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Oct. 24

Oct. 26

BETWEEN:

FRED JAMES BLACKWELL ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Revenue—Excess Profits Tax—The Excess Profits Tax Act, 1940, S. of C. 1940, c. 32, as amended, ss. 3, 7(b)—Whether profits of a commercial traveller representing several business concerns exempt from liability to excess profits tax—"Carrying on business"—Meaning of word "profession".

The appellant is a commercial traveller residing at London, Ontario. During the years in dispute he represented several mills or business houses and obtained orders for their merchandise. He was paid solely by commissions and paid his own expenses. He was assessed to excess profits tax under the Excess Profits Tax Act, 1940, as amended, but contended that he was not carrying on business within the meaning of the Act but was merely an employee of the commercial concerns for whom he obtained orders and, alternatively, that his profits were exempt as being those of a profession within the meaning of section 7(*b*) of the Act.

Held: That the appellant's activities as a commercial traveller constituted the carrying on of a business within the meaning of the Excess Profits Tax Act, 1940, and that his profits therefrom were subject to excess profits tax under it.

2. That the occupation of a commercial traveller is not a profession within the meaning of section 7(*b*) of the Act.

APPEALS under the Excess Profits Tax Act 1940.

The appeals were heard before the Honourable Mr. Justice Thorson, President of the Court, at Toronto.

R. B. Law K.C. for appellant.

R. S. W. Fordham K.C. and *A. Fergusson* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

The President now (October 26, 1949) delivered the following judgment:

These are appeals from assessments under The Excess Profits Tax Act, 1940, Statutes of Canada 1940, chap. 32, levied against the appellant in respect of the years 1942, 1943 and 1944.

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The facts are not in dispute. The appellant is a commercial traveller and resides in London, Ontario. During the years in question he represented several mills or business houses, nine altogether in 1942 and 1943 and eight in 1944. His activities consisted in travelling throughout his territory with samples of the merchandise of the business concerns he represented, calling on customers, displaying the samples and soliciting and obtaining orders for the merchandise. When he obtained such orders he sent them to the credit manager of the mill or business house concerned. If the order was accepted the merchandise was shipped to the customer and thirty days after the date of such shipment the appellant was paid a commission based on its amount. He received no salary, wages or remuneration from any of the mills or business houses except these commissions and if a customer did not pay for the goods the commission that had been paid to him thereon was charged back to him. He did not make sales or contracts for the concerns for whom he acted, his authority being confined to obtaining orders for them and transmitting such orders to them. He had no office or office staff and no telephone, typewriter or stationery of his own. The samples he carried belonged to the concerns he represented. In the course of his activities he incurred expenses for such items as hotels and meals, baggage and sample rooms, telephone, telegrams and tips, rail fares and excess baggage, car, gasoline, oil, etc. He did not send in any expense accounts in respect of these items to any of his mills or business houses or apportion them amongst them but assumed them all himself. The particulars of his commissions with the amount received from each mill or business house for each of the years in question appear in his income tax returns. In no year could it be said that they came virtually from one concern.

The appellant was assessed under The Excess Profits Tax Act, 1940, for each of the years in question in respect of the total commissions received by him less the expenses which he had paid and less the sum of $5,000. From these assessments he appealed to the Minister who affirmed them. Being dissatisfied with the Minister's decision he brought his appeals to this Court.

