

P. Stanwill & Co. Auctioneers, Cawnpore vs Commr. Of Income-Tax, U.P. & ... on 26 August, 1952

Equivalent citations: AIR1953ALL88, [1952]22ITR316(ALL), AIR 1953 ALLAHABAD 88

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Bench: V. Bhargava

JUDGMENT

Malik, C.J.

1. This is a reference under Section 21, Excess Profits Tax Act read with Section 66 (1), Income-tax Act. The assessee firm Messrs. P. Stanwill & Co. is a partnership firm and the partners work as auctioneers in the city of Kanpur. During the chargeable accounting period 1943.44 the assessee's income from this business amounted to Rs. 94,284. The Excess Profits Tax Officer considered that excess profits tax was leviable on the profits of the business made during the accounting period. The assessee, on the other hand, challenged their liability on the ground that they were carrying on a profession and the profits depended mainly upon their personal qualifications. A suggestion was also made on behalf of the department that the profession consisted wholly or mainly in the making of contracts on behalf of other persons. There were thus three points raised: firstly, whether the assessee carried on a profession; secondly, whether in that case the profits depended mainly on their personal qualifications and, lastly, whether the profession consisted wholly or mainly in the making of contracts on behalf of other persons.

2. The first and the third points were decided in favour of the assessee. The second point was decided against the assessee. The assessee alone asked for a reference to this Court.

3. The assessee formulated the question as follows:

"Whether in the circumstances of the case the activity of auctioneers conducted as profession did not depend wholly or mainly on the personal qualification of the partners?"

The Tribunal, however, changed the form of the question and the question referred to us is in these terms :

"Whether in the circumstances of the case, the income of the applicant derived from their activity of auctioneer's profession depend wholly or mainly on the personal qualifications of the partners of their firm as contemplated by Section 2 (6)?"

4. Learned counsel for the assessee has urged that the Tribunal in deciding the question whether the income of the assessee depended mainly on the personal qualifications of the partners of the assessee firm has not based its finding on the facts found by it in its appellate order but has decided the question on the general but irrelevant consideration that in India auctioneering is not a profession which required any particular qualification and there being no law requiring a person to take out a licence any one may set himself up as an auctioneer.

5. The relevant portion of Section 2 (5), Excess Profits Tax Act provides that "unless there is anything repugnant in the subject or context-

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'business' inducing any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture or any profession or Vocation, but does not include a profession carried on by an individual or by individuals in partnership if the profits of the profession depend wholly or mainly on his or their personal qualifications unless such profession consists wholly or mainly in the making of contracts on behalf of other persons or the giving to other persons of advice of a commercial nature in connection with the making of contracts"

The reason for exempting from payment of Excess Profits Tax the profits made which depend wholly or mainly on the personal qualifications of the person making the profit is obvious. The primary object of the Excess Profits Tax Act was to deal with increased profits made due to war conditions. If, however, the profits did not depend upon the war conditions but depended mainly on the personal qualifications of the person making it, there was no reason why it should be subjected to Excess Profits Tax.

6. As we have already said, the Tribunal has held that the business of an auctioneer is a profession. As the question whether the assessee was carrying on a profession was not referred to us, it is not necessary to go at any length into that question, but it may be pointed out that the main difference between ordinary commercial business and profession lies in the amount of knowledge or skill employed in carrying it on though that may not be sole criterion. As was pointed out by Rowlatt J. in *Christopher Barker & Sons v. Inland Revenue Commissioners*, (1919) 2 K. B. 222 :

"every businessman has to use skill and ability in the conduct of his business and, therefore, those qualities are not distinguishing marks of a profession."

The learned Judge in attempting to point out the difference says :

"All professions are businesses, but all businesses are not professions, and it is only some businesses which are taken out of the operation of the section, namely, those

are professions, the profits of which are dependent mainly upon personal qualifications and in which no capital expenditure is required or only capital expenditure of a comparatively small amount."

In *William Esplen, Son & Swainston, Ltd, v. Commissioners of Inland Revenue*, (1919) 2 K. b. 731, the same learned Judge again said :

"it is of the essence of a profession that the profits should be dependent mainly upon the personal qualifications of the person by whom it is carried on"

Scrutton L. J. in The Commissioner of Inland Revenue v. Maxse, (1921) 21 Tax Cas. 41 attempted, though with considerable diffidence, to define what is a 'profession' and said :

"I am very reluctant finally to propound a comprehensive definition. A set of facts not present to the mind of the judicial propounder, and not raised in the case before him, may immediately arise to confound his proposition. But it seems to me, as at present advised, that a 'profession' in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or if any manual skill, as in painting and sculpture, or surgery, skill controlled by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production, or sale, or arrangements for the production or sale of commodities. The line of demarcation may vary from time to time. The word 'profession' used to be confined to the three learned professions --the Church, Medicine and Law. It has now, I think, a wider meaning"

7. In *Currie v. Commissioners of Inland Revenue*, (1921) 2 K. B. 332, Lord Sterndale, M. R. pointed out that "whether it man was carrying on a 'profession' or a 'business' depended upon the circumstances of the case and there might be circumstances in which nobody could arrive at any other conclusion than that what the marl was doing was carrying on a profession; and, therefore, looking at the matter from the point of view of a Judge directing a jury, the Judge would be bound to direct them that on the facts they could only find that he was carrying on a profession. That reduces it to a question of law. On the other hand, there might be facts on which the direction would have to be given the other way. But between those 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; and if the Commissioners came to a conclusion of fact without having applied any wrong principle, then their decision was final upon the matter."

