[TRANSLATION]

Alexander (*Appellant*) *v.* **Minister of National Revenue** (*Respondent*)

Present: Jackett P.—Toronto, December 9, 10, 11, 1969

Income Tax—Office or Employment—Radiologist serving as head of hospital's radiology's department—Whether contract of service or for services—"Office", "Officer", meaning—Income Tax Act s. 139(1)(ab).

Under his contract with a hospital in Trenton, Ontario, appellant served as its professional radiologist and as administrative head of its radiology department with a staff of six hospital employees. Charges for the department's services were made by the hospital, and appellant was remunerated in accordance with the Ontario Medical Association fee schedule less 5% for uncollected accounts. The contract obliged him to provide a professional radiologist during his vacation. The hospital did not treat him as an employee for pension purposes or for income tax deductions. His administrative services were of the same character as those performed without remuneration by the chiefs of the hospital's surgery, medical and obstetrics departments, all of whom were medical doctors in general practice.

Held, the contract was a contract for services, not a contract of service under which appellant was a servant or employee. Appellant's remuneration was earned in the practice of a profession and was therefore income from a business and so not limited to the deductions applicable to income from an office or employment by s. 5 of the *Income Tax Act*.

Held also, appellant's car expenses in travelling between his home in Trenton and seminars at Queen's University in Kingston in order to keep up with developments in the field of radiology were deductible in computing his income from his profession notwithstanding s. 12(1)(*a*).

Semble: Appellant was not an "officer" within the definition of s. 139(1)(*ab*), which only applies when a person has been appointed, elected or otherwise assigned to some pre-existing "position" that carries "a fixed or ascertainable stipend or remuneration".

Ready Mixed Concrete (S.E.) Ltd. v. Minister of Pensions [1968] 1 All E.R. 433, considered.

INCOME TAX APPEAL.

W. Z. Estey, Q.C. for appellant.

M. J. Bonner for respondent.

JACKETT P.: These appeals are from the appellant's assessments under Part I of the *Income Tax Act* for the 1964 and 1965 taxation years.

The parties have filed a document in which they have agreed on the main question to be decided by the court on this appeal. As I understand that agreement, the main question is, in effect, whether the contract under which the appellant worked in the Trenton Memorial Hospital during 1964 and 1965 was a contract of service, so that what he received from the hospital authority under the contract was remuneration from an office or

employment, or was a contract for services so that the amounts so received were fees earned in the practice of a profession so as to be revenues of a "business" within the meaning of that word as used in the *Income Tax Act.* (If such amounts are remuneration from an office or employment, the deductions that may be made in computing "income" for the purpose of Part I of the *Income Tax Act* are limited in the manner indicated by section 5 of the Act. If they are, on the other hand, revenues of a "business", the deductions that may be made in computing "income" for the purposes of Part I are not so limited.) Pursuant to the aforesaid agreement, there are two subsidiary questions, of which one arises if the main question is answered one way and the other arises if the main question is answered the other way.

In my view, no question arises in this case as to whether, even if the appellant was not employed under a contract of service and was not therefore an employee or servant, he was in any event an "officer" because he held an "office" within the definition of that word to be found in section 139(1)(*ab*) of the *Income Tax Act,* which reads as follows:

> 139. (1) In this Act,
>
> * * *
>
> (*ab*) "office" means the position of an individual entitling him to a fixed or ascertainable stipend or remuneration and includes a judicial office, the office of a Minister of the Crown, the office of a member of the Senate or House of Commons of Canada, a member of a legislative assembly, senator or member of a legislative or executive council and any other office, the incumbent of which is elected by popular vote or is elected or appointed in a representative capacity and also includes the position of a corporation director; and "officer" means a person holding such an office;

To my mind, that definition only applies where a person has been appointed, elected or otherwise assigned to some pre-existing "position" that carries "a fixed or ascertainable stipend or remuneration". Here there is no evidence of any such "position" or of any act whereby the appellant became the holder of any such position. What we have here is a contract under which the appellant supplies certain services for a remuneration and it is, in my view, either a contract of service as a result of which the appellant was a servant or employee or it is a contract for services. That is not to say that there might not be an appointment to an office in addition to such a contract, but there is no evidence of any such situation here.

