

1961

Present: Sansoni, J., and Tambiah, J.

J. A. P. ZEBEDEE FERNANDO & CO., Appellant, and
THE COMMISSIONER OF INLAND REVENUE, Respondent

S. C. 7/60—Income Tax Case Stated BRA/281

Income tax—Profits of a non-resident person carrying on a wholesale business in Ceylon—Computation—Assessment of income tax due from such profits—Income Tax Ordinance, ss. 34 (1), 36 (3), 37, 65 (2) (b).

Where a person in Ceylon, acting on behalf of a non-resident person, sells by wholesale any property manufactured by the non-resident person outside Ceylon, proviso (a) to section 34 (1) of the Income Tax Ordinance is applicable and, for the purpose of income tax, the profit made by such sale is deemed to be not more than the profit which might reasonably be expected to be made by a merchant selling the property by wholesale in Ceylon. The merchant contemplated in the proviso to section 34 (1) is not a merchant who buys from a non-resident manufacturer and sells the commodity in Ceylon, but any merchant who sells it by wholesale in Ceylon.

Accordingly, evidence of the rate of commission paid to an agent cannot be used as a basis of measure of the profits of a merchant contemplated in proviso (a) to section 34 (1).

CASE stated under section 74 (1) of the Income Tax Ordinance.

H. V. Perera, Q.C., with S. Ambalavaner, for the Assessee-Appellant.

A. Mahendrarajah, Crown Counsel, with M. Kanagasunderam, Crown Counsel, for the Commissioner of Inland Revenue, Respondent.

Cur. adv. vult.

February 15, 1961. TAMBIAH, J.—

This is a case stated for the opinion of this Court by the Board of Review under section 74 (1) of the Income Tax Ordinance. The Appellant-assessee is an agent in Ceylon for a large number of non-residents who carry on a business in Ceylon in the sale of dry fish by wholesale. It is common ground that the dry fish is made by these non-residents outside Ceylon. The Appellant as agent for the non-resident consignors sold by wholesale the consignment of dry fish received in Ceylon and remitted the proceeds of the sale to the consignors abroad, and received a commission on such sales, which ranged from 4 per cent. to 6 per cent.

The assessee has shown the amounts he has received by way of commission in the returns sent by the partners of the business, but none of the non-resident consignors of dry fish carrying on business in Ceylon have produced any books of accounts or other documents from which the taxes due could be assessed.

It is also common ground that the Commissioner of Income Tax, acting under section 37 of the Income Tax Ordinance, up to and including the year of assessment 1953-54, assessed the profits of the non-resident consignors at 5 per cent of the turn over of the business in Ceylon.

When the assessment made under section 37 was increased in respect of the year of assessment 1953-54 five of the non-resident consignors of dry fish appealed to the Commissioner of Inland Revenue against the increased assessment. At the hearing of the appeal against the increased assessment for the year 1953-54, the Commissioner for Inland Revenue made the following order :—

“ Assessment to be revised estimating profits at 5 per cent of the turn over as previously. Separate assessments to be issued for non-residents with income over Rs. 10,000/- and for those with income below Rs. 1,000/-. I inform appellants that as from the year of assessment 1954-55 profits will be estimated at 7 per cent and for subsequent years at 10 per cent of the turn over.”

On 1.4.54 the Assessor sent a circular to all the agents of the non-resident consignors carrying on business in Ceylon stating that unless detailed accounts were submitted he would assess the profits at the rate of 7 per cent and 10 per cent of the turn over for the assessment years 1954-55 and 1955-56 respectively. As to the propriety of the arbitrary imposition in advance of taxes not yet fallen due I shall comment later. The assessee and all others to whom the circular was sent did not, however, produce any accounts of the business done by them for their non-resident principals. The assessor made an assessment of the profits made in Ceylon by the non-residents for whom the assessee acted as agent, under section 37 of the Income Tax Ordinance, and fixed the assessment of profits at 7 per cent of the turn over for the year of assessment 1954-55 and at 10 per cent of the turn over for the year of assessment 1955-56 and 1956-57. The assessee appealed to the Commissioner of Inland Revenue against the assessment made, and the appeal was heard by an authorised adjudicator. Before the adjudicator the assessee produced a statement (marked A1) which was prepared by the assessee's accountant, who was also the accountant of the firms referred to in A1. The firms referred to in A1 are traders in dry fish who purchase the commodity from importers and sell by wholesale. The adjudicator confirmed the assessment of the assessor and the appellant appealed to the Board of Review from the decision of the adjudicator.

At the hearing of the appeal before the Board the following contentions were made on behalf of the assessee :—

- (1) An assessment made under section 37 of the Income Tax Ordinance is subject to the limitation placed by section 34 of the Ordinance.

