55/84

TAXATION BOARD OF REVIEW NO. 2

MASON v COMMISSIONER of TAXATION

KP Brady, Chairman, JE Stewart and DJ Trowse, Members

6, 12 June, 20 September 1984 — [1984] 27 CTBR (NS) 1140; 84 ATC 623; 3 ATD 181

INCOME TAX – TAXPAYER A STIPENDIARY MAGISTRATE/CORONER – VARIOUS EXPENDITURE INCURRED IN DISCHARGE OF OFFICIAL DUTIES – WHETHER DEDUCTIBLE : *INCOME TAX ASSESSMENT ACT* 1936, SS51, 190.

M. a stipendiary magistrate/coroner sought to deduct various items of expenditure which he said were incurred in gaining his assessable income.

HELD:
(1) Home Office Expenses.
Outgoings on mortgage interest and insurance are of domestic nature and not deductible. Expenses incurred in cleaning and repairing the office are deductible.
***FCT v Faichney* [1972] HCA 67; (1972) 129 CLR 38; 3 ATR 435; (1973) 47 ALJR 35; 72 ATC 4245, applied.**

(2) Maintenance of Professional Appearance.
Dry-cleaning expenses associated with M.'s coronial duties were deductible: cf. *Frankcom v FCT* (1982) 65 FLR 25; (1982) 13 ATR 636; (1982) 82 ATC 4,599; 82 ATC 4599. However, on the evidence supplied, a calculation of the expense was not possible and accordingly, M. failed to discharge the burden of proof.

(3) Entertainment.
Expenditure incurred in attending functions to deliver lectures relating to coronial matters was deductible. However, as the record of expenditure included non-deductible items, and an apportionment was not possible, M. failed to discharge the burden of proof.

(4) Telephone Calls.
The cost of telephone calls, to the extent that they were made in the course of carrying out coronial duties, were deductible.

(5) Cost of Overseas Travel.
As the additional knowledge acquired did not assist M. in securing either a higher position or an increase in salary nor as a condition of his employment or at his employer's request or direction, the expenses incurred by M. in respect of overseas travel were essentially of a private nature and therefore, not deductible.
***FCT v Hatchett* [1971] HCA 47; (1971) 125 CLR 494; (1971) 2 ATR 557; (1971) 45 ALJR 565; 71 ATC 4184; and**
***FCT v White* [1968] HCA 41; (1968) 120 CLR 191; [1969] ALR 217; (1968) 42 ALJR 139; 15 ATD 173; 15 ATR 173; 75 ATC 4018, applied.**

KP BRADY, Chairman, JE STEWART and DJ TROWSE Members:

1. The questions for determination in these references concern the deductibility of various items of expenditure incurred by the taxpayer during the period 1st July 1977 to 30th June 1981. In that time the taxpayer was employed as a relieving stipendiary magistrate until December 1978, and then as the coroner at X, a capital city in the State of Y. With the taxpayer's consent, all references were heard together.

2. The amounts in dispute are -

	1978	1979	1980	1981
Home-office expenses.	$393	$416	$406	$299
Maintenance of professional appearance.	104	150	250	250
Entertainment.	-	648	720	720
Telephone calls.	-	-	61	-

Travel expenses	- local.	-	-	-	50
	- overseas.	-	-	-	1,252

The objections pertaining to the 1980 and 1981 assessments also referred to bank charges disallowed by the Commissioner. The claims for those outgoings were withdrawn by the taxpayer in the course of the hearing and, accordingly, we make no further reference to them.

3. It seems that the taxpayer, in his role as a relieving magistrate, was required to sit in courts located in X and country towns of Y, and that the provision of chambers at some of those courts was either non-existent or inadequate. It was said that those deficiencies resulted in the taxpayer's decision to establish a home-office.