The contract under which the appellant performed the services in question during 1964 and 1965 is dated February 15, 1964, and, by the introductory portion thereof, is expressed to be between Trenton Memorial Hospital and "Doctor Alexander, Radiologist and Director of Radiology", who is sometimes referred to in the contract as "The Radiologist". The substantive part of the contract reads as follows:

> 1.1 Where "The Hospital" appears in the provisions hereinafter stipulated, it is understood that the powers and duties to be exercised hereunder by "The Hospital" shall be exercised by the Board of Governors.
>
> 1.2 "The Administrator" shall mean the Administrator of the Hospital. "The Department" shall mean the Department of Radiology.

1.3 The Department of Radiology shall consist of "The Radiologist", and Employees who are associated with the provision of Radiological Services or whose activities are related to the provision of Radiological Services who have been placed under the Director of Radiology by the Administrator of The Hospital.

1.4 Both parties recognize that there are three aspects to the duties and responsibilities of "The Radiologist" and "The Director of Radiology". The Radiologist's responsibilities include the interpretation of films and consultation to the Attending Physician regarding Radiological findings. In addition, the Radiologist is responsible for consultation with regards to methods and procedures used in the Radiology Department. As "The Director of Radiology" the Radiologist is the Central Executive Officer of the Radiological service and has all the administrative duties which arise from this responsibility.

2.1 "The Radiologist" shall be a member of the Medical Staff of the Hospital and have all the responsibilities and privileges which accrue from such Membership as stipulated in the Hospital Bylaws.

2.2 "The Radiologist" shall establish Departmental Procedures and Methods of Operation. Provide Radiological services to aid in diagnosis of disease conditions and treatment of patients. He shall supervise all Radiological work. Serve as Consultant to other Department Heads and Visiting Physicians, to interpret Radiological findings.

2.3 The hours of work per week shall be such as are necessary for the efficient operation of the Department. "The Radiologist" shall be available for emergency work at any time of the day or night. "The Radiologist" agrees that sufficient coverage shall be provided so that equivalent of one full time Radiologist will be provided for each regular 9,000 examinations per annum (excluding all miniature Chest X-Rays).

2.4 The minimum annual vacation shall be one complete month. "The Radiologist" shall be responsible for arranging coverage in his absence, including costs incurred, and shall ensure that the operation of the Department will not be interrupted during his absence.

2.5 "The Radiologist" shall reside in the Town of Trenton or within a distance of five miles thereof.

2.6 "The Radiologist" shall be paid by "The Hospital" for his duties as Radiologist for Examinations performed in accordance with the attached Schedule "A". Accounting procedures for determining the number of Examinations performed shall be subject to confirmation by procedures to be set and approved by "The Hospital". Monthly advances made during the year shall be subtracted from the total remuneration, and settlement for the year shall include full value for all advances made. 5% reduction shall be made from total remuneration for uncollected accounts.

3.1 "The Director" of Radiology shall be the central Executive Officer of the Department of Radiology and shall have authority from, and be responsible to "The Administrator" for the administration of the Radiology Department in all its activities and divisions, subject to the policies and directions which are given by "The Administrator", to "The Director", with due observation to the best interest of the Patients and all relevant legislation, the Standards of Accreditation bodies and the provisions of the Hospital Bylaws.

3.2 Without limiting Section 3.1 of the Agreement, "The Administrator" shall assist "The Director" in his discharge of the following responsibilities:

3.21 The provision of the *best possible* Radiological service for the patients of the Hospital.

3.22 The establishment and operation of Educational Programmes and Training Courses which will prepare technicians for good, or better Radiographic Service, as approved by the Administrator.

3.23 To report and discuss with "The Administrator" on all matters which in the opinion of "The Director" should be brought to the attention of, or considered by, "The Administrator".

3.24 The proper management of the current operations and the planning for future operations of "The Radiology Department", the Staff, the Medical Staff and Personnel.

