175/1959

175/1959

G.P.-S.1256339—1956-7—4,000. S. U.D.J. 219.

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

{ APPELLATE [redacted] Division.) Afdeling.)

STATED CASE

Appeal in Civil Case.
Appèl in Siviele Saak.

COMMISSIONER FOR INLAND REVENUE *Appellant,*

versus

J. C. HICKSON *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Naude + Naude
Respondent's Attorney / *Prokureur vir Respondent* Webber + Son

Appellant's Advocate / *Advokaat vir Appellant* B.A. Eglinger Q.C. Dr. J.C. van der Spuy
Respondent's Advocate / *Advokaat vir Respondent* D. J. Shaw Q.C.

Set down for hearing on / *Op die rol geplaas vir verhoor op* Friday, 11th December, 1959.

(Sp. I.T. Crt.)

(B)

6.10 C.A.V.

2 # 12.5 p.m. – 3.45 p.m.

Parties: Thursday 17th December 1959

Appeal dismissed with costs.

A. Paulus
Reg.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

COMMISSIONER FOR INLAND REVENUE ..... Appellant

and

J.C. HICKSON ..... Respondent.

Coram: Schreiner, Beyers, Malan, van Blerk JJ.A. et van Wyk A.J.A.

Heard: 8th December, 1959. Delivered: 17th December, 1959.

J U D G M E N T

BEYERS J.A.:

The respondent is one of two partners in a business which undertakes work as accountants, secretaries, agents, and so forth. The partnership has at all material times acted as secretaries and selling agents for a company known as Comec Mimosa Extract Company Limited (hereinafter referred to as the Company). The two partners individually hold shares in the Company; the partnership as such owns no shares therein. For its services as secretaries the partnership receives £1,500 per annum from the Company. As selling agents it receives a commission of 4/- for every ton of wattle extract sold on behalf of the company. The partnership employs its

own ...../2

own staff and pays the salaries of that staff in carrying out its duties as secretaries and selling agents: the expense of any travelling done on behalf of the company is borne by the company. The respondent is in addition a director of the Company. He has held this position since 1953, after being an alternate director for two years. He devotes approximately three-quarters of his business time to the affairs of the Company. His director's fees, which amount to £220 per annum, are paid into the partnership.

The respondent sustained a spinal injury in 1937 and in 1952 an unsuccessful attempt was made to remedy his condition by surgery. Since that date he has moved about with considerable difficulty.

In 1955 the Company decided that the respondent, who by virtue of being the agent in charge of selling its products, was the director most fully conversant with its selling organisation, should visit the United States and England for a series of meetings with its overseas agents.

Prior to accepting this assignment the respondent consulted his medical adviser, who advised him that it would be possible for him to make the journey only if he had

someone ..../3

someone to assist him to get around. At the time he was using two sticks to assist him in walking, and he could not stand for any length of time: it was therefore essential for someone to accompany him. He accordingly decided that his wife should accompany him, since this would be less expensive than engaging a trained nurse for the purpose.

In August 1955 the respondent and his wife proceeded by air to the United States, via Amsterdam. After twelve days, spent in New York seeing the Company's agents, they returned to the Union via London, where the respondent also wished to see agents of the Company. During the stay in New York the respondent's wife was engaged for most of the time in looking after him. In London, where she had relations living, she enjoyed some leisure.

The Company paid the respondent's travelling expenses. He received no special fee for his services abroad. He did not ask the Company to pay his wife's expenses, nor did he charge any portion thereof to the partnership, as he did not think that the Company or the partnership should be put to extra expense because of his own physical disability. He therefore paid his wife's expenses out of

his ..../4

his own pocket, amounting to £609.10.0 in all - £532.6.4 for the air trip, and £77.3.8 for hotel expenses in New York. These expenses were additional to those incurred by the respondent in the upkeep during his absence of his home in the Union.

The tonnage of wattle extract sold by the Company in the United States increased considerably after the respondent's visit to New York. One of his objects in making the visit was to endeavour to increase such sales. In consequence of this there was an increase in the partnership's income by way of commission from the Company.