4. Whilst the duties of a stipendiary magistrate and coroner have similar features, it appears that the duties of coroner are of greater breadth and, in the instant case, the prescribed additional requirements of the position included the following (in so far as relevant for present purposes):

> (i) A preparedness to deliver lectures to medical students, pathologists, etc. and members of the homicide squad.
>
> (ii) Willingness to undertake research and attend seminars and studies in such areas as:
> (a) [Y] Civil Defence
> (b) Planning against Local Major Disasters and to prepare papers in such areas.
>
> (iii) Preparedness to assist in the setting up of the proposed new Forensic Science Centre, and in other matters as directed by the Chief Stipendiary Magistrate.

5. In the main, all of the matters in issue fall to be considered under s51(1) of the *Income Tax Assessment Act* 1936, the relevant provisions being:

> "All losses and outgoings to the extent to which they are incurred in gaining or producing the assessable 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 ..."

The words of the section which are most material to the taxpayer's claims are "incurred in gaining or producing the assessable income". That phrase was considered by the High Court in *Ronpibon Tin NL and Tongkah Compound NL v FCT* [1949] HCA 15; (1949) 78 CLR 47; (1949) 54 ALR 785; (1949) 8 ATD 431; 4 AITR 236; [1949] ALR (CN) 1055; 4 ATR 236, and the pronouncement made at pp56-57 CLR is apposite:

> "For expenditure to form an allowable deduction as an outgoing incurred in gaining or producing the 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 ..."

The Commissioner took the view that none of the outgoings in question qualified as deductions in terms of s51(1), and appeared to place substantial emphasis on the decision in *Frankcom v FCT* (1982) 65 FLR 25; (1982) 13 ATR 636; (1982) 82 ATC 4,599. In that case, the taxpayer, a stipendiary magistrate, claimed as deductions several items of expenditure which, in his opinion, arose out of or were consequential to his office. Those claims included expenditure incurred in attending official functions, receptions and dinners, entertainment, dry-cleaning of clothing and travelling. Kaye J decided that no deduction was permissible under s51(1) as such outgoings were either not incurred in the gaining of assessable income, or were of a private nature.

6. We turn now to examine the items in the order listed in paragraph 2.

HOME-OFFICE EXPENSES

7. One of the seven rooms of the taxpayer's home was exclusively used by him as an office during all of the years under review. It was furnished with a desk, table, two chairs and bookcase, and also contained a legal library, telephone, typewriter, tape recorder and other miscellaneous items of office equipment. The evidence of the Taxpayer indicated that the office was utilised in carrying out research and occasionally the typing of judgments throughout the period 1st July 1977 to December 1978, i.e. whilst he was engaged as a relieving magistrate. The taxpayer held the position of coroner for the balance of the term under review, and it seems that such

appointment carried an entitlement to occupy chambers at the Coroner's Court. However, the taxpayer contended that the duties attaching to that office were such that he was required to be on call at all hours and that the home-office became his operational centre in the handling of emergencies which arose outside of normal working hours. In that regard the home-office was used in attending to urgent telephone calls which, on average, occurred about three times per week, and also in the reception of members of the constabulary who made sporadic visits for various professional reasons. The taxpayer submitted that the establishment of a home-office was a necessary adjunct to the efficient performance of his duties, as opposed to the exercise of a personal choice.

8. The amounts claimed under this heading represented a one-seventh share of expenditure incurred on light, power and heating, insurance, repairs, cleaning and mortgage interest, and also depreciation of floor coverings. In raising the relevant assessments, the Commissioner allowed as deductions that same proportion of the outgoings for light, power and heating, and depreciation of floor coverings. It is the balance of those items which is central to the dispute. A floor plan of the home was tendered by the taxpayer and, according to our calculations, the area of the office is approximately one-sixteenth of the total.

9. In *FCT v Faichney* [1972] HCA 67; (1972) 129 CLR 38; 3 ATR 435; (1973) 47 ALJR 35; 72 ATC 4245, Mason J had occasion to consider a case which in some aspects is similar to the current problem. In that case, the absence of suitable facilities at his place of employment caused the taxpayer, a scientist with the CSIRO, to spend an appreciable amount of time at home working on matters directly related to his occupation. Mr Faichney claimed deductions in respect of, *inter alia*, a proportion of mortgage interest and electricity referable to his home-office. His Honour rejected the claim for interest on the basis that it was an outgoing of a capital, private or domestic nature, saying at pp4248 and 4249:

> "To my mind, a study in a taxpayer's home, no matter how great the extent of its dedication in point of use to the pursuit of those activities from which the taxpayer earns his income, is part of that home. Expenditure incurred in the erection of the study or in its renovation is as much an outgoing of a capital, private or domestic nature as expenditure on any part of the home."