3.25 To co-operate with, and assist and provide assistance, to maintain good relations with other Departments of the Hospital for the benefit of Patients.

3.26 To perform any other duties which are mutually agreed upon by "The Director" and "The Administrator", to be in the best interest of "The Hospital".

3.3 Without limiting the provisions of Sections 3 and 4 of this agreement, the duties of "The Director" shall include:

3.31 To submit for "The Administrator's" approval organization plans, budget proposals and other administrative data as requested by "The Administrator".

3.32 To recommend selection in employment, control and discharge of all employees of "The Department". No employee of "The Department" shall be discharged unless in accordance with a decision made by "The Director" and confirmed by "The Administrator". No person shall be employed unless that person has been interviewed and employed by the Personnel Department or someone appointed by "The Administrator" to act for the Personnel Department, and an evaluation given to "The Director".

3.33 To ensure that labour, supplies and equipment assigned to "The Department" are used efficiently and economically.

3.34 To advise "The Administrator" on Executive Hospital problems pertaining to Radiology and to assist with these problems and responsibilities in whatever manner is mutually agreed upon by "The Administrator" and "The Director".

3.4 The Board of Governors, upon the recommendation of "The Administrator" shall have the right to discharge "The Director" and terminate this Contract if he is guilty of any criminal offence or indictable moral or criminal act of any nature, or if after he has received written notice from "The Administrator" that he has refused to follow the policy laid down by "The Administrator", and he has had an opportunity to defend his action to "The Administrator", and to the Board of Governors, or three or more Representatives of the Board of Governors appointed by the Board of Governors for this purpose.

"The Director" may terminate this Contract, if in his opinion, "The Hospital" has not maintained the terms of the Contract, and he has reported and defended his opinion to "The Administrator", and to the Board of Governors.

3.41 Termination of this Contract under any Section shall be considered termination of the complete Contract. Either party may terminate this Contract upon six months written notice at their discretion. The notice to "The Hospital" may be given by delivery of such notice to "The Administrator" of the Hospital and the notice to "The Radiologist" may be given by written notice either delivered to him personally or forwarded by registered mail to his last known place of residence.

4.1 This Contract shall become effective February 15th, 1964, and shall be renewed automatically on January 1st of each year, from year to year, unless either party gives notice in writing to the other party at least six months prior to the following January 1st, or unless the Contract is otherwise terminated as herein provided.

The relevant facts are, for the most part, not in dispute.

The Hospital authority operated, as an integral part of the Trenton Memorial Hospital, a department called the "Department of Radiology". Apart from the appellant, that department consisted of four technicians, a medical secretary and a porter, all of whom were admittedly ordinary servants

or employees of the Hospital authority. The Department of Radiology operated in premises belonging to and maintained by the Hospital authority, used equipment belonging to and serviced by the authority and used supplies purchased by the authority. The department carried out diagnostic X-Ray examinations of patients referred to the department by their own medical doctors and the charges for such services were made by the Hospital authority who received payments for them, usually from an insurer with whom the patient carried some form of insurance against that kind of expense. While the technicians, the secretary and the porter played the supporting roles in the Department of Radiology, the appellant, who was a highly qualified radiologist, played the principal role. As appears from the contract, he had two functions. He was the administrative head of the department and he was the professional radiologist. While routine pictures were ordinarily taken by technicians, the appellant personally conducted all examinations calling for professional competence and he personally interpreted the pictures and made reports on all examinations, whether or not he had found it necessary to participate in the taking of the X-Ray pictures. He also consulted with the referring physicians, where necessary, and carried out any follow-up procedures that were required for the good administration of the department.

The appellant did not in fact carry on any medical practice apart from what he did under the contract with the Trenton Memorial Hospital. There does not, however, appear to be anything in the contract that prohibited him from doing so, or, indeed, that required him to devote any determinable amount of time to his duties under the contract.

It was not really suggested for the appellant that, by reason of the professional nature of the work that was required to be done under the contract, a radiologist could not have been employed as an employee or servant of the Hospital authority to do such work. The case for the appellant is that, when the contract in question is correctly appreciated, it was a contract for certain services and was not a contract of service under which he was employed as an officer or servant of the Hospital authority.

