[HIGH COURT OF AUSTRALIA.]

FEDERAL COMMISSIONER OF TAXATION APPELLANT;

AND

GREEN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1950.

BRISBANE, *June* 21.

Latham C.J., McTiernan, Webb, Fullagar, and Kitto JJ.

Income Tax (Cth.)—Assessment—Deductions—"Losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income, or are necessarily incurred in carrying on a business for the purpose of gaining or producing such income"—Taxpayer a director of several companies—Owner of shop premises in country—Investments—Business—Moneys paid to accountant for keeping books and for audit—Moneys paid to daughter for clerical work performed at home—Travelling expenses—Private or domestic nature—Income Tax Assessment Act 1936-1945 (*No.* 27 *of* 1936—*No.* 4 *of* 1945), *s.* 51 (1).

The taxpayer, a resident of Brisbane, who was a director of several companies and the owner of shops in North Queensland, derived his income from director's fees, rent from the shops, interest from Commonwealth loans, dividends from companies and interest on mortgages. He engaged and paid an accountant to keep and audit books, paid his daughter an annual sum for clerical work performed at his home in connection with his affairs, particularly during his absence, and incurred travelling expenses in visits to the shop premises. In respect of these items he claimed deductions from his assessable income, but they were disallowed by the commissioner.

On appeal from the decision of the commissioner *Philp* J. found that it was reasonably necessary for the taxpayer to keep books and records, to have them audited and to have some person in attendance at Brisbane to deal with matters in his absence and that it was also reasonably necessary for him to inspect and supervise the shop properties.

Held, that the evidence supported the findings and that in the circumstances the items were allowable deductions under s. 51 (1) of the *Income Tax Assessment Act* 1936-1945 as outgoings incurred in gaining or producing assessable income, and that it was immaterial that there might be difficulty in holding that the taxpayer was carrying on with continuity an identifiable business of some particular description.

Decision of the Supreme Court of Queensland (*Philp* J.) affirmed.

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APPEAL from the Supreme Court of Queensland.

This was an appeal to the High Court from the decision of the Supreme Court of Queensland (*Philp* J.) given on an appeal against the disallowance of certain objections by a taxpayer to an assessment under the *Income Tax Assessment Act* 1936-1945, in respect of income received in the year ending 30th June 1945. The taxpayer, William Herbert Green, who resided in Brisbane, was a director of seven companies and was supervising a pharmacy in Brisbane on behalf of a chemist who was absent on war service. From his directorships he received £500 and from the pharmacy £250. He was the owner of five shops in North Queensland, one at Cairns and four at Townsville, from which he received in rents £1,850. In addition, he received dividends as a shareholder in two companies, interest on moneys owing by purchasers, and secured, by mortgages, on two pharmacies sold by him. For the purpose of keeping permanent records of his various transactions, the taxpayer employed an accountant at Townsville to keep and audit books of account. For keeping and auditing the books, preparing his income-tax returns and advising on income-tax matters, he paid the accountant £35 13s. He also paid his daughter £150 for clerical work performed by her on his behalf. She performed this work in an office at his home and the work consisted of keeping business books of accounts, attending to correspondence, making appointments in his absence and other similar duties. The taxpayer managed all his own affairs and maintained a properly equipped office at his residence. Besides claiming deductions for the moneys paid to the accountant and his daughter he also claimed £15 15s. 6d. as the fair proportion of travelling expenses in visiting Townsville and Cairns attending to his interests in the shop premises at those places. He made annual visits, combining his own business with church and masonic matters.

On the Commissioner of Taxation disallowing these amounts, which were claimed as deductions in that they were outgoings incurred in gaining or producing assessable income under s. 51 (1) of the *Income Tax Assessment Act* 1936-1945 the taxpayer lodged objections, which were treated, under s. 187 of the Act, as an appeal to the Supreme Court.

Philp J. upheld the objections and found that it was reasonably necessary for the taxpayer to keep books and records, to have them audited and to have some person in attendance at Brisbane to deal with matters in his absence and that it was also reasonably necessary for him to inspect and supervise the shop properties in North Queensland.

From this decision the Commissioner of Taxation appealed to the High Court.

M. Hanger, for the appellant. The moneys paid for the clerical work performed by the daughter were not expenses incurred in gaining or producing assessable income. Neither were the moneys paid to the accountant for keeping and auditing the books. There was no business. It could not be said that the taxpayer was engaged in or carrying on a business. The expenses were of a capital or of a private or domestic nature. The test is laid down in *Ronpibon Tin No Liability and Tongkah Compound No Liability* v. *Federal Commissioner of Taxation* (1). If something takes place after the income has been earned or received that event does not take place in the course of producing or gaining income. It is not incidental to gaining income. In a business it would be necessary to keep books and records, but the taxpayer did not carry on a business. The payment out of these moneys did not bring anything in by way of income. It is not an event which necessarily takes place in order to produce income. The taxpayer did not carry on a business by having directorships, by receiving dividends from shares and rent from five properties. A business connotes some continuity of activity. There is a distinction between carrying on a business and a position such as this. While a business is being carried on the issue of receipts is a necessary part of the conduct of the business; but the taxpayer had no obligation and no necessity in order that he should receive the income which he had earned to issue receipts. The employment of the clerk was for the taxpayer's convenience and was of a private or domestic nature and therefore not allowable. As to the travelling expenses the tenants were bound to repair and it was not necessary for him to travel to Cairns and Townsville to get his income. A single enterprise does not amount to carrying on a business: *Smith* v. *Anderson* (2); *Commissioner of Income Tax (Bengal)* v. *Shaw Wallace & Co.* (3); *Richardson* v. *Jackson* (4).

