

# **BOMBAY HIGH COURT**

Native Share and Stock Brokers

Vs

Commissioner of Income-Tax

(Stone, C.J)

13.10.1944

## **JUDGMENT**

**Stone, C.J.**

1. This is a reference under Section 66(1) of the Income-tax Act. The assessee is the Native Share and Stock Brokers Association of Bombay more commonly known as the Bombay Stock Exchange. The Association is recognised by the Government under the Bombay Securities Contracts Control Act, 1925, and there are rules made by the Association for the regulation and control of transactions in securities, so that it becomes what is referred to in the Act as a "recognised Stock Exchange." Being a mutual association not formed for the purpose of making profits it does not pay income-tax unless its activities come within Section 10(6) which is as follows :-

"A trade, professional or similar association performing specific services for its members for remuneration definitely related to those services shall be deemed for the purpose of this section to carry on business in respect of those services, and the profits and gains therefrom shall be liable to tax accordingly."

The question referred to us concerns the assessment year 1940-41 or the accounting year, which is the calendar year 1939. The question submitted is :-

"Whether the sum of Rs. 1,22,600 received by the assessee Association in respect of authorised clerks and sub-brokers fees or subscriptions in the year of account is remuneration definitely related to specific services performed by the Association for its members, within the meaning of sub-section (6) of Section 10 of the Indian Income-tax Act, 1939 ?"

The sum of Rs. 1,22,600 represents 1,226 fees or subscriptions of Rs. 100 each paid in respect of the authorisation by the Association of 1,226 clerks or remisiers belonging to some 475 firms which admit them to certain privileges or rights in the exchange building which otherwise they

could not enjoy under the rules of the Association. The short question is whether the Association is performing specific services for its members for remuneration definitely related to those services. Sir Jamshedji Kanga on behalf of the Association says that the sum of Rs. 100 is the licence fee paid by a member for the granting of the facilities which the member would not otherwise enjoy and this is not performing services by the Association who grants the licence. The facility granted is merely admission of clerks and remisiers of the members to the exchange building and that no services are performed by the Association for its members. In the alternative he says that if any services are performed they are performed for all the members and not only for those members who pay the fees of Rs. 100 and that therefore the remuneration does not definitely relate to any services rendered to the member paying them. On the other hand, Mr. Setalvad on behalf of the Commissioner submits that the answer is to be found by asking the question, "for the remuneration paid, what, if any, are the services performed?" He draws our attention to some of the rules which he says show a definite scheme for the admission and supervision of the authorised clerks and which confer definite advantages to the members who pay the fees. Turning to the rules the relevant group of rules commences with rule 47, which is headed, "Authorised Clerks" and is as follows :-

"47. (a) The Board shall from time to time fix the number of authorised clerks a member may be allowed to employ.

(b) Members of the Association may be employed as authorised clerks in excess of the number permitted by this rule. A member so employed shall not himself be entitled to employ any authorised clerk.

(c) A member may with the permission of the Board employ his remisier also as his authorised clerk but not in addition to the number of authorised clerks allowed to him under this rule."

Turning for a moment to rule 172(1) it will there be found that it implements sub-rule (c) because it is as follows :-

"172. (1) A remisier shall be entitled to admission to the market on payment of an annual fee of Rs. 100 in advance or such higher fee as may be prescribed from time to time by the Board and shall wear a distinctive badge; but he shall not make bargains in his own name or on behalf of his employer."

Now sub-rule (d) of rule 47 provides as follows :-

"47. (d) A member desirous of obtaining admission to the market for his authorised clerks shall apply for the permission of the Board in such form as the said Board may from time to time prescribe." This actual form has been produced and in effect and in substance it is a notification

that the member intends to employ certain persons as his authorised clerk and on the back of the form are certain undertakings signed by the clerk. Sub-rule (e) is as follows :-

"(e) The employer shall pay to the Association an annual subscription of Rs. 100 or such higher fee as may be prescribed from time to time in respect of each authorised clerk employed by him. No such subscription shall be payable in respect of a member who acts as an authorised clerk."

This is the background of the scheme.

The next rule in chronological order which is relevant for the present reference is rule 50(a) and is as under :-

"50. (a) The Secretary of the Association shall keep a register for authorised clerks and shall enter in such register the name of the clerk and of the member who employs him, the dates of the beginning and termination of his employment or the withdrawal of his authorisation."

Then comes rule 53 which provides as follows :-

"53. (a) A member and his authorised clerk when in the market must wear a badge. No clerk without such badge shall be admitted into the market to transact business."

Rule 48(a) provides for admission in the market in the following terms, viz., "An authorized clerk is entitled to admission in the market and no clerk who is not authorized is so entitled." That is followed by rule 49 which provides what an authorized clerk may do, and is as under :-

"49. (a) An authorised clerk or a member acting as an authorised clerk shall transact business only on behalf of his employer. He shall not make bargains in his own name or in the name of any other than that of his employer or sign contracts in his own name or in any other name or on behalf of his employer, unless he holds a power of attorney for the purpose as provided in rule 167(d).