The main features of the contract in question that were relied on as indicating that this contract was a contract for certain professional services, and was not a contract of service under which the appellant became an officer or servant, are the following:

1. Article 1.3 provides that the Department of Radiology shall consist of "The Radiologist" and certain "Employees", thus setting up a contrast between "The Radiologist", *i.e.* the appellant, and the other persons in the department, who are described as "employees".

2. Article 2.1 provides that "The Radiologist" shall be a member of the "Medical Staff" of the Hospital and have all the responsibilities and privileges which accrue from such "Membership" as stipulated in the "Hospital Bylaws", thus giving him the same status as the medical doctors who carried on private practices and had the privilege of working in the Hospital. (It should be noted, however, that a doctor who, as head of the Pathology Department, was admittedly an officer or servant of the Hospital was also a member of the "Medical Staff".)

3. Article 2.2 outlines the duties of "The Radiologist" as being to "establish" departmental procedures and methods of operation, to "provide" radiological services, to "supervise" all radiological work and to "serve" as consultant. While the words "establish", "supervise" and "serve" indicate certain things that he is to do personally, the word "provide" used in relation to the major part of the professional work under the contract—the radiological services—seems to indicate that there is no obligation that he do such work himself.

4. Article 2.3 provides that the hours of work per week shall be "such as are necessary for the efficient operation of the Department" and that "The Radiologist" shall be available for emergency work at any time of the day or night. Here again, there is an obvious omission to relate the hours of work to the appellant while the obligation to be available is expressly related to him.

5. Article 2.3 further provides that "The Radiologist" agrees "that sufficient coverage shall be provided so that equivalent of one full time Radiologist will be provided for each regular 9,000 examinations per annum . . ." thus implying that, if the volume of work should require it, the appellant was to provide the services of more than one radiologist.

6. Article 2.4 provides that the "minimum annual vacation" shall be one complete month and that "The Radiologist" shall be responsible "for arranging coverage in his absence" including costs incurred, and "shall ensure that the operation of the Department will not be interrupted during his absence".

7. Article 2.6 provides that "The Radiologist" shall be paid by "The Hospital" for "his duties as Radiologist" for "Examinations performed" in accordance with the amounts shown for "professional services only" in Schedule "A" to the contract, which schedule expressly provides that the "Fee Schedule shall be the current fee schedule of the Ontario Medical Ass'n.". Subject to a reduction of 5 per cent for "uncollected accounts", it appears that the appellant was entitled to be paid the full amount of such fees regardless of how much "The Hospital" actually collected.

In fact, it would appear that the appellant devoted his full professional efforts to carrying out the obligations that he assumed by this contract except that, in order to carry out his obligation to arrange "coverage" during the "minimum annual vacation" of one month, he had an arrangement with the radiologist in a neighbouring town under which he did all of his colleague's work in addition to his own work while his colleague was on vacation in return for his colleague doing all his work while he was on vacation. In fact, one of the main questions in issue in this appeal is whether the appellant is entitled to deduct the costs of travelling that he had to incur in order to travel to other towns in order to do his colleague's work under this arrangement.

Another fact that is not entirely irrelevant is that the Hospital authority, while it treated the head of the Pathology Department as an employee for

purposes of pension and income tax deductions at the source, it did not treat the appellant as an employee for either of these purposes.

It is also of some importance, in considering the character of the contract under which the appellant worked in the Trenton Memorial Hospital, to have in mind that the services of an administrative character that he performed are apparently of the same general character as those performed without remuneration by the medical doctors who carried on general practices and who were appointed "Chiefs" of the Surgery, Medicine and Obstetrics Departments of the Hospital. According to Article 12 of the relevant by-laws, such "Chiefs" were required to "supervise their respective Departments".