Those thoughts were echoed by Wilson J, one of the majority in *Handley v FCT* [1981] HCA 16; (1981) 148 CLR 182; 34 ALR 275; 11 ATR 644; 55 ALJR 345; 81 ATC 4165, where at p4176 he said:

> "It is true that in choosing for purchase in 1969 this particular residence as a home for himself and his family the taxpayer was influenced by the fact that there was in it a room which he considered to be suitable for use by him as a study. But it remained essentially part of his home. The payments for mortgage interest, rates and insurance premiums were of a kind which in the circumstances of this case cannot be apportioned between home and office expenses. They related to the building and/or land as a whole, and are not affected in any way at all by reason of the fact that the taxpayer performs professional work on the premises. They would remain the same whether or not he worked at home."

In the present references, we are of the opinion that the outgoings for mortgage interest and insurance are of a domestic nature, and that no deduction is permitted. In regard to the repair outlays, we do not consider that the taxpayer has satisfied the burden of proof imposed on him by the operation of s190(b).

10. However, we hold a contrary view in relation to claims for cleaning. The taxpayer expended $312 in each of the years 1978, 1979 and 1980, and $300 in 1981 on cleaning the interior of his home. On the basis of the evidence, and applying the reasoning in *Faichney* (*supra*), particularly as it related to the claim for light and heating (see p4250), we consider that, as a matter of principle, the cleaning expenses possess a "business or employment character" and are deductible. However, we consider that the amounts claimed should only be allowed as set out hereunder (calculated on a floor area basis being one-sixteenth of the total):

1978	-	$20
1979	-	$20
1980	-	$20
1981	-	$19.

MAINTENANCE OF PROFESSIONAL APPEARANCE

11. The taxpayer was of the mind that his professional position called for a high standard of appearance, and in compliance with that evaluation he had acquired four to five suits which were replaced as the need arose. The amounts claimed were based on the taxpayer's assessment of the additional costs which emanated from the maintaining of an adequate wardrobe and the more frequent dry-cleaning of that apparel. Additionally, it was submitted that such costs increased with the acceptance of the position of coroner. In the performance of the ensuing duties, the taxpayer was involved in a wider range of activities including attendances at scenes of fatalities, the mortuary, media interviews and also meetings where he addressed members of various professional and social groups. The taxpayer's evidence was that the odour of the mortuary permeated his clothing and that, as a consequence, additional expenditure was incurred in dry-cleaning.

12. The following comments made by Murphy J in *FCT v Forsyth* [1981] HCA 15; (1981) 148 CLR 203; (1981) 34 ALR 263; (1981) 11 ATR 657; (1981) 55 ALJR 340; 79 ATC 4505, at p4508, are to the point when considering the taxpayer's submission that these outgoings are allowable deductions in terms of s51(1):

> "The cost of clothes purchased to enable a person to appear respectably in public are of a private or domestic nature, and do not become outgoings incurred in gaining or producing the assessable income simply because they are worn, and must necessarily be worn, when gaining the assessable income. Nor does the cost of having such clothes dry-cleaned in the ordinary course constitute such an outgoing."

Kaye J in *Frankcom* (*supra*) expressed a similar view at p4606 in determining that the costs of dry-cleaning the magistrate's suits did not qualify for deduction. In the present references, our initial impression was that all of the amounts claimed under this heading failed on the grounds that such expenditure was of a private nature. However, it seems possible to conclude that the decision in *Frankcom* may have been in favour of the taxpayer had it been established that the need for dry-cleaning had resulted from the existence of circumstances peculiar to the discharge of the duties required of Mr Frankcom. Whilst we accept that the additional expenses associated with the mortuary attendances were a product of the peculiar nature of the duties undertaken during part of the 1979 year and the whole of the 1980 and 1981 years, the evidence, in any event, does not provide a basis for apportionment. The taxpayer has not discharged the onus of proof, see s190(b), and thus his claims in those years must fail.