In his return of income for the year of assessment ended 30th June 1956, the respondent sought to deduct from his share of the income of the partnership the abovementioned sum of £609.10.0

The Commissioner for Inland Revenue, in his determination of the respondent's liability for normal and super tax for the year in question disallowed the respondent's claim to deduct this sum, and issued assessments without making allowance therefor.

The respondent lodged an objection and appeal

against ..../5

against these assessments on the grounds that -

(1) The expenditure of £609.10.0 was incurred in the production of his income derived from his directorship and the partnership's secretaryship and selling agency in the Company inasmuch as -
   (i) the journey was undertaken in the course of his duties as director,
   (ii) by reason of his health he had to be accompanied by some person on that journey, and
   (iii) the person best suited to accompany him was his wife.

(2) The deduction of the expenditure is not prohibited by any part of section 12 of the Income Tax Act, No. 31 of 1941.

At the hearing of the appeal by the Special Court the Commissioner contended that no portion of the expenditure was allowable under sec. 11(2)(a) of the Act read with sec. 12(g); and that the whole of the expenditure was specifically disallowable under the provisions of sec. 12(a) and (b) of the Act.

The Special Court held that the expenditure was expenditure actually incurred in the production of income, that it was wholly and exclusively laid out for the purposes of trade, and that the provisions of sec. 12 did not prohibit its deduction. Since the Special Court did not have before it any evidence showing how much of the expenditure was actually

incurred ..../6

incurred in the Union, and how much actually incurred outside the Union, the assessment was referred back to the Commissioner to enable him to consider what part, if any, of the expenditure was actually incurred in the Union and to allow a deduction thereof, and for the exercise by him of his discretion under section 11(2)(b) in relation to so much of the expenditure as may have been incurred outside the Union.

The Commissioner now appeals to this Court, the necessary consents to an appeal direct to this Division having been lodged by the parties in terms of section 81(1)(b) of the Act.

The sections of the Act which bear most directly on the point are sections 11(2)(a) and 12(g). As far as material they provide:

> " The deductions allowed shall be -
>
> (a) expenditure ,..... actually incurred in the Union in the production of the income ....." - sec. 11(2)(a)
>
> " No deduction shall in any case be made in respect of the following matters -
>
> (g) any moneys ..... which are not wholly or exclusively laid out or expended for the purposes of trade" - sec. 12(g)

It ...../7

It is, I think, correct to read the two sub-sections together (cf. Sub-Nigel Ltd. v. Commissioner for Inland Revenue 1948 (4) S.A. 580(A) at p.588) as was suggested by WATERMEYER J. in Port Elizabeth Electric Tramway Co. v. Commissioner for Inland Revenue (1936 C.P.D. 241). He says, of identical provisions in the Act there being considered -

> " The two sections provide positively for what may be deducted and negatively for what may not be deducted and thus furnish us with two apparent tests for determining what kind of expenditure may be deducted ..... The matter can therefore be put thus: if expenditure is incurred 'in the production of income' and 'wholly and exclusively for the purposes of trade' it is deductible, otherwise not."

The same case makes it clear that it is not incumbent upon the taxpayer to prove that the expenses were necessarily incurred: it is sufficient if they are incurred bona fide, provided always that they are incurred in the production of income. Mr. Ettlinger, who appeared on behalf of the Commissioner, fairly conceded that the expenses with which we are here concerned, were incurred bona fide. What he challenges is the Special Court's finding that they were incurred in the production of income. He submitted, moreover, that the

deduction ...../8

deduction claimed was specifically prohibited under section 12(a), as representing "the cost incurred in the maintenance of the taxpayer", ~~or~~ and under section 12(b), as representing "domestic or private expenses". He also referred the Court to section 11(2)(q) of the Act, which allows as a deduction

> " in respect of any person suffering from any physical disability, and the sum of whose taxable income ..... and dividends ..... for the year of assessment in question does not exceed one thousand five hundred pounds, notwithstanding the provisions of paragraphs (a) and (b) of section twelve, so much of any expenditure, but not exceeding one hundred and fifty pounds, incurred by such person during such year of assessment as the Commissioner is satisfied was necessarily incurred by him in consequence of such disability and for the purpose of carrying on his trade and which is not such expenditure as is referred to in any of the other paragraphs of this sub-section."