The case from the point of view of the appellant might be summarized in this way: The Hospital authority operated a number of medical departments as integral parts of the Hospital operation. The supporting staffs of such departments were employees of the Hospital. Apart from Radiology and Pathology, the medical services in such departments were provided by practicing doctors who were employed in the course of their practices to attend particular patients by a medical chief who was appointed from among such doctors to work on a voluntary basis. In the case of the Radiology Department, however, by reason of the nature of the work to be performed, the Hospital supplied the complete service to the respective patients and did not supply merely the place, equipment and supporting staff for the use of the doctors employed by the patients. To do so, the Hospital had to arrange for the services of a qualified specialist to do the work that in other departments was done by doctors employed by the patients. This was accomplished in the years in question by the contractual arrangement made with the appellant under which he not only agreed to provide such professional services, but agreed also to act as director of the department. He supplied such services on the same terms as he would have supplied them if he had been employed by the patients (subject to the 5 per cent deduction). In all respects, he performed the professional work for which he was being paid in exactly the same way as if he had been employed by the respective patients. If he had been employed by the patients, he would have clearly been working under contracts for services. The fact that the Hospital arranged with him to perform the services did not change the nature of the contract under which he worked. Conceding, as one must, that he might have been doing the same sort of work under a contract of service that would have made him an employee, in addition to other indications in the contract and to the view taken by the parties of the relationship, the requirement in the contract that he assume the obligation of supplying "coverage" by other radiologists, not only when on vacation but when the work becomes too much for one radiologist, is a compelling feature in the foreground of this contract that makes the proper characterization of this arrangement one of a contract for services and not that of a contract of service.

The other view, being the view that the Minister proceeded on in making the assessment, might be stated as follows: The appellant has a position or post in the Hospital of a continuing and full time character. He occupies an office there and he has no other office. He is an integral and essential part of the Hospital staff. To all outward appearances he is just as much a

senior officer of the Hospital as is the Administrator. He participates in the employment of the staff under him. He directs their activities. He is responsible to the Hospital authority for the proper operation of his department and he must make his department work in cooperation with the other parts of the Hospital operation. According to any sort of layman's sense of the term the appellant had all the functions and responsibilities of a senior officer on the staff of the Hospital.

Counsel for both parties made very helpful and extensive references to the authorities on the distinction between a contract of service and a contract for services. I do not think that I need to review the authorities as a preliminary to reaching a conclusion.[1] It seems evident that what is an appropriate approach to solving the problem in one type of case is frequently not a helpful approach in another type. On the one hand, a contract of service is a contract under which one party, the servant or employee, agrees, for either a period of time or indefinitely, and either full time or part time, to work for the other party, the master or the employer. On the other hand, a contract for services is a contract under which the one party agrees that certain specified work will be done for the other. A contract of service does not normally envisage the accomplishment of a specified amount of work but does normally contemplate the servant putting his personal services at the disposal of the master during some period of time. A contract for services does normally envisage the accomplishment of a specified job or task and normally does not require that the contractor do anything personally. If, in this case, the appellant had been given a post to work as a radiologist in the Hospital full time for an indefinite period of time at an annual salary there could, I should have thought, have been little doubt that he was an officer or employee of the Hospital. If, on the other hand, the appellant had had an ordinary medical practice and had undertaken to do exactly the same things that he was in fact bound by the present contract to do, but to do the office part of the work in his own office as and when he could find time to do it, and on the same terms as to payment as we find in the present contract, I do not think that any one would have doubted that it was the ordinary work of a practising doctor, which is a typical example of work done under contracts for services.

The problem arises in these cases because, in fact, there can be a contract of service that has features ordinarily found in a contract for services and there can be a contract for services that has features ordinarily found in a contract of service. A servant can be employed on terms that he is paid on a basis related to the volume of work and that he himself hires and pays help that is required. Compare the postmistress in *Reference as to the Applicability of the Minimum Wage Act of Saskatchewan to an employee of a Revenue Post Office*.[2] So, also, while a person who contracts to do a

[1] For recent reviews of the authorities, see *Ready Mixed Concrete (S.E.) Ltd. v. Minister of Pensions* [1968] 1 All E.R. 433, and *Market Investigations Ltd. v. Minister of Social Security* [1969] 2 W.L.R. 1, and [1968] 3 All E.R. 732.

