

1933

Present : Drieberg J. and Barber A.J.

COMMISSIONER OF INCOME TAX v. RODGER.

D. C. (Inty.) Colombo No. 105/1933 Special.

Income tax—Assessment of income—Change of employer but not employment—Meaning of words “Commence an employment”—Ordinance No. 2 of 1932, s. 11 (4).

Where a person goes over to a new employer within a year preceding the year of assessment but continues in the same kind of employment, he does not “commence to carry on an employment” within the meaning of section 11 (4) of the Income Tax Ordinance.

CASE stated under the provisions of section 74 of the Income Tax Ordinance of 1932 regarding the assessment of the income of the assessee for the year April 1, 1932, to March 31, 1933. The assessee, an accountant by profession, was employed by Brown & Company, on a salary of Rs. 400 per month from April 1, 1931, to February 28, 1932. On March 1, 1932, he joined Walker & Greig, also as accountant on a salary of Rs. 650 a month. His income was assessed at Rs. 7,800. The question submitted was whether the assessee in entering the service of Walker & Greig on March 1, commenced an employment on that date so as to bring him within the provisions of section 11 (4) of the Income Tax Ordinance.

L. M. D. de Silva, K.C., S.-G. (with him Wendt, C.C.), for appellant.—The question is whether the respondent ceased one employment and commenced another within section 11 (4). It is necessary to examine the object which section 11 was intended to achieve. Section 11 (1) sets out the general rule. The tax is to be paid on the income of the year before the year of assessment. The ideal method of assessment is the actual income earned during the year of assessment. That is not possible. Therefore the preceding year is made the test. But in certain specified instances an attempt is made to approximate as closely as possible the income of the year of assessment. Sub-section (6), for example, provides for cases where a person ceases an employment during the year of assessment. The income for the preceding year is not considered but the actual income for the year of assessment is taxed.

[DRIEBERG J.—If in the same employment his salary was raised he would be taxed on the total income for the year ?]

Yes.

[DRIEBERG J.—But if he changes his employer he is taxed upon another basis ?]

Yes. The question for decision is whether the section applies only to cases where a person commences a business on employment in Ceylon for the first time or whether it is applicable to cases where a person changes an employer but continues in the same kind of employment. To determine what an employment is, one has to consider the object

of the section. The word 'employment' in England is used in an entirely different meaning, and English decisions will not be of any help. The words of the Ordinance are "Commence to carry on an employment", not "Commence employment". 'Employment' can be used merely to indicate that a person is doing something, e.g., section 114 of the Criminal Procedure Code uses the word in that sense. The word 'an' takes it out of that sense in the Income Tax Ordinance. An employer from the point of view of 'an' employment is an essential ingredient. If you change employers you change *an* employment. If the word is used in this specific sense then the respondent has changed his employment. Suppose the respondent had been dismissed by his employer. Could it not be said that his employment had ceased? Then if he was subsequently re-employed would he not commence an employment? The only other change possible is a change in the nature of the employment. But they are both equally essential ingredients in the definition of an employment.

[BARBER J.—Does not the word 'Commence' mean 'first engages in'?]

No. It is true that when a man first engages in he commences. But that is not exhaustive. A re-commencement is also a commencement. When a man has ceased activity altogether and starts again he commences.

Respondent in person.—My business is that of an accountant and nothing else. There cannot be a change of employment without a change in the nature of the employment. Take the case of a proctor. If a proctor practising in Kandy decides to come to Colombo, it cannot be said that he had changed his profession. My position is precisely similar. There has been only a change of employers. The employment is the same. There is no difference for example between paying a fee for an audit and employment on a monthly salary. The method of remuneration is immaterial. Chartered Accountants are often employed by a number of firms to do their work regularly. If they are employed by another business firm they do not commence an employment. If the legislature wanted to indicate that the test was the change of employers, it could easily have done so. There can be a change in the nature of the employment without a change of employers.¹

Solicitor-General, in reply, referred to *Selden v. Johnson*.²

August 28, 1933. DRIEBERG J.—

This is a case stated by the Board of Review under the provisions of section 74 of the Income Tax Ordinance of 1932. The question is regarding the assessment of the income of the assessee for the year from April 1, 1932, to March 31, 1933. He is an Associate of the Chartered Institute of Secretaries and an accountant by profession and in the year preceding the year of assessment he was employed from April 1, 1931, to February 28, 1932, by Brown & Company, Limited, as accountant on a salary of Rs. 400 a month; on March 1, he joined Walker & Greig, Limited, as accountant on a salary of Rs. 650 a month.

