1934, provided that "a deduction shall not in any case be made in respect of the following matters . . . (*e*) money not wholly and exclusively laid out or expended for the production of assessable income. Under this section the Commissioner allowed a deduction of only £500 in respect of the remuneration paid to a director, although a much larger sum had actually been paid, on the ground that any amount in

(1) (1930) N.Z.L.R. 935; (1932) A.C. 683.
(2) (1937) 4 Australian Tax Decisions 335.

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excess thereof was not laid out or expended for the production of the assessable income." It was held, affirming the judgment of Rich J., that the question was one of fact and that the excess over £500 per annum was not "money wholly and exclusively laid out or expended for the production of assessable income."

These decisions, under legislation similar to section 6 (*a*), warrant the opinion that directors' fees paid by a company are not necessarily deductible expenditures for income tax purposes merely by reason of their having been validly paid; it is a question of fact in each case whether or to what extent such fees were wholly, exclusively and necessarily laid out or expended for the purpose of earning the income of the company.

The test of the deductibility of an expenditure was laid down by the Lord President (Clyde) of the Scottish Court of Session in *Robert Addie & Sons Collieries, Limited* v. *Commissioner of Inland Revenue* (1) as follows:

> What is "money wholly and exclusively laid out for the purpose 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.

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* (2) and adopted by the Supreme Court of Canada in *Minister of National Revenue vs. Dominion Natural Gas Co. Ltd.* (3). And in *Montreal Coke and Manufacturing Co.* v. *Minister of National Revenue* (4) Lord MacMillan said:

> If the expenditure sought to be deducted is not for the purpose of earning the income, and wholly, exclusively and necessarily for that purpose, then it is disallowed as a deduction.

and later:

> Expenditure, to be deductible, must be directly related to the earning of income.

It is clear that by this is meant the earning of income from the business.

(1) (1924) S.C. 231 at 235.
(2) (1937) A.C. 685 at 696.
(3) (1941) S.C.R. 19.
(4) (1944) A.C. 130 at 133.

It is clear from the cases cited that it was open to the Commissioner to enquire whether the remuneration paid to the directors was out of proportion to the value of their services and if so to disallow the disproportionate part on the ground that such payment was really a distribution of taxable profit in the guise of remuneration for services rendered. On the other hand, it is also clear that reasonable remuneration should not be interfered with. In both the *Aspro* case (*supra*) and the *Nall* case (*supra*) part of the remuneration paid to the directors was allowed as a deduction without any question being raised, but in the present case the Commissioner went farther and disallowed the directors' fees *in toto*. The Court may properly determine whether the Commissioner was right in his findings of fact. Under its appellate jurisdiction the Court may deal with questions of fact as well as of law, and in respect of the Commissioner's findings of fact on which the disallowances were based, it may, on its own view of the evidence, come to the conclusion that such findings cannot be supported and substitute its own findings, with the result that the assessments must be amended accordingly; it need not refer the matter back to the Commissioner.

I have come to the conclusion that the Commissioner's findings that the directors' fees were not exclusively and necessarily laid out or expended for the purpose of earning the income ought not to stand. The uncontradicted evidence shows that directors' meetings were held at least monthly, at which sales and advertising policies were discussed, that such meetings were usually held after business hours, and that a great deal of time and effort was spent in establishing sales policy and directing the general policies of the company. It may fairly be inferred that such meetings were necessary for the proper conduct of the appellant's business and that the services of the directors in shaping and directing its policies were rendered for the purposes of contributing to its success; as such they were part of the process of profit making and directly connected with the earning of the income from the business. That being so, it seems to me that unless it is shown that the directors' fees were unreasonable or disproportionate to the value of the services rendered they should be regarded

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as an expenditure for the purpose of earning the income. The effect of the Commissioner's findings is that the expenditure was not made for the purpose of earning the income but was really a disguised distribution of profits. There is no established basis of fact for such findings; the services rendered by the directors were proper and necessary, and there is nothing in the evidence to show that the amount of the fees paid for them was unreasonable or disproportionate to their value. No real argument was advanced for disallowing the fees paid to John Mirsky; he performed the necessary duties of secretary-treasurer of the appellant, and I see no reason why the fees paid for such performance should not be deducted. It was suggested that the fees paid to David Mirsky and Lionel Mirsky were not deductible because they were full time paid employees. In my opinion, the salaries paid to them for their managerial activities have nothing to do with their duties as directors and I see no reason why reasonable remuneration for their services in such capacity should not be allowed. This leaves only the fees paid to Mervin Mirsky. He carried on his duties as a director until December 1940, when he proceeded overseas as a member of the armed forces. It was no doubt laudable to continue his remuneration while he was in service overseas, but during such time he did not perform the services required of a director. The fees paid to him after he left for overseas cannot be regarded as an expenditure made for the purposes of earning the income, for they were in the nature of a gratuitous payment for services not actually performed. The net result is that in respect of the disallowances of directors' fees the appeal in respect of the year 1940 is allowed and in respect of the year 1941 it is allowed except as to the $200 paid to Mervin Mirsky. The Commissioner's findings of fact are to such extent reversed with the result that the assessments must be revised accordingly. There having been divided success in the appeals, neither party will be entitled to costs.

Judgment accordingly.