C. G. Wanstall, for the respondent. The question whether an outgoing is an allowable deduction under s. 51 is a question of fact: *Maryborough Newspaper Co. Ltd.* v. *Federal Commissioner of Taxation* (5). Unless the circumstances as found by *Philp* J. cannot in law come within s. 51, this Court will not disturb the findings:

(1) (1949) 78 C.L.R. 47, at p. 57.
(2) (1879) 15 Ch. D. 247.
(3) (1932) Ind. L.R. (Cal. Series) 1343.
(4) (1841) 8 M. & W. 298 [151 E.R. 1051].
(5) (1929) 43 C.L.R. 450, at p. 452.

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Federal Commissioner of Taxation v. *Broken Hill South Ltd.* (1); *Commissioner of Taxation* v. *Miller* (2). The evidence shows that the taxpayer had a properly equipped office at his residence. His activities necessarily involved his moving from place to place in order to earn a living and it was both necessary and incidental to the earning of his income to have a clerk or attendant at some central point where he might be reached or an appointment made. During his absence the clerk was in attendance at the office carrying on all necessary correspondence and acting generally as secretary. A prudent and efficient man who is deriving his income from letting properties must keep some record of moneys received in order to know what is outstanding: *British Insulated and Helsby Cables Ltd.* v. *Atherton* (3); *W. Nevill & Co. Ltd.* v. *Federal Commissioner of Taxation* (4); *Amalgamated Zinc (De Bavay's) Ltd.* v. *Federal Commissioner of Taxation* (5); *Robert G. Nall Ltd.* v. *Federal Commissioner of Taxation* (6). The taxpayer carried on a business. His business was the discharge of the duties of a director and the letting of properties. Provided there is no fraud or sham involved the *quantum* of the expenditure is not a matter for the commissioner. It is a question of fact to be decided according to the circumstances of the particular case: *Blockey* v. *Federal Commissioner of Taxation* (7). The word "business" must be given a wide meaning: *Tweddle* v. *Federal Commissioner of Taxation* (8). However it is not necessary that the taxpayer is carrying on a business in order to get the benefit of s. 51 (1) of the Act. An expense is incurred in the course of producing income when it is directed towards increasing the income-producing capacity of the taxpayer: *Herald and Weekly Times Ltd.* v. *Federal Commissioner of Taxation* (9); *Hallstroms Pty. Ltd.* v. *Federal Commissioner of Taxation* (10); *Alliance Assurance Co.* v. *Federal Commisioner of Taxation* (11); *Worsley Brewery Co. Ltd.* v. *Inland Revenue Commissioners* (12); *Croft* v. *Sywell Aerodrome Ltd.* (13).

M. Hanger in reply. A business may be large or small, but whatever its nature, there must be continuity of operation. Otherwise there is no business operation.

(1) (1941) 65 C.L.R. 150, at p. 155.
(2) (1946) 73 C.L.R. 93.
(3) (1925) A.C. 205.
(4) (1937) 56 C.L.R. 290, at pp. 300, 304, 305.
(5) (1935) 54 C.L.R. 295, at pp. 303, 304.
(6) (1937) 57 C.L.R. 695, at pp. 711, 712.
(7) (1923) 31 C.L.R. 503.
(8) (1942) 5 A.T.D. 186.
(9) (1932) 48 C.L.R. 113.
(10) (1946) 72 C.L.R. 634, at p. 643.
(11) (1921) 29 C.L.R. 424.
(12) (1932) 17 Tax Cas. 349.
(13) (1942) 1 K.B. 317, at p. 324.

The following judgment of the Court was delivered by :—

LATHAM C.J. This is an appeal from an order of *Philp* J. of the Supreme Court of Queensland made upon an appeal to the Supreme Court against the disallowance of objections by the taxpayer William Herbert Green to an assessment under the *Income Tax Assessment Act* 1936-1945.

The assessment related to income received in the income year ending on 30th June 1945. The questions raised upon the appeal relate to claims of the taxpayer that certain deductions should be allowed from his assessable income in order to determine his taxable income by reason of the provisions of s. 51 of the Act. Section 51 (1) of the Act is in the following terms :—" All losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income, or are necessarily incurred in carrying on a business for the purpose of gaining or producing such income, shall be allowable deductions except to the extent to which they are losses or outgoings of capital, or of a capital, private or domestic nature, or are incurred in relation to the gaining or production of exempt income."