ENTERTAINMENT

13. The amounts in question are no more than estimates and appear to he calculated at the rate of so much per week. An examination of the prescription for the position of coroner reveals that the taxpayer was required to deliver lectures to various allied groups, and it seems that those addresses were made at dinner meetings. We accept that the taxpayer expended money on drinks and sometimes on the purchase of meals, and that no reimbursement was received from the employer. In our opinion the taxpayer, in attending those functions, was carrying out the requirements of his office and the costs attaching thereto might be said to be expenses having a business or employment character. That belief is supported by the fact that there existed an expectation by both the employer and the taxpayer that expenditure would be encountered in the performance of the duties as coroner. Such a prospect may be implied from the employer's stated intention to pay an allowance designed to meet those types of outgoings. It was noted that the granting of the allowance did not occur until June 1982.

14. However, the records maintained by the taxpayer and produced at the hearing disclosed that he had attended other functions, receptions and dinners which, to our mind, were unrelated to the scope and terms of his appointment. Whilst it might be said that the invitations to those functions resulted from the taxpayer's position of coroner, the evidence does not establish that it was part of his duties, as required by the scope and terms of his appointment, to attend such gatherings. We are of the opinion that the expenditure incurred on those occasions was not incidental or relevant to the gaining of the assessable income and that those outgoings were clearly of a private nature.

15. Whilst the records were comprehensive in demonstrating the functions attended, they were of no assistance in providing a dissection of the amounts expended. Once more we have no option but to rule that the taxpayer has failed to discharge the onus of proof, and for that reason we can take the matter no further.

TELEPHONE CALLS

16. The amount claimed in the 1980 return represents a one-half share of the cost of calls originating from the taxpayer's home during that year. The telephone rental was paid for by the taxpayer's employer. The Commissioner's representative conceded that the cost of calls, to the extent that they were made in the course of carrying out the duties of coroner, was deductible in terms of s51(1). It is the question of quantum which requires our attention. An analysis of the material presented by the taxpayer enables us to conclude that it is appropriate to allow a deduction of $12 under this heading.

LOCAL TRAVEL EXPENSES

17. In considering this matter, we observe from the schedule attached to the 1981 return the statement that the taxpayer used his own car during the period 1st July 1980 to 7th December 1980, in the performance of his duties as coroner. According to that information, such vehicular use referred to visits to other courts, scenes of many accidents, prisons and also attendances at functions which, to our mind, included those of a social or private nature. However, the evidence was not totally supportive of the above explanation since it seems that the number of visits to other courts, scenes of accidents and prisons was minimal. We were not advised of the departure points of these excursions, i.e. whether they commenced from home or from the Coroner's Court.

18. The paucity of evidence on this subject prevents us from taking the matter any further. In our opinion, the taxpayer has failed to discharge the onus of proof and, for that reason, his submission is rejected.

OVERSEAS TRAVEL

19. The taxpayer, in the company of his spouse and daughter, travelled to America and Canada during the period 28th October to 19th November 1980. That time coincided with the taking of his annual leave. The tour was undertaken on the taxpayer's initiative, and no contribution towards costs was made by the employer. It appears that the taxpayer resolved to make the trip at his own expense notwithstanding the expectation that an official visit to Europe and England was in the offing. In the course of the journey, the taxpayer visited coronial complexes in Los Angeles and San Francisco, and entered into dialogue with people of authority on a range of professional topics. Those activities appear to have occupied the equivalent of four days. The prime purpose of the trip was explained by the taxpayer in the following terms:

> "It was to keep up to date with the profession generally as it applied overseas, but more particularly it was to persuade the Law Department, or the government at the time, that it was going to be necessary to travel overseas so that a proper overview could be made in relation to this new coronial complex which was to be constructed at [X]."

