

# ALLAHABAD HIGH COURT

L. Jeewanlal

Vs.

Commissioner of Income Tax

Misc. Case No. 45 of 1951

(Malik, C.J. and V. Bhargava, J.)

05.05.1953

## JUDGMENT

**Malik, C.J.**

1. In this reference under Section 21, Excess Profits Tax Act, read with Section 66 (1). Income-tax Act, the following question has been referred to this Court for decision:

"Whether on the facts and in the circumstances of the case mentioned wholly or partly income from Laxmi Ratan Cotton Mills Ltd., could be held to be profits from business within the meaning of Section 2 (5) of the E.P.T. Act?"

2. The assessee is Lala Jeewan Lal Dalal of Generalganj, Kanpur, who is being assessed in the status of an individual. The relevant assessment year is 1946-47 and the chargeable account period is from 1-4-1945 to 31-3-1946. The assessee apart from other income showed in his return an amount of Rs. 1,27,147/- as remuneration from Laxmi Ratan Cotton Mills Ltd., Kanpur, at 1 per cent on sales and claimed it under the head 'salary'. The Excess Profits Tax Officer, on the other hand, claimed that the amount was income from business for which Excess Profits Tax was payable.

3. The question referred to us relates to this sum of Rs. 1,27,147/- and we have been asked to decide whether on the facts and in the circumstances of the case it would be held to be profits from business as defined in Section 2 (5), Excess Profits Tax Act.

4. Before we come to the definition, it would be convenient to give the facts so far as they appear from the Statement of the Case and the Appellate Order. The assessee acted as broker for Laxmi Ratan Cotton Mills Ltd. Kanpur (hereafter called the 'mills') i.e., he used to secure orders for the Mills and was being paid brokerage at the rate of 4 annas per cent. It appears that he used also to

advise the Mills as to the type of cloth that would find a ready market, for which act he was not getting any separate remuneration. In the assessment year, 1939-40 the income under this head, i.e., brokerage from the Mills, was Rs. 3,643/-, and the assessee showed it in his return under the head 'income from business'. In 1941-42 the income from this source went up to Rs. 22,741/-. It was during the assessment year, 1941-42 that the assessee agreed to be responsible for any toad debts on orders secured through him and the commission payable to him was increased from 4 annas per cent. to one rupee per cent. The Mills continued to pay the commission of 4 annas per cent in cash as before and the balance of 12 annas per cent was credited to the account of the assessee for meeting bad debts. In the assessment years, 1942-43, 1943-44 and 1944-45 the assessee continued to show the income from the Mills under the head 'business' and the amount was assessed as such.

5. During the assessment year 1945-46, for the first time, the assessee claimed that the Income which had mounted up to Rs. 1,28,329/- was 'salary' and showed it as such in the return. The Income-tax Officer, however, again assessed the income under the head 'business'. In the assessment year, 1946-47 the assessee returned an income of Rs. 1,27,147/- from the aforesaid Mills and again claimed that it was 'salary' while the Excess Profits Tax Officer claimed that it was 'income from business' and was liable to Excess Profits Tax. The question is whether the Excess Profits Tax Officer was justified in doing so.

6. The facts found in the order of the Appellate Tribunal and the Statement of the case are as follows: (1) that the assessee used to secure orders for the Mills and advise them as to the type of cloth which was likely to find a ready market and was getting as his remuneration 4 annas per cent on the value of contracts secured; (2) that the assessee's remuneration was increased from 4 annas per cent to Re. 1/- per cent and for this extra remuneration he agreed to reimburse the Mills if any of the persons to whom the goods were sold through him failed to pay the amount due; (3) that the remuneration of 4 annas per cent was paid to the assessee in cash; (4) that the remuneration of 12 annas per cent was credited to the account of the assessee for meeting bad debts; (5) that up to the assessment year 1944-45 the assessee had been showing this income as 'income from business.' These are all the facts that appear to have been established.

7. The assessee made a statement which is marked Annexure 'A' in which he claimed that he was the Sales Manager of the Mills, that he used to get the goods prepared and sold and for this he was getting 1 per cent as commission. He, however, admitted that there was no agreement with the Mills as to the capacity in which he would work. This statement of his that he was working as Sales Manager does not appear to have been accepted by the Appellate Tribunal as would appear from paragraph 4 of the Appellate Order.