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On these facts it was contended on his behalf that he was not subject to tax under The Excess Profits Tax Act at all on the ground that he was not carrying on a business within the meaning of the Act but was merely an employee of the commercial concerns for whom he obtained orders. This argument involves consideration of section 3 of the Act which provides in part as follows:

3.(1) In addition to any other tax or duty payable under any other Act and as herein provided, there shall be assessed, levied and paid

(*a*) a tax in accordance with the rate set out in the Third Part of the Second Schedule to this Act, upon the profits during the taxation period; and

(*b*) a tax in accordance with the rates set out in the First Part of the Second Schedule or in the Second Part of the Second Schedule to this Act upon the profits or the excess profits respectively during the taxation period, whichever of such taxes is the greater in amount, of every person residing or ordinarily resident in Canada or who is carrying on business in Canada:

And section 2(1) (*g*) of the Act defines "profits" in the case of taxpayers other than corporations as follows:

2.(1) In this Act and in any regulations made under this Act, unless the context otherwise requires, the expression,

(*g*) "profits" in the case of a taxpayer other than a corporation or joint stock company, for any taxation period, means the income of the said taxpayer derived from carrying on one or more businesses, as defined by section three of the *Income War Tax Act*, and before any deductions are made therefrom under any other provisions of the said *Income War Tax Act*:

There is no definition of the word "business" in either the Income War Tax Act or The Excess Profits Tax Act. It has been said that it has the widest possible meaning and that it means anything which occupies the time, attention and labour of a man for the purpose of profit. In *Smith* v. *Anderson* (1) Jessel M.R. described it as "a word of extensive use and indefinite signification". If this view of it is adopted there can, I think, be no doubt that the appellant, as a commercial traveller, was carrying on a business. But counsel contended that in The Excess Profits Tax Act the word "business" is not used in its widest signification but has a restricted meaning and that Parliament did not intend to subject commercial travellers such as the appellant to tax under the Act. He urged that a substantial body of persons was not under the Act at all and that the appellant was one of them. It was

(1) (1880) 15 Ch. D. 247 at 258.

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essential, according to his submission, that, before a person could be subject to excess profits tax under the Act, capital should be employed by him and that he should be the proprietor of a business. And he urged that the appellant's occupation did not meet these tests; no capital was employed by him and he could not be described as the proprietor of a business; he was merely a part time employee working for the various business concerns for whom he took orders. Counsel sought support for his contention in various sections of the Act.

I am unable to accept this contention. While there is no Canadian decision on the question whether the profits of a commercial traveller are subject to tax under The Excess Profits Tax Act, 1940, there is a decision in the United Kingdom under similar legislation namely, section 12 of the Finance (No. 2) Act, 1939. In *Marsh* v. *Commissioners of Inland Revenue* (1) the facts were that the appellant was employed by P. and P. as a commercial traveller on a basis of salary and commissions on orders taken; and that he also travelled for other firms with the permission of P. & P. and received commissions from them on the orders he obtained. He was assessed to excess profits tax on the ground that he was carrying on a trade or business as a commercial traveller and contended that there was no evidence on which the Commissioners could find that he was carrying on a business at all. Macnaghten J. held that if he had been employed solely by P. & P. he could not be held to be carrying on a trade or business; but because he acted for other firms there was evidence on which the Commissioner could conclude that he was carrying on the business of a commercial traveller and he was, therefore, assessable to excess profits tax in respect of that business. A seemingly contrary decision in *Binney* v. *Commissioner of Inland Revenue* (2) has now no bearing on the question since the legislation on which it was based has been altered. There should, in my opinion, be a finding similar to that in *Marsh* v. *Commissioner of Inland Revenue* (*supra*) on the facts of the present case, namely, that the appellant's activities as a commercial traveller constituted the carrying on of a business within the meaning of The Excess Profits Tax

(1) (1943) 1 All E R. 199. (2) (1920) 1 A.T.C. 155.

Act, 1940, and that his profits therefrom were subject to excess profits tax under it. If he had been operating for only one mill there would have been support for counsel's contention that he was merely an employee but the facts in their entirety are against it. The appellant was free to go and solicit orders as he saw fit for any one of the business concerns for whom he acted. He had his own car, as his claims for deduction of expenses show, and he paid his expenses himself. He operated from his own house and selected his own customers. His remuneration depended on his own efforts and their results. He was not subject to the direction or control of any one of the mills or business houses but was independent of them. He was his own master. The facts are inconsistent with his being merely an employee and consistent with his carrying on a business. I find that that is what he was doing. Counsel's argument that he was outside the ambit of the Act cannot, therefore, be sustained.