It was submitted that this paragraph was intended to cover expenses of the kind now sought to be deducted, and that such expenses were allowable under this paragraph only, and under no other; and that inasmuch as the respondent's taxable income exceeds £1,500 he fails to qualify for a deduction.

In my opinion this paragraph merely permits,

within ..../9

within limits, a deduction of expenses which would otherwise not be allowable because of the provisions of sub-sections (a) and (b) of section 12, i.e. either because they are incurred in maintaining the taxpayer or are of a domestic or private nature. The object of adding this paragraph to the other paragraphs in sub-section (2) of section 11 was, it seems to me, to afford a certain class of taxpayer some further and additional relief. I do not think it was intended to cut down any form of relief to which the taxpayer is entitled under the other paragraphs of the sub-section. And that, indeed, is what the concluding words of the paragraph in effect say.

Nor do I consider that the expenses claimed by the respondent are of the kind contemplated and prohibited by sub-sections (a) and (b) of section 12 of the Act. I take "maintenance of the taxpayer, his family or establishment" to mean feeding and clothing himself and his family, providing them with the necessities of life, and comforts, and, as it were, maintaining a certain standard of living, and keeping up his establishment. "Domestic and private expenses" are, I should say, without attempting an

exhaustive ..../10

exhaustive definition, expenses pertaining to the household, and to the taxpayer's private life as opposed to his life as a trader. House rent and the cost of repairing the house are specifically mentioned. Other costs which come to mind are servants' wages, the cost of board and lodging, the cost of running a motor-car for private use, ~~the cost of educating children~~, holiday expenses, and so forth.

The crucial question would therefore seem to revolve around section 11(2)(a) and be whether the respondent incurred the expenses, which he claims to deduct, in the production of his income. In Commissioner for Inland Revenue v. Glenn & Co. (Pty) Ltd. 1955 (3) S.A. 293 (A) SCHREINER J.A, in pursuing the same line of inquiry, says at p. 299:

> " For present purposes the chief importance of the Port Elizabeth Tramways case lies in its reference to the factor of the closeness of the link which must exist between the expenditure and the production of the income in order to make the expenditure deductible. At p. 246 the learned judge said that
>
> > ' all expenses attached to the performance of a business operation bona fide performed for the purpose of earning income are deductible ~~x~~ whether such expenses are necessary for its performance or attached to it by chance or are bona fide incurred for the more efficient performance of such operation

provided ..../11

> " ' provided they are so closely connected with it that they may be regarded as part of the cost of performing it.' If I am right in understanding the words 'they may be regarded' as connoting that it would be proper, natural or reasonable to regard the expenses as part of the cost of performing the operation this passage seems to state the approach to such questions correctly. Whether the closeness of the connection would properly, naturally or reasonably lead to such treatment of the expenses must remain dependent on the Court's view of the circumstances of the case before it ..... In deciding how the expenditure should properly be regarded the Court clearly has to assess the closeness of the connection between the expenditure and the income-earning operations, having regard both to the purpose of the expenditure and to what it actually effects."

Mr. Ettlinger does not dispute that the respondent made the journey to New York in connection with his trade, and that the purpose of the journey was to earn income. His submission on this part of the case is that the wife's expenses, although associated with the business operation performed by the respondent, are not so closely connected with it that they may be regarded as part of the cost of performing it: she admittedly aided him, but that was not special to the journey to New York - it was part of the daily routine of making him fit for duty.

Mr. Shaw ...../12

Mr. Shaw, for the respondent, submitted that the respondent was unquestionably entitled to deduct his travelling expenses, and that his travelling expenses necessarily included the expense of having someone to accompany him: just as his own travelling expenses were part of the cost of performing the business operation, so was the extra expense part thereof.