[2] [1948] S.C.R. 248.

job ordinarily has his own place where he works and has his own plant and equipment with which he works, and supplies the materials required to do the job, nevertheless any one or more of these features can be eliminated by special agreement without changing the character of the contract as a contract for services. Here I am faced with a contract that can be analyzed either as a contract of service with deviations from the normal, or a contract for services with deviations from the normal. I must, therefore, seek some basis for a conclusion as to what is the correct character to assign to it.

On the one hand, the functions performed by the appellant as administrative head of his department point very strongly to his being a senior employee of the Hospital. In my mind, however, this is largely counterbalanced by the fact that functions of the same general character are performed in other departments by medical chiefs who are practising doctors and whose status as determined by the by-laws would not, I should have thought, make them employees of the Hospital. [In any event, it would seem that that part of his duties is something that is added on to the obligation of providing the professional services, which obligation is the main obligation of the contract and the one in respect of which the remuneration is paid.]

On the other hand, there is this central obligation in the contract for the appellant to provide "coverage" for the professional radiological work of the Hospital whether or not he is able to do it personally and regardless of the volume that it may attain. This obligation clearly contemplates a situation where the appellant would have to hire one or more other radiologists not merely for some emergency or temporary period but on a permanent basis. I find here not only a "freedom" but an obligation on the appellant, in certain possible circumstances, to have work under the contract done by somebody other than himself. In *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions*[3], MacKenna, J. said at page 440:

> The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands, or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be...

While, during the years in question, the appellant carried on the work in question as though he were normally bound to provide his own work and skill to do the designated work, the contract must be classified according to its terms and having regard to the various possible situations to which it may apply. With considerable hesitation, having regard particularly to the fact that during the years in question the appellant carried on the work exactly as he would have done if he had been an employee, my conclusion is that he was working under a contract for services and was therefore not an officer or servant. The appellant's remuneration under the contract was therefore revenue from a business within the definition of that word in section 139(1)(*e*) of the *Income Tax Act*, which reads as follows:

> 139. (1) In this Act,
>
> * * *

[3] [1968] 1 All E.R. 433.

> (*e*) "business includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

While it is not relevant to my duty to decide this appeal in accordance with the statute, I cannot refrain from expressing gratification that the result that I have reached enables the appellant to deduct expenses of earning his income that would otherwise not be deductible because of the rigid provisions of section 5 of the *Income Tax Act*.

Having made that finding on the main question, I turn to an "Agreement of Parties by their Counsel" that forms part of the material put in at trial. Paragraph 2 of that Agreement reads:

> 2. If this Court should hold that the Appellant's income for 1964 and 1965 is income derived from the carrying on of a business, the parties agree that the assessments are to be referred back to the Minister of National Revenue for reconsideration and re-assessment on the basis of such determination. In the event of this Court so holding, the Court shall also determine whether the car expenses with respect to the travelling of the Appellant between his home and the seminars at Queen's University are deductible. In any event, if the Appellant's income is from a business, the parties agree that the car expenses of the Appellant that are deductible shall not include the cost of travelling between his home and the Trenton Memorial Hospital but shall include the car expenses with respect to the exchange of coverage arrangement with Dr. Richards, including the applicable capital cost allowance.

I must, therefore, reach a conclusion as to whether the car expenses incurred by the appellant in travelling between his home and certain seminars at Queen's University in Kingston were expenses of earning his income.

On the evidence, I find that the appellant attended these seminars once a week for half the year because he found it necessary to do so to keep up with developments in the field of radiology which was a subject that was, at the time, undergoing substantial changes. On that basis, in the absence of any relevant authority having been discovered by counsel for either party, my conclusion is that the travelling expenses in question were made "for the purpose of gaining or producing income" from the appellant's profession and that they may therefore be deducted in computing that income notwithstanding section 12(1)(*a*) of the *Income Tax Act*.

There will, therefore, be judgment that the appeal be allowed with costs and that the assessments under appeal be referred back to the respondent for reconsideration and re-assessment on the basis that the appellant's income for 1964 and 1965 was derived from carrying on a business and that the car expenses with respect to the travelling of the appellant between his home and the seminars at Queen's University are deductible.