It has been held in the case of *Amalgamated Zinc (De Bavay's) Ltd.* v. *Federal Commissioner of Taxation* (1), that the words in the initial part of s. 51 " All losses or outgoings to the extent to which they are incurred in gaining or producing the assessable income " mean such losses and outgoings as are incurred in the course of gaining or producing the assessable income. Further, in the case of *Ronpibon Tin No Liability and Tongkah Compound No Liability* v. *Federal Commissioner of Taxation* (2), it was said with reference to s. 51 :—" For expenditure to form an allowable deduction as an outgoing incurred in gaining or producing an assessable income, it must be incidental and relevant to that end. The words ' incurred in gaining or producing the assessable income ' mean in the course of gaining or producing such income " and " In brief substance, to come within the initial part of the sub-section it is both sufficient and necessary that the occasion of the loss or outgoing should be found in whatever is productive of the assessable income or if none be produced would be expected to produce assessable income." (3).

It is not enough in order to establish a right to a deduction to show that it was proper or reasonable for the taxpayer to make the expenditure which he claims as a deduction. For example, it is perfectly reasonable and proper for a taxpayer to incur living expenses and many expenses of a private or domestic nature, but

(1) (1935) 54 C.L.R. 295.
(2) (1949) 78 C.L.R. 48, at p. 56.
(3) (1949) 78 C.L.R., at p. 57.

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such expenditure is expressly excluded from deductibility by the final words of the first sub-section of s. 51. Thus, as has been stated in the course of argument, a taxpayer cannot deduct ordinary living expenses. It is true that such expenses are necessarily incurred if any income is to be earned or otherwise derived, but such expenses would be incurred whether income was earned or otherwise derived or not.

In the present case the income returned by the taxpayer included first, director's fees paid to the taxpayer by seven companies, secondly, rents from five properties at Cairns and Townsville, thirdly, dividends from two companies, and fourthly, interest from two mortgages. There were other items of income, including a payment of £250 made in thanks for the services of the taxpayer in helping to supervise a druggist's business while the owner was absent at the war.

The deductions in question which were claimed by the taxpayer were disallowed by the commissioner but were allowed by his Honour Mr. Justice *Philp*. They are deductions which are said to relate to the items of income which I have mentioned.

In the first place a deduction is claimed in respect of a salary paid to the taxpayer's daughter for her services in acting as a secretary or clerk in attending to the taxpayer's financial affairs. This is in all an amount of £150 in the year in question and it has been apportioned by the taxpayer between income derived from personal exertion and income from property. In the second place a claim is made for the deduction of audit fees amounting to some £35, also apportioned between the two sources of income mentioned. The taxpayer employed an accountant who lived at Townsville and who was familiar with his affairs. The accountant was paid an annual fee, with second-class railway fares. His functions were described in this manner in a statement made on behalf of the taxpayer to the commissioner: "He balances off my books (not completed by my clerk and myself). He then audits the books, compiles my annual profit and loss account and balance sheet and makes out my income tax returns and also the Federal and State land tax returns. He also advises during the year on any income tax matters and supervises my property interests in Townsville." In the third place a deduction is claimed for part of the expenses of travelling to Townsville and Cairns to inspect, supervise and generally look after the properties which the taxpayer owned there and which he had let to tenants. This was apparently an annual expenditure, a regular expenditure. Only £15 was claimed, though more was spent upon these visits, and £15, it was held by the learned judge, was barely enough to

cover railway fares. Accordingly, in so far as any part of this latter expenditure could be regarded as devoted to a capital purpose in the protection of the reversion of the taxpayer in these properties, allowance has been made for that matter by the learned judge.

His Honour found that it was reasonably necessary for the taxpayer to keep books and records and to have them audited and to have a person in attendance in Brisbane to deal with matters affecting his financial affairs which arose during his absence from Brisbane, and his Honour held that it was reasonably necessary to inspect and supervise from time to time the properties from which rents were derived. The evidence supported these findings. The expenditure, a deduction of which is claimed, was incurred in relation to the management of the income-producing enterprises of the taxpayer. If this is so it is immaterial that there might be a difficulty in holding that the taxpayer was carrying on in a continuous manner an identifiable business of some particular description.

Section 51, it should be observed, is not limited to deductions from income derived as being the proceeds of a business. Section 51 is a general provision relating to deductions claimable in relation to expenses, losses or outgoings incurred in gaining or producing any income whatever and not merely in relation to income derived from a business.

The evidence shows, with respect to what have been referred to as audit fees, which were accountancy fees as well as audit fees, that the accountant not only performed ordinary accountancy work, but that he made out income-tax returns and land-tax returns and advised on income-tax matters which arose. The proportion of his fee—it is a small amount, I think £35 in all—which would be attributable to these particular matters, that is, preparing taxation returns and advising on income-tax matters, must be very small, and so small really as to be a negligible amount, and for this reason we think that no attention need be paid to it in this case, but we are not to be taken as deciding whether or not the cost of preparing taxation returns or of advising in relation to taxation liability is a deductible expenditure.

For these reasons we are of opinion that the appeal should be dismissed. The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *K. C. Waugh*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent: *Tully & Wilson.*

B. J. J.