¹ (1932) *Tax Cases* 126.

² (1932) 1 *K. B.* 759.

Brown & Company, Limited, and Walker & Greig, Limited, are not connected concerns but are independent companies. His income was assessed at Rs. 7,800, that is, on the basis of a monthly salary of Rs. 650. It was contended by the Income Tax Commissioner that in taking service under Walker & Greig, Limited, he had commenced an employment within a year preceding the year of assessment, that is on March 1, 1932, and that as provided by section 11 (4) of the Ordinance, his statutory income for the year of assessment was his profits for one year from that date and that he was liable to pay on an income of Rs. 7,800. The assessee contended that his statutory income for the year of assessment was the income actually received by him during the preceding year; this amounted to Rs. 5,050, eleven months' salary under Brown & Company at Rs. 400 a month and one month's salary under Walker & Greig, Limited, at Rs. 650. The Board of Review held in favour of the assessee and annulled the assessment under section 11 (4). At the request of the Commissioner the Board have stated a case which is shortly this—Did the assessee in entering the service of Walker & Greig, Limited, on March 1, 1932, commence an employment in Ceylon on that day so as to bring him within the provisions of section 11 (4) of the Ordinance?

Sub-section (4) of section 11 is one of several exceptions to the general manner of assessment laid down in sub-section (1) and it is necessary to consider the basis of assessment.

Section 11 (1) enacts that "Save as provided in this section, the statutory income of every person for each year of assessment from each source of his profits and income in respect of which tax is charged by this Ordinance shall be the full amount of the profits or income which was derived by him or arose or accrued to his benefit from such source during the year preceding the year of assessment, notwithstanding that he may have ceased to possess such source or that such source may have ceased to produce income."

We have two years to consider. The year of assessment "and the preceding year". A person is not taxed on the income of the preceding year as such but on his income for the year of assessment, and by an arbitrary rule his income for the preceding year is accepted as his income for the year of assessment: you do not tax the income of the preceding year but you tax the income of the year of assessment and measure that income by that of the preceding year.

There are exceptions to this mode of assessment; provision is made in sub-section (6) for a cessation of income, occurring during the year of assessment or during the preceding year, where it is due to the assessee ceasing to carry on a trade, business, profession, vocation, or employment in Ceylon; sub-sections (7) and (8) deal with incomes, from sources other than those stated in sub-section (6), of persons who become resident or cease to be resident on a day within the year of assessment or on a day within the preceding year. Sub-section (9) provides for death within the year of assessment, and sub-section (10) deals with the assessment of income where a person receives a capital sum from the estate of a deceased person within a year of assessment.

I have mentioned these exceptions before referring to those dealt with in sub-sections (3) and (4) which deal with incomes from a certain source and which begin at a certain stated point of time. These are incomes derived from a "trade, business, profession, vocation, or employment in Ceylon" which a person has "commenced to carry on or exercise" on a day within a year of assessment (sub-section (3)), or on a day within the year preceding a year of assessment (sub-section (4)). The Income Tax Commissioner claims that the case falls within sub-section (4) which is as follows:—"Where on a day within the year preceding a year of assessment any person whether resident or non-resident has commenced to carry on or exercise a trade, business, profession, vocation, or employment in Ceylon, or, being a resident person, elsewhere, his statutory income therefrom for that year of assessment shall be the amount of the profits for one year from such day." If the assessee when he entered the service of Walker & Greig, Limited, commenced an employment within the meaning of this sub-section, then his statutory income for the year of assessment commencing on April 1, 1932, would be the profits, which is another word for income, for one year from March 1, 1932, at the rate of Rs. 650 a month. The Commissioner contends that this is so, while the assessee says that he did not commence an employment when he entered the service of Walker & Greig, Limited, but that he did so when he first began to practice the profession or calling of an accountant.