8. From the facts enumerated above which were established, the Tribunal in its Appellate Order has inferred (1) that the assessee was an adviser of a commercial nature to the Mills and used to give advice to the company as to the type of cloth that would find a ready market; (2) that he

used to find a ready market for the goods through his own exertions; and (3) that he dealt with the goods quite independently of the company. This last inference is based on the fact that "if he was liable to reimburse the company for ally bad debts incurred he would certainly be entitled to an independence in the matter of effecting the sales of the company's stuff."

9. On these findings and inferences, as also the fact that the assessee had in the past been showing the income as income from business, the Tribunal observed:

"That his position was that of guarantee broker remunerated on commission basis is further borne out by the supplementary agreement between him and the company which raised his remuneration from -/4/- per cent. to Re.1 per cent. The mere fact that the payments made to him were described as his remuneration could not convert the character of his work into that of an employee. We are therefore of opinion that his receipts were on account of his work partly as a commercial adviser and partly as a guarantee broker and were evidently receipts from business."

10. The question whether a particular income is 'salary' or is 'income from business' is not always free from difficulty. At times, the line between 'business' and 'employment' becomes rather thin, and the question has to be determined on such material as may be available, whether the relationship between the assessee and the person from whom the money was received is that of a servant and master or that of two independent contracting parties. Several tests have been laid down to help in the decision of the question. One such test is by ascertaining whether the assessee is doing his own work or is working for others. The assessee would be working for others if he has to work according to their directions for a remuneration either paid in cash or paid on a percentage basis for the work done, while if it is the assessee's own business then the discretion how it has to be carried on is primarily his and he is entitled to the profits and liable for the losses thereof. Though this may be true as a broad proposition, it may be pointed out that even a servant may be given a wide discretion and having given the discretion to the servant the master may have no right to control it. On the other hand, if it is the business of the assessee even then there might be to some extent a control by those who supply him with the goods with which to carry on his business, e.g., price for which it should be sold, quantity which should be sold to each customer, whether the goods should be sold for cash or on credit, if on credit at what terms, etc. These may all be controlled by agreement. To find out whether it is the assessee's own business or he is merely working as a servant, though the extent of the control exercised on him is a test, it would be necessary to find out whether it is the right of the assessee that is being controlled by contract or a discretion conferred by others on a servant so that all his powers and authority flow from his master. In the case of a servant, it is not likely that he would be entitled to the profits of the business and liable for its losses, though he may be remunerated not in cash but on a percentage basis so that his income would vary according to the amount of business done by him for his master. The capacity in which he was carrying on the work is another test. e.g., a company may employ a broker to secure orders for it. In that case, it would be the duty of the

broker to work to secure orders. We have cases of travelling agents and others who though remunerated on a percentage basis, may be held to be servants. On the other hand, it is open to an assessee to take upon himself the work of securing orders and on such orders as he secures he might get a commission, the rate of commission varying according to the amount of orders secured by him, so that if he does not secure any order it would not be open to the company to claim that the assessee had not done the work for which he had been employed. In other words, it is left to the option of a broker unless he has undertaken to procure a certain minimum amount of business, if he is not a servant, to secure or not to secure an order according to his own convenience and pleasure. The question whether a person works whole time or only part time also gives some indication and if it is found that an assessee undertakes to do similar work for a number of persons, it indicates that the assessee is carrying on a business, though from the fact that he is doing the work only for one person it does not necessarily follow that the relationship between them is that of a master and servant. If the work is being done by a company or a firm, that again would be an indication that it is a business of that company or of that firm. This is so, as a company is floated or a firm is constituted for a purpose and if one of the aims and objects of the company or the firm is to do that type of work, it is the business of the company or the firm. Another test might well be as to the capacity in which the work was being done and whether the assessee is dealing with his own goods or the goods belong to some one else. This too, however, is not a sure test. If the goods belong to the assessee then it indicates that it is his independent business. If, on the other hand, the goods belong to some one else and he has merely to secure a contract for the sale thereof, he may be working as a servant or he may be carrying on the business of commission agency. In each case, the question whether the assessee is carrying on business or is working as a servant has to be decided on the materials available bearing in mind the relationship between the assessee and the person from whom he has received the income.

11. The question has in most cases to be decided on the facts and circumstances of each case and not much assistance can be got from decisions in other cases where the facts and circumstances might have been totally different. The general principles guiding such decisions may, however, at times prove useful. We may, therefore, refer to the following cases which were placed before us during the course of arguments.