- (2) The statement A1 was evidence that the profit made in Ceylon by a wholesale dealer in dry fish was 3 per cent to 5 per cent of the turn over. Non-resident consignors who carry on a wholesale business in Ceylon should not exceed 5 per cent of the turn over.

On behalf of the Commissioner of Inland Revenue it was contended that :—

- (1) The proviso to section 34 of the Income Tax Ordinance applies only to non-residents who manufacture the goods sold outside Ceylon, and export the manufactured goods to Ceylon and sell the imported goods by wholesale in Ceylon.
- (2) The profit made in Ceylon by a non-resident manufacturer who exports the manufactured goods to Ceylon and sells the same by wholesale is deemed to be the profit made on the same goods by a merchant selling the property by wholesale. This profit would be that made by a merchant in Ceylon who imports the same goods and sells by wholesale.
- (3) The firms referred to in the statement A1 are not importers of dry fish who sell by wholesale. The profit made by the firms mentioned in A1 is not evidence of the profit made in Ceylon by the non-resident importers who sell dry fish by wholesale.
- (4) The non-residents paid a commission of 4 per cent to 6 per cent on the turn over to their agents in Ceylon. In the absence of any other evidence of the true amount of the profits made by the non-residents, the computation of their profit at 7 per cent of the turn over for the year 1954–55 and 10 per cent of the turn over for the subsequent years was a fair assessment.

The Board of Review, after setting out the facts and the proviso to section 34 of the Income Tax Ordinance, stated as follows :—

“ The non-resident consignors chargeable with tax in this case are importers who sell wholesale and are accepted for the purpose of this appeal as manufacturers or producers of the dry fish. The firms mentioned in A1 purchase from importers and sell wholesale. Manufactured goods may pass through the hands of many persons before these reach the consumer. The profit made by any one of these intermediaries cannot be based on the profit made by a subsequent intermediary. The proviso to section 34 does not sanction such an assessment to tax. If the income of an importer selling wholesale has to be assessed on the income of another it must be the income of a person in a comparable position in the same trade. It must be the income of another importer selling wholesale dry fish of the same nature and quality and on identical commission. We are therefore of opinion that the assessor was right in not acting on the information in A1 ”.

The Board confirmed the assessment of the assessor on the ground that the non-resident consignors of dry fish carrying on wholesale business in Ceylon had, by not submitting their accounts, failed to discharge the burden of proving that the assessment was excessive.

The case stated for the opinion of this Court raises the following points, as set out in B2 :—

1. Whether the Board of Review has misdirected itself in holding that the evidence led by the appellant as to the profits of a merchant selling the property by wholesale was not that of the merchant contemplated under section 34 (1), proviso (a).
2. Even if the evidence led did not relate to the merchant contemplated under section 34 (1) proviso (a), should not the next best and only evidence led as to the profits of a merchant trading wholesale be accepted.
3. Whether evidence of the rate of commission paid to an agent can be used as a basis of measure of the profits of a merchant contemplated in section 34 (1) proviso (a) and, if not, whether the only inference that can be drawn is that appellant's evidence stands unchallenged and should be accepted.
4. Whether the assessment made on the basis of a ruling by the Commissioner of Inland Revenue and not on any disclosed evidence as to the profits of a merchant trading wholesale can be sustained.

Section 34 (1) of the Income Tax Ordinance reads as follows :—

“Where a person in Ceylon, acting on behalf of a non-resident person, effects or is instrumental in effecting any insurance or sells or disposes of or is instrumental in selling or disposing of any property whether such property is in Ceylon or is to be brought into Ceylon and whether the insurance, sale, or disposal is effected by such person in Ceylon and by or on behalf of the non-resident person outside Ceylon and whether the moneys arising therefrom are paid to or received by the non-resident person directly or otherwise, the profits arising from any such insurance, sale, or disposal shall be deemed to be derived by the non-resident person from businesses transacted by him in Ceylon and the person in Ceylon who acts on his behalf shall be deemed to be his agent for all the purposes of this Ordinance.”

The proviso to this sub-section was introduced by an amendment which came into operation on 2.2.1956. It reads as follows :—

“Provided that, where the property sold or disposed of is produced or manufactured by such non-resident person outside Ceylon, the profits from the sale or disposal shall—

- (a) If the sale or disposal was by wholesale, be deemed to be not more than the profits which might reasonably be expected to be made by a merchant selling the property by wholesale, and

(b) if the sale or disposal was by retail, be deemed to be not more than the profits which might reasonably be expected to be made by a merchant selling the property by retail.”