Mr. Ettlinger has said that a case of this kind is largely a matter of impression. I agree that this is so. My view of the circumstances of the case is that the respondent could not have made the trip to New York without making use of his wife's services, just as he could not have made it without making use of some form of conveyance. If he is entitled to deduct the expenses of the latter, he is similarly entitled to deduct the expenses of the former. While his wife no doubt catered for his comforts in New York, this was purely incidental: he could not have got to the scene of the business operation and would not have been in a position to spend twelve days there, if it had not been ~~fi~~ for her assistance. ~~In the circumstances I consider that the expense of having her with him was an expense~~

The ~~incurred~~ ..../13

The facts with which we are confronted in this appeal are undoubtedly of an exceptional nature. The expenses incurred by the respondent might suggest extravagance on his part, and it may be argued that he should have exercised greater economy, and chosen a less expensive form of assistance. As to whether there was a duty on him to do so I express no opinion - cf. the remarks of WATERMEYER J. in the Port Elizabeth Tramways case, at p. 244. The extravagance or otherwise of his claim is, however, a question of fact which has been, or ought to have been, investigated by the Special Court. There was, for example, as indicated above, evidence to the effect that the expense would have been greater if the respondent had engaged a trained nurse to accompany him. The Special Court has found that "on the facts the appellant's wife's services were necessary to enable him to carry out his duties". This finding has not been challenged on the ground that there is no evidence to support it, or that it is one which could not reasonably have been reached by the Special Court. ~~As far as this Court is concerned, therefore, nothing more need be said about this aspect of the case~~.

In the circumstances I consider that the expense

of .../14

of having his wife to accompany him was an expense incurred by the respondent in the production of his income, and that it was wholly and exclusively laid out for purposes of trade.

The appeal is therefore dismissed with costs.

D.O.K. Beyers

(Signed) D.O.K. BEYERS.

SCHREINER, J.A.
MALAN, J.A.
VAN BLERK, J.A.
VAN WYK, A.J.A.

} Concur.

NATAL INCOME TAX SPECIAL COURT.

Before :

The Hon. Mr. Justice Henochsberg - President.

Mr. R.H. Button - Accountant Member.

Mr. G.E.D. Sutton - Commercial Member.

CASES OF

J. C. HICKSON (No. 5816)

AND

A. C. BIRCHER (No. 5817).

(Heard at Durban on the 11th July, 1958.)

J U D G M E N T.

DURBAN. 25th July, 1958.

HENOCHSBERG. J. : On the 23rd December, 1946, the late H.W.C. Hickson, father of J.C. Hickson, and the appellants entered into an agreement of partnership whereby they agreed to amalgamate the businesses that they had previously been carrying on and to carry on business in partnership as one firm under the name or style of

"Hickson, /...

"Hickson, Son and Bircher". The partnership business was that of accountancy, secretarial appointments, agency and other work usually associated with the foregoing. The profits and losses of the partnership were to be divided equally between the three partners. Any partner was to be permitted, with the consent of the others, to accept directorships of companies or like appointments in which case any fees or remuneration derived from such offices were to form part of the partnership revenue.

Clause 15 of the agreement provides -

> "That on the death of any one of the partners there shall be no goodwill attaching to his share of the partnership, but the remaining partners shall be bound to pay out of the Profits of, and as a charge against the Profits of the business, to the widow of the deceased partner during her lifetime a monthly sum of Thirty Pounds (£30. 0. 0.) and in addition to such payment a further monthly sum of Ten Pounds (£10. 0. 0.)in respect of each minor child of such partner with a maximum payment of Sixty Pounds (£60. 0. 0.) per month on the death of their widows and/or the attainment of majority of such children, such respective payments shall cease."

After /...

After the death of H.W.C. Hickson appellants carried on the partnership business which acted as secretaries and selling agents for a company called Comec Mimosa Extract Company Limited, hereinafter for convenience referred to as "Comec".

For the years of assessment ended 30th June, 1956, and 30th June, 1957, both appellants rendered returns of their income supported by accounts made up to those dates in respect of the partnership practice.

In the case of both appellants it was sought to deduct from their respective incomes from the partnership an amount of £180 each for each of the years under review, being the amounts paid to Mrs. E.E. Hickson, widow of the deceased partner, H.W.C. Hickson, which amounts became payable in terms of the provisions of the agreement to which reference has already been made above.