12. In - '*Robbins v. Commissioners of Inland Revenue*<sup>1</sup>', the assessee by an agreement made on 8-4-1913, at Chicago in the United States had been granted the exclusive right to sell comptometers in the United Kingdom for fourteen months; the Company agreed to furnish a working stock of comptometers to a quantity which they deemed desirable and necessary for the business; to pay all transportation charges to the territory on all comptometers shipped by them to the appellant, or on his order; to exercise their best endeavours to prevent any comptometers from being sold to parties in the territory without the appellant receiving his full commission thereon, to pay the rent of the main office in London, it being left to the Company to fix the size, location etc. of the office. The Company was also to pay for the heating, cleaning, lighting, office furniture, office supplies, telephone, rates and taxes, postage, printing stationery and advertising

etc. and the amount of the expenditure was to be determined by the Company itself, but they were not liable to pay any travelling expenses and hotel bills. They were to pay commission at a fixed rate for each comptometer sold and they were to send to the appellant all letters of enquiry from prospective customers. The Company was to pay salary of one stenographer. The Company was to pay the employer's contribution for all sub-agents working for the assessee. The Company guaranteed an income of £ 50 per month until the expiration of the contract and if the assessee gave his whole time and sold during the period of the contract 350 comptometers or more then he was entitled to extension of the period of the contract. Rowlatt, J. held that the words 'trade and business' do not

"include the occupation of a whole-time servant, which is not an independent occupation but simply that of working for one isolated employer"

and pointed out that

<sup>1</sup>(1920) 1 KB 51

"A business which is capable of being owned or carried on is in the ordinary sense of the word a business which is the adventure of the person who owns it or carries it on."

13. In the Court of Appeal, '*Robbins v. Commrs. of Inland Revenue*<sup>2</sup>', it was held by Lord Sterndale, M.R. that the word 'trade' or 'business' does not include the work carried on by

"a person who is remunerated for services either wholly or partly by commission or who may in one sense of the word be described as an agent, if he be merely rendering those services or acting as agent in that way as an assistant of a business of somebody else, a business which does not belong to him and of which he does not take the profits."

It was pointed out that the position of a salesman in a shop remunerated on a commission basis is not that of a man carrying on a business or a trade.

14. In - '*Marsh v. Commissioners of Inland Revenue*<sup>2</sup>', the question again arose whether the assessee was an employee or was carrying on business. After having considered the facts and circumstances of the case, the learned Judge was of the opinion that the assessee was not carrying on a business. The assessee in that case was a member of a staff of commercial travellers. The learned Judge observed that-

"An individual in the whole time employment of a firm carrying on a trade or business, and precluded by the terms of his engagement from doing any work for any other firm, could not be said to be carrying on a business on his own account..... On the other hand, an individual employed, whether as a commercial traveller or in some other activity, by a number of firms does, as it seems to me, carry on a trade or business. An accountant acting for a number of firms is a good illustration of that proposition."

15. The question whether an assessee was working as a servant or was carrying on a business of his own arose for consideration before this Bench in - '*Inderchand Hari Ram v. Commissioner of Income-tax, U.P. and C.P.*', and as regards the taking over of the sole selling agency of Messrs. Shankar Sugar Mills Ltd., we held that the assessee was a servant of the company, while as regards the work of managing agents of Messrs. Shankar Sugar Mills Ltd., we were of the opinion that the assessee was carrying on a business of his own. The reasons given by us in the judgment bring out the difference between the two capacities. As we pointed out, the question has to be determined on the basis of the relationship and on the facts and circumstances of each case.

16. The definition of 'business' in section 2 (5) of the Excess Profits Tax Act is as follows:

" 'business' includes any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture or any profession or vocation....."

It would thus appear that the definition of "business" in the Excess Profits Tax Act is very

<sup>1</sup>(1920) 2 KB 677      <sup>3</sup> AIR 1952 All 706

<sup>2</sup>(1943) 29 Tax Cas 120

wide and it includes in its scope not only work which is considered normally to be business, i.e. trade, commerce and manufacture, but also includes within its scope profession and vocation. As regards profession, however, the section provides that, if the income from profession is mainly due to the skill and qualification of the person carrying on the profession, then it is not to be treated as 'business'. There is a further exception to it that this qualification does not apply to a profession, the main purpose of which is to secure contracts on behalf of other persons or give to other persons advice of a commercial nature in connection with the making of contracts.