The decision depends on the meaning of the word employment in this sub-section. According to ordinary usage it may mean that on which a person is employed and is synonymous with business or occupation; it is also used to indicate a particular contract of service under a particular master.

In the English Income Tax Act the word is used in both senses. Schedule D deals with "The annual profits or gains arising or accruing from any trade, profession, employment, or vocation", and Schedule E deals with the incomes of persons "having or exercising an office or employment of profit". The distinction in the use of the word employment was explained by Rowlatt J. in *Davies v. Braithwaite*¹. The word as used in Schedule D means the way in which a man employs himself, and in Schedule E it means something analogous to an office. We are asked to apply the latter meaning to the word in sub-section (4).

Little help can be obtained by considering the meaning given to the word in other statutes, and, as I have said, according to ordinary usage both meanings are possible. The learned Solicitor-General pointed out the reasonableness of the construction he contended for. He said that if the assessee had taken employment under Walker & Greig, Limited, not on a higher but on a reduced salary, let us say of Rs. 200 a month, he would have been assessed on a statutory income of Rs. 2,400, though the income actually received by him during the preceding year would have been Rs. 4,600. While I agree with him that there is nothing unfair or unreasonable if the assessment is made on that basis, I do not think that is the right construction of this sub-section. There can be no question when a person commences to carry on or exercise a trade, business, profession, or vocation; in the case of a doctor, for example,

¹ (1931) 2 K. B. 694.

it would be the time when he first treats patients. It is contended, however, that a person may begin to practice a profession and later, while continuing to do so, "commence an employment" in the sense of an office of profit; for example, a doctor might follow his profession privately and while doing so accept a salaried office as a doctor. He can rightly be said to commence an employment when he accepts that post. But I do not think the word 'employment' is here used in that sense to indicate a particular contract of service but that it refers to occupations other than trades, businesses, professions, or vocations. The assessee must be regarded as having commenced an employment as an accountant not when he took an appointment as such under Walker & Greig, Limited, but when he first began to do the work of an accountant taking remuneration for his services, and this he had begun to do before the year preceding the year of assessment.

The members of the Board of Review were of opinion that section 11 (4) only applied to the case of persons who had come out to Ceylon and commenced employment in Ceylon, for the first time, within the year preceding the year of assessment. This is not correct, for the section deals with the commencement of employment by a person, whether resident in Ceylon or not.

This sub-section and sub-section (3), which deals with commencement on a day within the year of assessment, provide for trades and other activities, regarded as sources of income, when they "first sail within the ambit of the Income Tax Act," to use the words of Rowlatt J. in *Fry (H. M. Inspector of Taxes) v. Burma Corporation, Limited*.¹

Sub-section (5) deals with the same source of income as sub-sections (3) and (4) and provides that, where the "commencement" was within two years preceding the year of assessment, the Commissioner, on application made to him within twelve months of the year of assessment, shall reduce the assessment to the actual income earned during the year of assessment. It appears to me that this is based on a recognition of the fact that the stability of incomes from such sources cannot be assumed and that the income of the preceding year is not as safe as an estimate of that of the year of assessment as in the case of occupations followed for a longer period before the year of assessment. I do not think this sub-section was intended to apply to persons who have for a long period been engaged on an occupation of a certain nature but who, within two years of the year of assessment, had a variation in income on going over to a new employer.

The assessment by the Board of Review of the assessee's income for the year 1932—1933 on the basis of his income for the year preceding the year of assessment is confirmed.

I make no order regarding costs.

BARBER A.J.—I agree.

Appeal dismissed.

¹ 15 Tax Cases 113 at page 116.