

K. P. Bhargava vs Commissioner Of Income-Tax, U. P., ... on 12 April, 1954

Equivalent citations: [1954]26ITR489(ALL)

JUDGMENT

MALIK, C.J. - This is a reference under Section 21 of the Excess Profits Tax Act (XV of 1940) read with Section 66(1) of the Indian Income-tax Act (XI of 1922).

The question referred to us reads as follows :-

"Whether in the circumstances of the case and on a true interpretation of the agreement dated 8th December, 1935, between the applicant and the Central Bank of India, the Tribunal were right in law in holding that the income earned by the former as a guarantee commission agent and as a treasurer was income from business as defined in Section 2(5) of the Excess Profits Tax Act ?"

There was an agreement entered into between the assessee and the Central Bank of Indian Ltd., on the 8th of December, 1935, and the assessee was appointed treasurer and guarantee commission agent of the Bank at Agra and at other branches. The agreement is printed at page 5 of the statement of the case. For his work as treasurer the assessee was to get a remuneration of Rs. 100 per mensem. The duties that he was to perform as treasurer are set out in several paragraphs of the agreement. In paragraph 2 it is provided that the assessee shall engage and employ all such subordinate cashiers, sircars, munshies, writers, cash keepers, potdars and peons as may be necessary for the efficient working of the various branches of the bank. These persons were to be under his control and he was entitled to dismiss and change them at his pleasure with this limitation that he could not employ any one who had not been approved by the bank and was bound to dismiss any one whom the managing director or the agent of the bank required him to dismiss. It is not necessary to give in detail his other duties and liabilities as treasurer but we may mention that he was responsible for the correctness and genuineness of all hundies and cheques bearing vernacular signatures and endorsements, etc., and any loss caused to the bank for any forged signature or endorsement or any other forged instrument which came into his hands or into the hands of the cash department staff. He was also responsible as treasurer for the safe custody of all bullion, coin, cash, bank and currency notes, promissory notes, hundies, etc. In short, the duties assigned to him were that as treasurer he was put in charge of the cash department and was to be held responsible for any loss caused to the bank by his conduct or the conduct of the cash department staff, and that he was to make good any loss caused to the bank by the cashing of forged cheques or other such instruments and for payment of money to a wrong party.

The other work assigned to him was that of guarantee commission agent for which he was to get a commission. As a guarantee commission agent he had to recommend to the bank merchants and dealers who wanted to borrow money and if the bank accepted the names suggested, then they were

termed approved borrowers. If any money was advanced to an approved borrower and he failed to repay the loan, the bank could realise the amount from the guarantee commission agent. The guarantee commission agent was required to furnish a sum of Rs. 75,000 as security which was liable to be replenished whenever it was reduced by reason of a loan advanced to an approved borrower having had to be adjusted against the security. Any legal proceeding against the borrower was to be instituted at the cost of the assessee. All expenses incurred by the assessee in making enquiries about the solvency of the borrowers before recommending them had to be spent by him and he could not claim repayment from the bank. The staff had to be engaged by the assessee with the approval of the banks agent of Agra and Delhi, and except for the previous approval at the time of appointment the assessee had complete control over the staff. The bank agreed to pay the salary of all the employees appointed by the assessee as treasurer or guarantee commission agent with the approval of the bank at the rate mentioned in paragraph 18 so that if the assessee employed the staff at a higher rate, then he was to pay the balance himself and if the pay was less than the pay mentioned in paragraph 18 of the agreement, then the amount was assessee's own gain. The pay of the staff mentioned in paragraph 18, however, related only to the commission agency business, and for guaranteeing the work of the said staff the assessee was entitled to commission mentioned in paragraph 19.

The staff to be engaged for the commission agency business detailed in paragraph 17 consisted of cashiers, godown keepers, clerks, chowkidars and peons, and paragraphs 18 and 19 give the pay allowable to only godown keeper and cashier combined, godown keeper, literate chowkidar and illiterate chowkidar and commission payable to the assessee for guaranteeing their work. Those four posts were held by men in the commission agency business and not in the cash department.

Remuneration of the assessee is mentioned in paragraph 20. He was to get Rs. 100 for his work as treasurer and he was to get commission at a sliding scale for his work as guarantee commission agent.

The question, therefore, arises whether the work of the assessee as treasurer and guarantee commission agent is service, or is partly service and partly business, or the whole of it is business. The Appellate Tribunal has held that the whole of it is business.

Recently in several cases we had to consider whether the income could be classified as salary payable to a servant or was income from business. In a contract of service there are three basic concepts which must be borne in mind. A servant does the work for the master and the work done by him is, therefore, not his own. The control and supervision must necessarily be of the master and the servant is bound to work according to his directions. The servant works for remuneration which may be paid in a lump sum or on a commission basis or partly one and partly the other. The relationship of master and servant being, however, the result of a contract, it is possible to vary any or all the terms mentioned above by agreement, but the basic idea of the servant doing the work of the master for remuneration and under the supervision or control of the master is there. On the other hand, a person carrying on a business cannot be said to be doing the work of another; he has an interest in the business and can be said to be doing his own work. He is entitled to the profits and is liable for the losses and he also has a discretion to do his work in his own way. Even in the case of

a business agreement it is possible to vary all or any of these terms by contract and then the question whether it is a business or a contract of service becomes a difficult question, to be decided by taking into account all the facts and the totality of circumstances.