Mr. H. V. Perera contended that considering the hazards incurred by a manufacturer who sells his goods in Ceylon and in view of the fact that he has to incur expenditure in the process of manufacture, storing and export, and his liability to pay taxes in his own country, a manufacturer who sells goods wholesale in Ceylon is given a tax concession by the proviso to section 34. The Crown Counsel who represented the Respondent urged that the word “merchant” should in the context of the proviso be read as a non-resident merchant. He contended that the merchant referred to in the proviso is necessarily the non-resident person referred to in the opening lines of section 34 (1). He urged that the statement A1 did not contain the profits made by a non-resident merchant who manufactured and sold dry fish by wholesale in Ceylon, and therefore the Board of Review should ignore the provisions in the proviso to section 34 of the Ordinance. He added that if the word “merchant” were given any other interpretation, then the legislature would be making an invidious distinction between a non-resident manufacturer and a wholesale dealer who is a manufacturer, since the tax concession is given only to the former and not to the latter.

In interpreting statutes, “the first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and, otherwise, in their ordinary meaning; and, secondly, that the phrases and sentences are to be construed according to the rules of grammar. From these presumptions it is not allowable to depart where the language admits of no other meaning. Nor should there be any departure from them where the language under consideration is susceptible of another meaning, unless adequate grounds are found, either in the history or cause of the enactment or in the context or in the consequences which would result from the literal interpretation, for concluding that that interpretation does not give the real intention of the Legislature.” (See Maxwell on the Interpretation of Statutes, 8th Edition, p. 2.)

Another cardinal rule of interpretation is that “the language of Acts of Parliament, and more especially of modern Acts, must neither be extended beyond its natural and proper limits, in order to supply omissions or defects, nor be strained to meet the justice of an individual case”. (See Craies on Statute Law, 5th Edition, p. 68).

“If”, said Lord Brougham in *Gwynne v. Burnell* (1840, 7Cl. & F. 572, 696) “we depart from the plain and obvious meaning on account of such views (as those pressed in argument on 43 Geo. 3.c.99), we do not in truth construe the Act, but alter it. We add words to it, or vary the words in which its provisions are couched. We supply a defect

which the Legislature could easily have supplied, and are making the law, not interpreting it. This becomes peculiarly improper in dealing with a modern Statute, because the extreme conciseness of ancient statutes was the only ground for the sort of legislative interpretation frequently put upon their words by the Judges. The prolixity of modern statutes, so very remarkable of late, affords no grounds to justify such a sort of interpretation". This dictum is equally applicable to our modern statutes.

The word "non-resident" occurs several times, not only in section 34 but also in other sections of the Income Tax Ordinance and if it was the intention of the Legislature to use the words "a merchant" in the Proviso to section 34 so as to mean a non-resident merchant, it would not have failed to state so or use appropriate words to limit the ordinary connotation of the word "merchant".

If one takes the view that the words, "a merchant selling property by wholesale", refer to any merchant in Ceylon who sells the commodity by wholesale, it may be contended that the profits made by a merchant who sells the commodity may vary and therefore the Assessor may be unable to find out the profits of such a merchant. Mr. H. V. Perera stated that in such an eventuality the assessor could accept the highest profits of such a merchant or may take the mean of the profits of merchants who sell the article in question by wholesale.

Adverting to the contention of the Crown Counsel that unless the word "merchant" in the proviso to section 34 is read as non-resident merchant, an invidious distinction would be made between a non-resident wholesale merchant and a non-resident merchant who is a manufacturer, it may well be that the Legislature deliberately made the distinction, and gave a concession to the latter for the reason that the consumer in Ceylon would be in a position to buy the commodity in question cheaper if manufacturers were encouraged to sell their goods in Ceylon without an intermediary. Further, as Counsel for the Appellant contended, it may be that the Legislature, having considered the risks the manufacturer undertook in selling his goods in Ceylon, gave him a concession. Whatever may be the underlying reason for the introduction of the proviso to section 34 the Legislature has thought fit to give tax-concessions to non-resident manufacturers who sell the goods they manufacture in Ceylon.

The Proviso to section 34 states that in taxing a non-resident manufacturer of goods who sells such goods in Ceylon the profits shall "be deemed to be not more than the profits which might reasonably be expected to be made by a merchant selling the property by wholesale". We are of the view that in such case a ceiling of the profits has been placed beyond which he cannot be taxed.