8. That view was followed by the Court of Appeal in *Carr v. Inland Revenue Commissioners*, (1944) 2 K. B. 163.

9. From an examination of these decisions it follows that a certain amount of skill and know-ledge is required in every business; in a profession it is required in a larger degree, though that may, not be the sole criterion for judging whether a particular business is a profession or not.

10. It is urged that an auctioneer's business requires special skill and the personal factor goes a long way to make it a success and reliance is placed on Halsbury's Laws of England, 2nd Edn., vol. I, p. 695 where it is said :

"The licence is of a personal character, and every member of a firm of auctioneers who exercises or carries on the trade or business of an auctioneer or acts as such must take out a separate and distinct licence . . ."

And again at page 697 where it is said that "The agency of the auctioneer is personal and cannot be delegated." At page 705 of the same book it is pointed out that an auctioneer is held liable for negligence and at page 711 the passage is as follows :

"An auctioneer, being a person who professes to carry on a business requiring skill and knowledge, must display such skill and knowledge in acting for his vendor as is reasonably to be expected from competent auctioneers and must follow the course of business ordinarily recognised by custom or prescribed by statute . . ."

11. There can, therefore, be no doubt that an auctioneer's business is recognised in England as a business requiring personal skill to be carried on by the person who has been engaged for the purpose by his customer and a personal licence has to be taken out by every member of the firm of auctioneers before they can work as such. The Tribunal has relied on the fact that in India no licence is needed for the work of an auctioneer. It is urged in reply that to practise any of the indigenous systems of medicine or even homoeopathy it is not necessary to be a registered practitioner in India and yet it cannot be urged that the work of a Kaviraj or Hakim or that of a doctor practising homoeopathy is not a profession. Learned counsel has, therefore, pointed out that the mere fact that there is no statutory provision yet setting out the requirements for carrying on the business of an auctioneer does not make it any the less a business requiring skill and knowledge.

12. The question whether the profits in the case before us mainly depended upon the personal qualifications of the partners of the assessee firm would depend upon the facts and circumstances of the case. The point was raised before the Appellate Tribunal and the circumstances were clearly set out on behalf of the assessee why the assessee claimed that the profits were mainly due to the personal qualifications of the partners.

The facts and circumstances relied on by the assessee were that the assessee firm was an old firm and the partners thereof had acquired considerable experience in this line; that one of them was a qualified engineer which enabled him to do the work of valuing the property and carrying on the business more efficiently than it could be carried on by any person not so qualified; that by reason of the efficient manner in which they were able to discharge their duties they had attracted a lot of Government work and, out of the total profits amounting to Rs. 94,284, Rs. 70,308 were derived from income made by sale of Government properties; and, lastly, that though there were several firms of auctioneers in Kanpur, they had done much better than other firms which must be due to their personal qualifications. As against this it is pointed out that there is nothing on behalf of the Department to show that there was any increase in business or income due to war conditions.

13. The facts and circumstances relied on by the assessee do not seem to have been challenged before the Tribunal except that, while the assessee claimed that the business had been carried on for two generations, on behalf of the Department it was admitted that from the assessment records available it was clear that the firm had been assessed to income-tax at least since 1929-30.

14. The Tribunal, however, decided the point against the assessee, not on the facts of this particular case, but in the view that it took that in India no special qualifications were needed to set oneself up as an auctioneer.

15. Sri Jagdish Swamp on behalf of the Department has relied on the seventh paragraph of the appellate order of the Tribunal in which the Tribunal held that though in a sense they were exercising a profession but it was not one the income of which depended on personal qualifications of its partners. This finding was, however, not recorded, as would be apparent from the previous two paragraphs of the appellate order, on the facts and circumstances of the particular case, but on the reasoning that in India anybody can set himself up as an auctioneer and he need not possess any qualification to be able to carry on that business.

16. When the application under Section 21, Excess Profits tax Act was heard by the Tribunal an objection was raised on behalf of the Department that the case did not raise a question of law but a question of fact and the Tribunal took the view that the point raised was ft question of law as the point was not decided on the facts of the particular case but on the general view that no special qualifications being required for setting up the business of an auctioneer the assessee could not claim that the main part of their income depended on their personal qualifications.

17. The income of an auctioneer depends mainly on the amount of business that the firm can attract, the price at which it succeeds in selling the goods find the rate at which commission is payable on the sale proceeds. All these are factors requiring or depending on personal skill and prima facie, it is not possible to say that the business of an auctioneer does not require any personal qualifications for its being carried out successfully. It may be that anybody can set up the business, as no restrictions have yet been imposed, but so far as the assessee firm is concerned, there can be no doubt that the circumstances relied on by them could lead to the conclusion that the main part of their profits depended on the personal qualifications of the partners and the Tribunal erred in rejecting the contention on general grounds. On the facts and circumstances stated by us above, which appear from the appellate order of the Tribunal and the statement of the case, in our view it is possible to come to the conclusion that the income of the assessee depended mainly on the personal qualifications of the partners as contemplated by Section 2 (5). That is our answer to the question referred to us.

18. The assessee is entitled to its costs which we fix at Rs. 500.