17. It is nobody's case that the income made by the assessee from the Mills was income from profession. We need not, therefore, consider that part of the definition. The question here is whether the assessee was carrying on a trade, commerce or vocation.

18. In dealing with this matter we have to consider whether it is possible to divide the remuneration into two parts, 4 annas per cent. and 12 annas per cent., as they both arise under two different heads and are covered by two different contracts.

19. The assessee was being paid 4 annas per cent as remuneration for advising the Mills as to the type of goods that would find a ready market and securing contracts for the sale thereof. How much of this 4 annas per cent was for one or the other, it is difficult to say. It does not appear from the Statement of the Case or even from the Appellate Order that the assessee had been employed by the Mills as a broker. All that we know is that the assessee used to do this work for which he was getting a commission and that for several years he had been treating it as his income from business. Mr. Pathak on behalf of the assessee, has strenuously urged that we should

ask the Tribunal to go further into the matter and to investigate the origin of the relationship between the assessee and the Mills. We find it very difficult to agree to this contention. We can under Section 66 (4) ask the Tribunal for a better and fuller statement of the case. Under Section 66, however, we have to decide questions of law which arise out of the Appellate Order and the Tribunal has to act in accordance with our decision. We doubt whether to give our opinion on a question of law arising out of the Appellate Order we can ask the Tribunal, before deciding the reference, to take further evidence and then add to or amend the Appellate Order. To further clarify the matter, we may say that as a result of our answers to the questions referred to us it may be necessary for the Appellate Tribunal to rehear the appeal and decide it afresh even after taking such further evidence as may be necessary, but that stage would arise only after we have answered the reference under Section 66.

20. As regards the brokerage of 4 annas per cent all that we know is that the assessee was doing the work of securing contracts and giving advice and was being paid remuneration therefor. In the absence of any finding that he had been employed for that purpose it is difficult to say that the Appellate Tribunal was wrong in its view that this was not income from business (sic. salary?).

21. As regards the remuneration of 12 annas per cent for guaranteeing bad debts we fail to see how it could be salary. Mr. Pathak has urged that this guarantee only means that the assessee was to do his work properly and secure contracts from those who were solvent enough to pay for them. The assessee's liability did not depend on the question whether at the time that the goods were sold the purchaser was or was not solvent. The guarantee included that, if for any reason, which might include a supervening cause which came into existence after the date of the contract, the customer was not able to or did not pay, the assessee had to pay for him. The assessee took all the risk. If the goods were transferred to parties who were all good paymasters and paid their dues, the assessee would make a profit by getting 12 annas per cent. If on the other hand, any of the customers turned dishonest or was unfortunately placed in such a position that he was not able to meet the liability, the assessee had to pay for him and the amount thus payable by him might far exceed the remuneration that he was getting. That the sum of 12 annas per cent was treated differently from the sum of 4 annas per cent is evident from the fact that 4 annas per cent was paid in cash, while 12 annas per cent was kept in suspense account pending the final payment of the bills by customers to whom the goods had been sold.

22. Mr. Pathak, learned counsel for the assessee, has strenuously urged that the commission of Re.1/- per cent payable to the assessee should not be split up into 4 annas per cent and 12 annas per cent, but should be treated as a single payment. Even if that is done, we do not see how that would help the assessee. The facts and circumstances, as appear from the findings, would remain the same, that is, the assessee kept himself aware of the market trend and advised the Mills as to what type of cloth would find a ready market. He sold the cloth to his customers and made himself personally liable for the price of the goods sold and in return was remunerated on a

commission basis of Re.1/- per cent. So far as the Mills were concerned, they handed over the goods to the assessee and were entitled to get the price thereof from him. It was the assessee's risk whether the transactions ended in profit or loss. If some of the persons to whom the goods had been sold did not pay, he would have to recompense the Mills for the price of the goods which amount might exceed the amount received by him by way of commission. This was clearly, therefore, a venture in the nature of trade which might end in profit or in loss and not work done for an employer where the remuneration being fixed on a commission basis it might be more or less according to the work done.

23. Having, therefore, considered the matter in all its aspect, we are of the opinion that the answer to the question referred to us must be in the affirmative. The assessee must pay the costs which we assess at Rs. 500/-.

Answered affirmatively.