The next argument for the appellant was that if he was carrying on a business his profits therefrom were exempt from tax as being the profits of a profession pursuant to section 7(*b*) of the Act, which reads as follows:

> 7. The following profits shall not be liable to taxation under this Act:—
>
> (*b*) the profits of a profession carried on by an individual or by individuals in partnership if the profits of the profession are dependent wholly or mainly upon his or their personal qualifications and if in the opinion of the Minister little or no capital is employed: Provided that this exemption shall not extend to the profits of a commission agent or person any part of whose business consists in the making of contracts on behalf of others or the giving to other persons of advice of a commercial nature in connection with the making of contracts unless the Minister is satisfied that such agent is virtually in the position of an employee of one employer in which case this exemption shall apply and in any case the decision of the Minister shall be final and conclusive.

In *Lumbers* v. *Minister of National Revenue* (1) the rule to be applied in dealing with claims of exemption from income tax was put as follows:

> a taxpayer cannot succeed in claiming an exemption from income tax unless his claim comes clearly within the provisions of some exempting section of the Income War Tax Act; he must show that every constituent element necessary to the exemption is present in his case and that every condition required by the exempting section has been complied with.

(1) (1943) Ex. C.R. 202 at 211.

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Thus if the appellant is to succeed in his claim for exemption under the first part of section 7(*b*) he must show that he was carrying on a profession, that the profits sought to be charged were the profits of such profession and that such profits were dependent wholly or mainly upon his personal qualifications. The onus of proof of these matters, all of which are questions of fact, is on the appellant; if he fails in respect of any of them his appeal must be dismissed. In *Bower* v. *Minister of National Revenue* (1) I had occasion to consider section 7(*b*) of the Act and referred to several United Kingdom decisions on similar enactments there in which the meaning of the word "profession" was dealt with: *vide Commissioners of Inland Revenue* v. *Maxse* (2); *Currie* v. *Commissioner of Inland Revenue* (3); *Webster* v. *Commissioners of Inland Revenue* (4); *Carr* v. *Inland Revenue Commissioners* (5); and *Neild* v. *Commissioners of Inland Revenue* (6). I need refer particularly only to the statements of Lord Sterndale M. R. in the *Currie* case (*supra*), at page 335, and of Du Parcq L.J. in the *Carr* case (*supra*), at page 166, cited in the *Bower* case (*supra*). Having regard to the facts of the present case I have no hesitation in saying that even if all due allowance is made for the fact that the meaning of the word "profession" has been greatly enlarged so as to bring within its ambit occupations that were not previously regarded as professions it would be a distortion of it to say that it extends to the activities of a commercial traveller. Certainly the ordinary reasonable man, referred to by Du Parcq L.J., would not for a moment think that the occupation of a commercial traveller was a "profession". Moreover, the appellant has not shown that his profits, even if it were conceded that they are those of a profession, depended wholly or mainly upon his personal qualifications. When he was asked what his success as a commercial traveller depended upon he mentioned his personality, his ability to show his merchandise to the best advantage, his health and his experience but on cross-examination he stated that his merchandise was the most

(1) (1949) Ex. C.R. 61.
(2) (1919) 1 K.B. 647.
(3) (1921) 2 K.B. 332.
(4) (1942) 2 All E.R. 517.
(5) (1944) 2 All E.R. 163.
(6) (1946) 2 All E.R. 405; (1947) 1 All E.R. 480, (1948) 2 All E.R. 1071.

important factor in his success. In my view, the appellant has wholly failed to show that his claim for exemption comes within the ambit of section 7(*b*).

Since the assessments appealed against have not been shown to be erroneous either in fact or in law the appeals herein must be dismissed with costs.

Judgment accordingly.