(b) The Board shall expel immediately an authorised clerk or a member acting as an authorised clerk who contravenes this rule."

Then we come to the important rule 52 which is the good behaviour rule and it provides that :-

"Authorised clerks shall be admitted to the market only during good behaviour and the Board may by a resolution in their absolute discretion refuse admission to the market to the authorised clerk of any member and may at any time suspend or terminate the right of admission of such clerk without assigning any reason whatsoever."

Finally we come to rule 50(b) which provides for the termination of the employment of the authorized clerks and is as follows :-

"A member employing an authorized clerk or terminating the employment or withdrawing the authorization of such clerk shall give notice in writing to the said Secretary of the name of such clerk and of the date of the beginning or termination of his employment or the withdrawal of his authorization and the said Secretary shall forthwith post the notice of such employment, termination or withdrawal upon the notice board of the Association."

In my judgment these rules lay down a definite scheme and provide an organised arrangement, controlled and supervised by the Association for the benefit of its members. In my opinion the carrying of their scheme into effect is performing services for its members of the Association. No doubt the benefit of the scheme would redound to the benefit of all members since all would have the advantage of disciplined supervision exercised over the authorised clerks and remisiers of the others. I do not think that because the payment for the carrying of the scheme is provided for only by members who avail themselves of the use of the authorised clerks it makes any difference. It cannot make a difference whether the remuneration for the services performed is provided by some or all the members provided it is supplied by members. In my opinion the services performed are specific because they provide an identifiable scheme laid down with sufficient clarity and in my opinion the remuneration is definitely related to the services and is for the benefit of the members of the Association. Accordingly in my opinion the answer to the question referred to the Court should be in the affirmative.

KANIA, J. - I agree. The relevant sections of the Act and the material rules of the Association have been set out in the judgment of the learned Chief Justice. Under Section 10(6) of the Act the question to be considered is whether this Association is performing specific services for its members, and, if so, whether the remuneration in question is definitely related to those services. If the answer to these two questions is in the affirmative the assessee becomes a person carrying on business in respect of those services and becomes liable to tax accordingly. For its ordinary activities this Association not being formed for the purpose of making profits is not taxed because it does not carry on business. Section 10(6) is an exception in respect of associations of this kind. Broadly speaking, the object is that although the Association may not ordinarily be carrying on business, if for a stated remuneration it renders services to its members, it is admitted to be carrying on business for that portion of its activities and is liable to be taxed accordingly. In order to answer the two questions which I have formulated at the commencement it is therefore necessary to examine the rules and determine whether by reason of those rules the Association is performing specific services for its members. A perusal of the rules referred to in the judgment of

the learned Chief Justice shows that the institution of authorised clerks exists for the benefit only of those who pay remuneration of Rs. 100 instead of going to the market and carrying on their business themselves. Individual members are permitted to work through an agent. For that the charge is made. The rules provide for the application and grant for such permission, registration of the authorised clerks on the individuals being recognised as clerks of particular members, supervision over the work of such clerks and particularly to prevent them from registering contracts either in their own name or in the name of another member; and a general supervision over their good behaviour is contemplated. Moreover on a clerk ceasing to be a clerk of the individuals member proper entries have to be made in the register. This is in order to prevent a member who had employed such authorised clerk being liable thereafter for the transactions effected by such clerks. It is clear that the scheme taken as a whole is based on the institution of the authorised clerks and their work for the members who employ them. For that the Association has to render services which I have briefly described above. Those are clearly specific services rendered by the Association for its members who desire to employ authorized clerks. It was argued on behalf of the assessee that these are facilities given to the members and not the performance of specific services by the Association. That contention overlooks the fact that the Association has undertaken certain obligations by the rules towards its members in accepting these fees. By the rules the Board and the Secretary have to perform certain duties as prescribed by the rules in respect of authorized clerks. It is therefore futile to contend that they amount merely to facilities and do not constitute performance of services by the Association. A question was raised as to whether these are specific services to be performed for particular members or whether the rules amount to performance of duties towards members in general. It is true that several of the services to be rendered may be helpful to the other members for their business. Taken as a whole I consider that as a performance of services by the Association for the benefit of members who pay the remuneration. But for the institution of authorised clerks such services would not come into being at all. The rules are primarily framed to show what agent is employed by what member and up to what date. The general supervision is also in respect of the individual acts of the authorized clerk in respect of the transactions of his principal who had employed him. It seems therefore that the specific services to be performed by the Association are in respect of the members who pay the fees. The second question is whether the remuneration is definitely related to these services. The answer to this again also depends on the construction of the rules. On the payment of Rs. 100 "the authorized clerk" comes into existence. All the services which the Association has thereafter to render are in respect of the authorized clerk who has thus come into being. It is therefore clear that the remuneration paid brings into existence the authorized clerk in respect of whom the specific services are definitely related. In my opinion therefore the two requisites of the section are fulfilled under the rules of the Association and the conclusion of the Tribunal is correct. I therefore agree that the answer to the question submitted to us should be

in the affirmative.

The assessee to pay the costs of the reference. Reference answered in the affirmative.