A consideration of the phraseology in section 36 (3) of the Income Tax Ordinance shows that the word "merchant" in the section must

be given the meaning it has in ordinary parlance. If the taxes are levied under section 36 (3), a lower ceiling is fixed by section 36 (3), and the profits of such non-resident persons from the sale of such goods or produce are to be deemed to be not less than the profits which might reasonably be expected to have been made by a merchant "who has bought the same direct from a manufacturer or producer with whom he was not connected". The learned Crown Counsel conceded that the word "merchant" in this section cannot be interpreted to mean non-resident merchant. It is an accepted canon of interpretation that the same words occurring in different parts of a particular statute must be presumed to bear the same meaning, unless the context is such that a different meaning has to be given by implication. (Maxwell on the Interpretation of Statutes, 8th Edition, p. 276-277.) If the word "merchant" has to be given its ordinary meaning in section 36 (3) there is nothing in the context to justify us in giving a different meaning to this word in the proviso to section 34.

Although the onus of proof is on the assessee, the appellant has produced before the Board of Review the statement of profits (A1), made by merchants who imported dry fish in Ceylon for the relevant period. The Respondent has not questioned the correctness of these accounts and presumably has taxed the merchants referred to in A1 on the basis that these accounts were correct. In the absence of any other evidence placed before the Board of Review, I am of the view that the Board should have acted on these figures in estimating the profits of the merchant who sold dry fish by wholesale in Ceylon. It is not clear on what basis the Commissioner of Income Tax stated in advance, by the circular letter of 1.4.54, that for the years of assessment 1954-55 and 1955-56 he would tax at the rate of 7 per cent and 10 per cent respectively. In imposing the tax for those years he appears to have been influenced by the view he stated in advance. I do not think that a tax authority could arbitrarily fix the tax for the future. His power is limited to that of fixing taxes for a particular period under consideration.

The Counsel for the respondent contended that section 65 (2) (b) of the Income Tax Ordinance gives him unfettered power to estimate the income of an assessee whose returns are not accepted. But, under this section he has only the power to estimate when a person has furnished a return of income. Further in view of the limitation placed by the proviso to section 34, in the present case he is precluded from fixing the rate of income beyond the ceiling set out in the proviso. Similarly, although section 37 of the Income Tax Ordinance gives him wide powers of computing the profits of a non-resident person carrying on business in Ceylon, whose accounts cannot be readily ascertained by computing the profits on a fair percentage of the turn over, the Assessor cannot override the proviso to section 34 which fixed an upper ceiling to such profits.

We answer the questions of law submitted to us in the document, marked B2, as follows :—

- (1) The Board of Review has misdirected itself in holding that the evidence led by the appellant as to the profits of a merchant selling the property by wholesale was not that of a merchant contemplated in section 34 (1) proviso (a). We are of the view that where a person in Ceylon sells or disposes of any property wholesale by or on behalf of a non-resident outside Ceylon, who manufactures such goods, the proviso to section 34 applies and for the purpose of income tax the profits of such sale or disposal are deemed to be not more than the profits which might reasonably be expected by the merchant selling the property by wholesale in Ceylon. The words “ a merchant ” mean any merchant belonging to the category set out in the proviso to section 34. The merchant contemplated in the proviso is not a merchant who buys from a non-resident manufacturer and sells the commodity in Ceylon, but any merchant who sells it by wholesale in Ceylon.
- (2) In view of the interpretation we have placed on the proviso to section 34, the question of law formulated in paragraph 2 of B2 does not arise.
- (3) I am of the opinion that in the instant case, evidence of the rate of commission paid to an agent cannot be used as a basis of measure of the profits of a merchant contemplated in proviso (a) to section 34 (1) in view of the unchallenged evidence contained in A1. In the light of the construction which I have placed on the proviso to section 34 (1), the profits shown in A1 should be regarded as the basis for the computation of the tax,
- (4) In view of the answers given above, it would be unnecessary to answer the abstract question of law set out in paragraph 4 of B2.

As stated earlier, the proviso to section 34 (1) was operative only from 2.2.56. The Crown Counsel contended that no restrictions were placed on the assessor in imposing any tax he wished for the period prior to that date. In view of the fact that the assessment for the period 1953-54 was computed on the footing that a wholesale dealer in dry fish was only making a profit of 5 per cent and the uncontradicted evidence furnished by A1, the assessor has no basis on which to tax the assessee other than 5 per cent of the turn over of the business for this period. It would hence be fair to hold that 5 per cent was the profit made by a wholesale dealer in the commodity for the periods 1953-54 and 1954-55. The case is sent back to the Board of Review with our opinion on the points of law set out and with the direction that the profits of the

appellant assessee should be computed at the rate of 5 per cent of the total turn over of the sale during the assessment years 1953-54, 1954-55 and 1956-57.

The appellant is entitled to the costs of the appeal.

SANSONI, J.—I agree.

Appeal allowed.