20. The amount claimed related only to the costs associated with the taxpayer's travel, and such sum was calculated in the following manner:

Air fares and accommodation (bed only)	$1,902
Insurance	$27
Meals and incidentals - 23 days @ $25	$527
	$2,504
Amount claimed as relating to professional activities – one-half share	$1,252

Finally, we observe that the employer furnished letters of accreditation to professional counterparts engaged at the complexes visited, and that the taxpayer upon his return provided a written report to the Law Department on his findings.

21. The leading authority on the deductibility of outgoings designed to increase one's knowledge, efficiency or aptitude is the decision of the Full High Court in *FCT v Finn* [1961] HCA 61; [1961] 106 CLR 60; [1962] ALR 173; 12 ATD 348; 35 ALJR 293; 12 AID 348. In that case, Mr Finn, a senior architect employed by the Public Works Department of Western Australia, used his long service and accumulated recreational leave to tour Great Britain and the Continent for the express purpose of updating his knowledge in current architectural trends and bettering his prospects for future promotion. At the request of his employer, the taxpayer included in his itinerary a visit to South America, with the employer paying the additional costs resulting from that extension. In deciding that the expenditure was incurred in the gaining of Mr Finn's assessable income, Dixon

CJ placed significant reliance on the following conclusions when considered in conjunction, see pp67-68:

> "In the first place it seems indisputable that the increased knowledge the taxpayer sought and obtained of his subject and the closer and more realistic acquaintance he secured of modern developments in design and construction made his advancement in the service more certain, and that in respect of promotion to a higher grade these things might prove decisive. This was put clearly by the Principal Architect, though in a letter written *ex post facto*, 'I understand from you that the Commissioner now desires to know whether the experience obtained and the large amount of data collected will result in an increase in your income. To me, it is obvious that this must increase your professional efficiency, and hence your value to this Department, and must materially assist your future advancement to a higher position in the Department with consequent increase in income'. In the second place, so far as motive or purpose is material, advancement in grade and salary formed a real and substantial element in the combination of motives which led to his going abroad. In the third place it is apparent that the heads of his Department, and indeed the Government itself, treated the use which he made of his long service and other leave to study architecture, increase his professional knowledge and study modern trends, as a matter not only of distinct advantage to his work for the State but of real importance in at least one project in hand. In the fourth place it was all done while he was in the employment of the Government, earning his salary and acting in accordance with the conditions of his service. He was in fact complying with the desires, and so far as going to South America was concerned, with the actual request of the Government."

22. After considering all of the evidence in the present matter, we express the following points of view:

> (i) The additional knowledge acquired did not assist the taxpayer in securing either a higher position or an increase in salary. Nor could it be said that such factors played any part in the decision to travel overseas. This is not a situation where the taxpayer "spent money to earn more", see p4186 of the judgment of Menzies J in *FCT v Hatchett* [1971] HCA 47; (1971) 125 CLR 494; (1971) 2 ATR 557; (1971) 45 ALJR 565; 71 ATC 4184.
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> (ii) In the incurring of these outgoings, the taxpayer was not complying with the conditions of his service. There was no suggestion that the employer directed or even encouraged the taxpayer to undertake the tour. It was not part and parcel of his employment, see p4022 of the judgment of Helsham J in *FCT v White* [1968] HCA 41; (1968) 120 CLR 191; [1969] ALR 217; (1968) 42 ALJR 139; 15 ATD 173; 15 ATR 173; 75 ATC 4018.
>
> (iii) The evidence adduced indicates that the expenses were essentially of a private nature.

For those reasons, we conclude that the amounts expended on the overseas trip were not incurred in gaining or producing the taxpayer's assessable income and, furthermore, such outgoings were of a private nature.

23. It follows that the Commissioner's decisions on the questions pertaining to maintenance of professional appearance, entertainment, local and overseas travel are confirmed. We partially allow the claims for home-office expenses and telephone calls, see paragraphs 10 and 16, and direct that the assessments for years 1978, 1979, 1980 and 1981 be amended to allow deductions for home-office cleaning of $20, $20, $20 and $19 respectively and that the 1980 assessment be further amended to allow a deduction of $12 for telephone calls.