In a further statement submitted by J.C. Hickson with his return of income for the year of assessment ended 30th June, 1956, he sought to deduct

from /...

from his share of the income from the partnership a further amount of £609.10. 0., described as - "Claim for my wife's expenses on business trip to United States of America/England" and arrived at as follows :-

Return air fare - Johannesburg to New York	£532
One half-share - hotel expenses, New York (appellant and his wife)	£ 77
	£609

In elucidation of this claim J.C. Hickson advised the Commissioner that in his capacity as Secretary and Sales Director of Comec he was instructed to proceed, at that company's expense, to New York in August, 1955, for a series of meetings with that company's agents. In view of his physical condition - he suffers from paraplegia as a result of a spinal injury - he was advised by his medical adviser that the journey would only be possible if he were accompanied by someone who would give him physical assistance from time to time as required and that it was for this reason that he was accompanied by his wife at his own expense.

In /...

In the determination of both appellants' liability for tax for the years of assessment under review, the Commissioner declined to allow the deductions claimed in respect of the payments made by the partnership practice to Mrs. E.E. Hickson, namely £180 for each appellant for each of the years under review.

In the case of J.C. Hickson the Commissioner also declined to allow the overseas travelling expenses in respect of appellant's wife.

In the case of J.C. Hickson the Commissioner included in his income the following amounts :-

Year of Assessment ended:

30th June, 1956:	(a)	Half share of amount paid by partnership to Mrs. E.E. Hickson	£180
	(b)	Overseas travelling expenses	£609
			£789
30th June, 1957:		Half share of amount paid by partnership to Mrs. E.E.Hickson	£180.

On /...

On this basis the Commissioner issued on the appellant assessments in respect of the following :-

Year of Assessment ended	Taxable Income.	Income subject to Super Tax.
30th June, 1956	£ 4,119	£ 4,258
30th June, 1957	£ 3,982	£ 4,139

In the case of A.C. Bircher the Commissioner issued upon him assessments in respect of the following:-

Year of Assessment ended	Taxable Income.	Income subject to Super Tax.
30th June, 1956	£ 4,825	£ 5,140
30th June, 1957	£ 4,835	£ 5,472

Both appellants appealed against the inclusion in their income of their half share of the payments by the partnership practice to Mrs. E.E. Hickson, namely, £180 in each of the years under review, on the ground that by virtue of clause 15 of the partnership agreement such amount

(i) did not accrue to and was not received by the taxpayer at all; and

(ii) alternatively, did not accrue to and was not received by appellant beneficially but only as a trustee, such amounts having accrued beneficially to the widow. These amounts, therefore, formed no part of the income for which the taxpayers were liable

to /...

to be assessed in their personal capacity. Alternatively, that the amounts were amounts properly deductible in terms of Section 11(2)(a) of the Act.

In regard to the inclusion of £609 claimed by J.C. Hickson as overseas travelling expenses in respect of his wife, J.C. Hickson appealed on the ground -

"(a) that the whole of the expenditure on the journey in question ought to be allowed as a deduction for the reason that it was expenditure incurred in the production of the appellant's income derived from his Directorship and his firm's Secretaryship and Selling Agency of Comec inasmuch as -

(i) the journey was undertaken in the course of the appellant's duties as a Director of Comec;

(ii) by reason of his physical condition he had to be accompanied by some person on that journey and the person best suited to accompany him was his wife;

(b) that the deduction of the expenditure is not prohibited by any part of Section 12 of the Act;

alternatively,

(c) that an amount of £532, being expenditure incurred in the Union ought to be so

allowed /...

allowed and the assessment ought to be referred referred back to the Commissioner for the due exercise of his discretion under section 11(2)(b) of the Act."

J.C. Hickson established by evidence that his occupation as a director of Comec takes up about three-quarters of his personal time; that the partnership benefits to the extent of £1,500 per annum, his salary as a director, and 4/- per ton commission on all wattle extract sold. Appellant said he was not anxious to proceed overseas but was instructed by the Board to go as being the most suitable person and as the person acquainted with the company's organisation in the United States of America and the United Kingdom. Dr. Bamford, a medical practitioner, whom he consulted, considered that it was absolutely essential that someone should accompany him and he thought it best that appellant should take his wife. Had appellant taken anyone else it would have cost him more. The trip was by no means a holiday and Mrs. Hickson's time was spent in assisting him. Mr. and Mrs. Hickson flew to the United States and spent the whole time in New York. They were there 12 days and returned via England but the hotel expenses in London were not /...

not claimed as a deduction. The purpose of the visit to London was to see Comec's agents there. The air fare was approximately £560. Over and above these expenses, appellant had to meet the expenses of his home in Pietermaritzburg.

