

1960

Present: de Silva, J., and Sansoni, J.

PEIRIS, Appellant, and COMMISSIONER OF INCOME TAX,
Respondent

S. C. 1—Income Tax Case No. BRA. 261

Income tax—Cessation of employment—Meaning of word “employment”—Income Tax Ordinance (Cap. 188), ss. 11 (6) (a), 11 (6B).

When a person goes over to a new employer but continues to do the same kind of work, he cannot be said to cease to carry on an employment within the meaning of section 11 (6) of the Income Tax Ordinance (Cap. 188) when he leaves his former employer. In such a case, the word “employment” is synonymous with business or occupation, and does not indicate a particular contract of service under a particular master.

The assessee, who was a Visiting Surgeon of the General Hospital, Colombo, from 1936 and a Visiting Lecturer of the University of Ceylon from 1942, was paid a salary by the Ceylon Government for the work done by him as Visiting Surgeon, and by the University for his work as a Visiting Lecturer. The

Public Service Commission released his services and he was seconded for service with the University as Professor of Surgery from 1st June 1952. There was no material change in the manner in which he was employed after he was appointed Professor.

Held, (i) that the assessee did not cease to be employed under the Government inasmuch as he was only seconded for service in the University.

(ii) that, even if the assessee ceased to be a Government servant on 1st June 1952, he did not cease to carry on an employment on that date. At most he merely changed his employer.

CASE stated under section 74 of the Income Tax Ordinance (Cap. 188).

S. Ambalavanar, with *F. X. J. Rasanayagam*, for Appellant.

A. C. Alles, Acting Solicitor-General, with *A. Mahendrarajah*, Crown Counsel, for the Respondent.

Cur. adv. vult.

October 11, 1960. SANSONI, J.—

This is a case stated by the Board of Review under the provisions of Section 74 of the Income Tax Ordinance, Chapter 188, at the request of the assessee, Dr. M. V. P. Peiris.

From 1936, he was a Visiting Surgeon of the General Hospital, Colombo and also a Visiting Lecturer, first of the Ceylon Medical College, and from 1942 of the University of Ceylon. He was paid a salary by the Ceylon Government for the work done as Visiting Surgeon, and by the University for his work as a Visiting Lecturer. The Public Service Commission released his services and he was seconded for service with the University from 1st June 1952.

During the period of secondment, the Government could have asked him to resume his service under the Government, and he had the right to go back to Government service of his own accord. By arrangement between the Government and the University his pension rights were preserved, the University making a contribution for the period he served under it. It has also been found by the Board of Review that prior to 1st June, 1952 as Visiting Surgeon the assessee had to work in the Out-Patients Department Clinic on certain days, and had 85 beds allocated to him in the General Hospital; and as Visiting Lecturer he had a certain number of students allotted to him, and they received instruction from him in the Clinic and also followed his operations and post-operative treatment. After 1st June, 1952 also, as Professor of Surgery he had to work at the Out-Patients' Department Clinic on certain days, and he also had to work as a Surgeon at the Hospital where he had 65 beds allocated to him. His students received instruction from him just as they had done prior to 1st June, 1952.

The assessee claimed that there was a cessation of employment in terms of section 11 (6) (a) of the Ordinance, when he ceased to be a Visiting Surgeon and assumed duties as Professor of Surgery. The material provisions read :

11. (6) Where a person whether resident or non-resident ceases to carry on or exercise a trade, business, profession, vocation, or employment in Ceylon, or, being a resident person, elsewhere, his statutory income therefrom shall be—

(a) as regards the year of assessment in which the cessation occurs, the amount of the profits of the period beginning on the first day of April in that year and ending on the date of cessation ; and

(b) as regards the year of assessment preceding that in which the cessation occurs, the amount of the statutory income as computed in accordance with the foregoing sub-sections, or the amount of the profits of such year, whichever is the greater,

and he shall not be deemed to derive statutory income from such trade, business, profession, vocation, or employment for the year of assessment following that in which the cessation occurs.