In the case before us so far as the work of treasurer is concerned there can be no doubt that the assessee had to work under the control of and in accordance with the directions given by the agent of the bank. It may be that by reason of the nature of the work certain special terms had been imposed to guard the interest of the bank against possible loss or carelessness on the part of the assessee or the subordinate staff maintained under his control, but so far as the other work of the commission agent is concerned the assessee's position appears to us to have been entirely different. It was open to the assessee to spend what he liked, to make such enquiries as he considered necessary and in any manner that he considered convenient and then recommend to the bank the names of persons who wanted to borrow money. It was open to the bank to accept the whole list or to reject the entire list and if the entire list was rejected the assessee would get nothing in return for the expenditure incurred by him in making enquiries about the solvency of the prospective borrowers whose names he had recommended to the bank. If the bank agreed to lend money to any of the persons recommended by the assessee, the assessee no doubt got a commission but he held himself responsible to the bank as a guarantor for the debtor and the bank was entitled to recover the debt from him and from the security money deposited by him and leave him to have recourse through the bank to a court of law to recover the money from the borrower. The assessee thus clearly took the risk of incurring loss in the loan transactions between the bank and the approved borrowers.

It is not necessary to discuss all the recent cases decided by this Court but we may refer to some of the cases that have been brought to our notice. The first case to which our attention has been drawn is the case of *L. N. Gadodia and Co. v. Commissioner of Income-tax, United and Central Provinces and Berar*. We have pointed out in that case that -

"The conditions relating to the payment of commission to Messrs. L. N. Gadodia and Company on direct sales, their liability for payment for all the goods on delivery thereof irrespective of the price being realised from the purchasers, their liability to take delivery in respect of accepted sales even if the purchasers failed to do so and their liability to meet expenses, commission and other charges which might be incurred in connection with direct sales by the Corporation in the event of unsold stocks of yarn or cloth reaching certain figures are all inconsistent with the relationship between a master and servant".

Many of the terms in the agreement now in question are very similar to the terms of the agreement that were considered by us in *Gadodia's* case.

Again, in *L. Jeewan Lal v. Commissioner of Income-tax, U. P.*, we discussed the various tests that might be applied in determining whether the contract was a contract of service or a commercial agreement between two businessmen. We pointed out that if the assessee is entitled to the profits and liable for the losses of a business and has the discretion as to how he has to carry it on, that is

inconsistent with contract of service. We also pointed out that the question of the control to be exercised in the carrying on of the business in one of the tests in determining whether the relationship is that of master and servant.

Two other case to which reference has been made are *Inderchand Hari Ram v. Commissioner of Income-tax, U. P. and C. P.*, and *P. Stanwill and Co. v. Commissioner of Income-tax, U. P.* In *Inderchand Hari Rams* case we pointed out that the managing agency of a limited company can be service or business according to the terms of the contract and in that connection pointed out the difference between the position of a servant and the position of an independent contracting party.

In *Stanwill and Companys* case it was pointed out that the question whether it was business or profession depended upon various circumstances and reliance was placed on the observations of Lord Sterndale, M. R., in *Currie v. Commissioners of Inland Revenue*, that between the two extremes "there was a very large tract of country in which the matter became a question of degree; and where that was the case the question was undoubtedly, in his opinion, one of fact".

It has been urged by learned counsel for the assessee that there being only one agreement between the assessee and the bank it is not possible to split it up into two parts and all the duties assigned to the assessee was in his capacity as treasurer of the bank and, therefore, as a servant of the bank. Learned counsel has urged that the salary of Rs. 100 per mensem plus the commission for the guarantee commission agency work must be deemed to be remuneration for service and not income from business. We do not see why the income cannot be split up into two parts merely because there is one agreement. The two capacities are clearly defined and the remuneration for each is separately specified. In *Commissioner of Inland Revenue v. Maxse*, the Court of Appeal held that the assessee must be deemed to have been carrying on the profession of a journalist and editor and income from such source was to be exempted from excess profits duty that his work as publisher was business for which he was liable for excess profits duty. In that case the assessee had purchased the paper and was doing the work of journalist, editor, as well as publisher and the income was split up into two parts for the purposes of assessment of the excess profits tax. In *Gadodias* case cited above we similarly held that though one part of the income was assessable as income from business, the other part was income from service.

Having considered the terms of the contract we are of the opinion that the pay of Rs. 100 per mensem received by the assessee as treasurer of the Central Bank of India Limited was salary received by him as servant of the bank, while the remuneration received by him for the work of guarantee commission agent was income from business as defined in Section 2 (5) of the Excess Profits Tax Act.

The assessee is liable to pay the costs of the other side which we assess at Rs. 400.

Reference answered accordingly.