The directors of Comec are not required to pay their own travelling expenses, but the partnership pays the staff expenses and in this instance Comec paid appellant J.C. Hickson's own travelling expenses. Appellant paid his wife's expenses himself and did not request Comec to pay them, nor did he charge any portion of those expenses against the partnership, as he did not think that the company or the partnership should be put in any worse position as the result of his own physical disability.

Both J.C. Hickson and A.C. Bircher own shares in Comec, the capital of which is 300,000 shares of 5/- each. J.C. Hickson has been a director since 1953 and for two yearsbefore that was an alternate director.

One of the objects of the visit overseas

was to increase the sales in the United States of America and as the result of appellant's visit the remuneration of the firm has increased so far as sales are concerned. One of the reasons that actuated J.C. Hickson in deciding to go himself as he had been requested to do was that he felt that he would not be pulling his weight as a director, if he refused to go and that such a refusal might eventually affect his position as such a Director. He undertook the trip as part of his duties as a director of Comec.

The first part of this case raises the same point as was raised in Income Tax Cases Nos. 5805 and 5806, but with this difference that here there is no bequest of the deceased partner's goodwill and no Will to consider.

As in those two cases, so here, Mr. Shaw who appeared for appellants in these two appeals, contended that a fideicommissum had been created and he stressed the fact that the payments to the widow of the late H.W.C. Hickson were clearly charged against the profits of the partnership by the terms of Clause 15

(see /...

(see supra) of their partnership agreement. Mr. Shaw pointed out the distinction between a merely personal obligation and a charge upon the property and he relied upon M. v. Commissioner of Taxes (S.R.), 21 S.A.T.C. 16 at p. 24; Lambson v Commissioner for Inland Revenue, 14 S.A.T.C. 57 at 61, 69 and Holley v. Commissioner for Inland Revenue, 14 S.A.T.C. 407.

Mr. Shaw further contended that Income Tax Case No. 285, 7 S.A.T.C. 318, Income Tax Case No. 407, 10 S.A.T.C. 217 and Income Tax Case No. 555, 13 S.A.T.C. 214 should be regarded as overruled by Holley's case, supra.

A fideicommissum is defined as a disposition by which one person (the fideicommittens) transfers property to a beneficiary (the fiduciary) subject to a provision that, if a certain condition is fulfilled, the property is to go over to a further beneficiary (the fideicommissary). ii Lee & Honoré para. 655 p. 226. A fideicommissum may attach to any property, movable, immovable or incorporeal ii Lee & Honoré para. 662 p. 229. In Nadaraja The Roman Dutch Law of Fideicommissum at pp. 33/34 the learned author states-

"Since /...

"Since 'anything over which we have power of disposition may be bequeathed, namely anything which may become the subject of commerial transactions and of which the ownership may be acquired' a fideicommissum can exist over all such property, whether movable or immovable, corporeal or incorporeal; and in accordance with the principle applicable to inheritances and legacies in general, 'not only may (the thing which is left by fideicommissum) be the testator's own property, it may be also that of the heir ... nay, more, a thing which manifestly belongs to a third party may be left by fideicommissum.'"

It does not seem to me, however, that a person can dispose of or create a fideicommissum in respect of the fruits of the labour of a fiduciary. It is true that it has been held to be possible to create a fideicommissum of the income or profit derived from a business such as a store or a wattle plantation (see Holley's case supra at pp. 416-417) and it is also true that the income or profits of a business can only be brought about, at least to some extent, by someone putting his own labour into the business so that to that extent those profits are the fruit of that labour. Nevertheless, where those

profits /...

profits do not depend to any extent whatsoever upon the disposal of something tangible, e.g. merchandise or wattle bark, but solely upon the labour of the fiduciary it is not, in my view, legally possible to create a fideicommissum in respect of the profit of those future earnings. I cannot bring myself to think that it would be legally possible for a person to dispose by will of the future earnings of say, his son from the carrying on of a professional practice. The carrying on by a professional man, such as a Chartered Accountant, of the practice of his profession and the earnings of such a professional man cannot be regarded in the same light as the carrying on of and the profits of a commerical undertaking which is the sense in which the word "business" is used in Holley's case supra at pp. 416/7 and in other cases.