The Board of Review held against him on the grounds (1) that he did not cease to be employed under the Government inasmuch as he was only seconded for service in the University, and (2) that even if it be assumed that he terminated his services under the Government when he became Professor of Surgery, he did not cease to carry on an employment, because there was no material change in the manner in which he was employed after he was appointed Professor.

I think that on both points the decision of the Board of Review was correct. With regard to the period of secondment, it would seem that no pension was paid to the assessee ; it was merely a temporary arrangement whereby the assessee worked in the University of Ceylon until such time as he or the Government chose to terminate that arrangement, if either party desired to do so.

The more important question, however, is whether, even if the assessee ceased to be a Government servant on 1st June, 1952 it could be said that he ceased to carry on an employment on that date, either on the ground that there was a radical change in the nature of his employment or on the ground that he was working for a new employer. The former is a question of fact and I have already referred to the finding of the Board that there was no material change in the nature of the work done by the assessee. That finding must be upheld. We are then left with the question of law whether, when a person goes over to a new employer but continues to do the same kind of work, he can be said to cease to carry on an employment when he leaves his former employer. On this question we are bound by the decision in *Commissioner of Income Tax v. Rodger*¹.

¹ (1933) 35 N. L. R. 169.

Although Drieberg, J. had to deal in that case with the meaning of the word 'employment' in section 11 (4) and we are dealing with the meaning of the word in section 11 (6), that decision binds us because the principle underlying it is applicable to both cases. The word was held to mean that on which a person is employed, and to be synonymous with business or occupation, and not to indicate a particular contract of service under a particular master.

Mr. Ambalavanar sought to distinguish that case on its facts from the present case, but I can see no distinction between the two in this respect. He was also constrained to argue that the decision was wrong in principle, and his main argument was that it overlooks the scheme of the Ordinance whereby, in the machinery of assessment, each employer is regarded as a separate and distinct source of income so that on a cessation of a particular contract of employment the source ceases. Drieberg, J. has not overlooked this question of source in his judgment, and it seems to me that the meaning one gives to the word 'employment' in the particular sub-section decides the question. This judgment was followed in *Rowan v. Commissioner of Income Tax*¹, where Poyser, J. applying the reasoning of Drieberg, J. that an accountant commences an employment as an accountant when he first begins to do the work of an accountant, taking remuneration for his services, held that a proctor who was employed on a salary does not cease to carry on an employment as a proctor when he is admitted as a partner of a firm of proctors.

Finally, Mr. Ambalavanar submitted that the case was governed by section 11 (6B) which was added to the Ordinance in 1939 and reads :

11. (6B) For the purposes of this section, a person shall be deemed to carry on or exercise an employment notwithstanding that he carries on or exercises a trade, business, profession or vocation if such trade, business, profession or vocation is carried on or exercised by him as the employee of another and not on his own account or in partnership with another ; and a person so deemed to carry on or exercise an employment shall be deemed to commence or cease to carry on or exercise such employment when he commences or ceases to be such an employee :

Provided that if a person who is so deemed to carry on or exercise an employment carries on or exercises, in addition to such employment, any trade, business, profession or vocation on his own account or in partnership with another, the profits arising from such trade, business, profession or vocation shall be assessed as profits from a separate source.

I do not think that this provision helps the assessee, and I agree with the decision of the Board on this point also. It deals with the case of a person who carries on or exercises a trade, business, profession or vocation as an employee of another, not on his own account or in partnership with another, and then ceases to do so. Such a person is deemed (1) to carry on or exercise an employment; and (2) to commence or cease to carry on or

¹ (1939) 40 N. L. R. 4.

exercise it when, he commences or ceases to be employed by another. Since the assessee in this case did not cease to be an employee of another during the years of assessment under consideration, but at most merely changed his employer, the sub-section has no application to this case. In my view the sub-section left the decision in *Rodger's case (supra)* unaffected, though it probably nullified the effect of the decision in *Rowan's case (supra)*.

The appeal is dismissed with costs.

DE SILVA, J.—I agree.

Appeal dismissed.