In my view the payments to Mrs. Hickson senior were an application of the profits earned by the partnership after they had accrued to the two appellants.

Mr. Shaw's next contention was that even if the profits did accrue to appellants, then as no goodwill was to be claimed it remained in existence and there was a letting of goodwill, so that the deductions were allowable as the hire thereof. For this proposition Mr. Shaw relied upon Income Tax Case No. 444, 11 S.A.T.C. 81. In that case there was an agreement between the deceased's widow and the surviving partner, entered into after the deceased's death, which the Court was required to interpret and which it held amounted in effect to a letting of the widow's share in the goodwill and furniture of the practice to appellant. It seems to me, however, that one cannot so interpret Clause 15 of this agreement, of its very wording. It expressly states that there shall be no goodwill attaching to the share of any deceased partner and it expressly charges the payments to such partner's widow against the profits made by the remaining partners. The payments are not for hire of goodwill but in lieu of goodwill; nothing is retained in the deceased partner's estate. I can find no ground upon which it can be said that the Commissioner was wrong in disallowing these

deductions. Such cases as Lambson's case supra, Income Tax Case No. 334, 8 S.A.T.C. 334 and Income Tax Case No. 285 supra are against appellant.

For these reasons both appeals fail in so far as they relate to the inclusion in the appellants' taxable incomes of the £360 per annum paid to Mrs. Hickson senior for each of the years under review.

I pass now to consider the appeal in the case of J.C. Hickson (No. 5816) against the disallowance by the Commissioner of appellant's claim for his wife's travelling expenses. There is no question that the fees and commission from Comec form a substantial part of the income of the partnership business of the two appellants. The expenditure was incurred in the production of additional income - commission on increased sales by Comec - for the partnership of which appellant was a member. In our view appellant has established as a fact that this expenditure was not of a capital nature and that it was incurred in the production of his income. He has not, however, established what portion of the expenditure, if any, was incurred in the Union and what outside the Union.

He /...

He has nevertheless established both a causal and a direct connection between the expenditure and the carrying out of his duties as a director of Comec.

It was, however, suggested for the Commissioner that this expenditure was part of the cost incurred in the maintenance of the taxpayer, his family or his establishment or that it was a domestic or private expense and that therefore in terms of section 12 of the Act was not an allowable deduction. We do not think this expenditure can be classed as either domestic or private nor as being incurred for maintenance. On the facts appellant's wife's services were necessary to enable him to carry out his duties and to move from place to place in New York so that he could interview people and conduct the business required of him there. She went to New York exclusively to help appellant carry out his duties. This expenditure was not cost incurred in maintenance nor was it a domestic or private expense within the meaning of section 12 of the Act. Income Tax Case No. 833, 21 S.A.T.C. 324 is distinguishable from the instant case, because there the expenditure was incurred so as

to /...

to prepare the way to enable the taxpayer to increase his income, here it was expenditure related solely to the carrying out of part of continuing duties actually required of appellant to enable him to earn income, that is to say the duty of travelling as a Director of Comec on Comec's business which business produced an income for him personally. In our view this expenditure was wholly and exclusively laid out for the purposes of trade.

The fact that this expenditure might have been met by Comec, if they had been approached on the subject, or that it might be considered as a legitimate charge against the partnership profits does not seem to us to matter. It was in our judgment in the circumstances of this case definitely an allowable expenditure in so far as appellant's income is concerned.

Appellant J.C. Hickson therefore succeeds on this aspect of his appeal.

In Case No. 5817 (A.C. Bircher) the appeal is dismissed and the assessments are confirmed. In Case No. 5816 (J.C. Hickson) the appeal succeeds in

part /...

part only and the assessment is referred back to the Commissioner to enable him to consider what part, if any, of the expenditure on appellant's wife's travelling expenses was actually incurred in the Union and to allow a deduction thereof and also for the exercise by him of his discretion under section 11(2)(b) in relation to so much of the expenditure as may have been incurred outside the Union.

Signed Edgar S. Henochsberg.

PRESIDENT.

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