1945 *Present:* **Howard C.J. and Canekeratne J.**

WIGNARAJAH, Appellant, *and* COMMISSIONER OF INCOME TAX, Respondent.

71-S—Income Tax No. 748/12.

Excess profits duty—Assisting a firm in buying and selling plumbago—Division of profits—Arrangement for passing plumbago for Commissioner of Commodity Purchase—Receipt of fees—Joint enterprise—Carrying on business—Ordinance No. 38 of 1941, s. 3.

Mr. A, who was Shroff of the National Bank, had been guarantee broker of Messrs. Lee Hedges & Co., and, after he became the Shroff of the Bank, continued to assist Messrs. Lee Hedges & Co. in the buying and selling of plumbago. The arrangement between him and the Company during the material period in regard to the plumbago business was that the profits were to be divided equally between him and the Company. Under the arrangement Mr. A. secured sellers of plumbago, used special skill in selecting the required grades of plumbago for export, saw to the packing and handling of plumbago. Mr. A. spent his own money on this work, which was afterwards refunded but used his store without making any charge therefor. When the Commissioner of Commodity Purchase became the sole exporter of plumbago, Mr. A. received half the fees for passing the plumbago, a duty which the Company had to perform for the Commissioner.

Held, that Mr. A. and Messrs. Lee Hedges were engaged in a joint enterprise and that the activities by which Mr. A. obtained his income amounted to a business, within the meaning of section 3 of the Excess Profits Duty Ordinance.

CASE stated for the Supreme Court by the Board of Review under the Income Tax Ordinance.

The facts appear from the headnote.

H. V. Perera, K.C. (with him *E. F. N. Gratiaen* and *D. W. Fernando*), for the assessee, appellant.—It cannot be said that Mr. A. was carrying on a "business" within the meaning of sections 2 and 3 of the Excess Profits Duty Ordinance, No. 38 of 1941. Proviso (*b*) of section 19 of that Ordinance and sections 2 and 6 (1) (*a*) of the Income Tax Ordinance throw light on the meaning of the word. Section 2 of the Excess Profits Duty Ordinance corresponds to section 38 of 5 & 6 Geo. V. c. 89. The meaning of "business" is considered in *Commissioners of Inland Revenue v. Marine Steam Turbine Co.*[1] and *Robbins v. Commissioners of Inland Revenue*[2]. A person who holds a particular employment under another is in a sense doing "business" but cannot be regarded as carrying on a business unless he holds a series of similar contracts with other persons also. Mr. A., in the present case, was merely an employee on a single contract of employment with Messrs. Lee Hedges & Co.

H. H. Basnayake, Acting Solicitor-General (with him *R. A. Kannangara, C.C.*), for the Commissioner of Income Tax, respondent.—The evidence establishes that Mr. A. was really carrying on a joint enterprise with

[1] *L. R. (1920) 1 K. B. 193 at 202.*

[2] *L. R. (1920) 2 K. B. 677.*

Messrs. Lee Hedges & Co. " Business " is a word of wide import, and whether a person is carrying on a business or whether he is having a contract of employment is a question of fact—*Smith v. Anderson* [1]; Konstam on Income Tax; *Burt & Co. v. Inland Revenue Commissioner* [2]; *Charles Radcliffe & Co. v. Inland Revenue Commissioners* [3]; *Davies v. Braithwaite* [4]. The decision of the Commissioner of Income Tax upon a question of fact cannot be canvassed in appeal—*The Commissioners of Inland Revenue v. Maxse* [5]; *Carr v. Inland Revenue Commissioners* [6].

H. V. Perera, K.C., in reply.—The evidence does not show that there was a joint enterprise. There is no evidence that any contracts were entered into by Lee Hedges & Co., and Mr. A. as co-principals. The business was in fact carried on by and in the name of Lee Hedges & Co. *Braithwaite's* case (*supra*) supports the position that there cannot be a " business " unless there are several contracts of a similar nature.

Cur. adv. vult.

June 22, 1945. HOWARD C. J.—

This is an appeal by the appellant by way of case stated under the provisions of the Income Tax Ordinance (Cap. 188) and the Excess Profits Duty Ordinance, No. 38 of 1941, by the Board of Review, Income Tax, appointed under section 70 of the Income Tax Ordinance. The appellant appealed to the Board of Review against the decision of the Commissioner of Income Tax confirming an assessment of the appellant as being liable to pay a sum of Rs. 31,632 as Excess Profits Duty on the footing of profits from a business for the accounting period commencing April 1, 1942, and ending on January 23, 1943. The Board of Review dismissed the appeal.

The facts as established before the Board of Review are as follows:— Since the year 1925, Mr. C. Arumugam, now deceased, was the Shroff of the National Bank of India, Ltd. Prior thereto he had been the guarantee broker of Messrs. Lee Hedges & Co. and after being the Shroff of the Bank continued to assist Messrs. Lee Hedges & Co. in the buying and selling of plumbago. The arrangement between him and the Company during the material period in regard to the plumbago business was that the profits were to be divided equally between him and the Company. Under the arrangement between the Company and himself Mr. Arumugam secured sellers of plumbago, used special skill in selecting the required grades of plumbago for export, saw to the loading, unloading, packing and handling of such plumbago. Mr. Arumugam spent his own money on this work which was afterwards refunded, but he used his store without making any charge therefor. After April 1, 1942, the Commissioner of Commodity Purchase became the sole exporter of Ceylon plumbago, but the same arrangement continued as Mr. Arumugam received half the fees for passing the plumbago, a duty which the Company had to perform for the Commissioner of Commodity Purchase. The Board of Review on these facts held that Mr. Arumugam and Messrs. Lee Hedges & Co., Ltd.,

[1] *(1881) 50 L. J. (Ch. D.) 39 at 43.*
[2] *L. R. (1919) 2 K. B. 650.*
[3] *(1920) L. J. (K. B. D.) 267.*
[4] *L. R. (1931) 2 K. B. 628; 18 T. C. 198.*
[5] *L. R. (1918) 2 K. B. 715; 12 T. C. 41 at 53.*
[6] *(1944) 2 A. E. R. 163.*

were engaged in a joint enterprise and that his activities were not those of a mere employee. Those activities by means of which he obtained his income amounted to a ' business ', within the meaning of section 3 of the Ordinance. The appellant who is the executor of Mr. Arumugam has contended before the Commissioner, the Board of Review and this Court that he was not carrying on a business within the meaning of section 3 of the Excess Profits Duty Ordinance, No. 38 of 1941, but was an employee of Messrs. Lee Hedges & Co., Ltd., who had complete control over his activities and remunerated him as employees frequently are by a payment of a proportion of the profits. He was therefore not liable to pay excess profits duty.

In *Currie v. Commissioners of Inland Revenue* [1] it was held that if the Commissioners of Inland Revenue came to a conclusion of fact without having applied any wrong principle, then their decision is final upon the matter. In his judgment at page 259 Lord Sterndale M.R. stated as follows:—

" The first question that has been debated before us is this: Is the question whether a man is carrying on a profession or not, a matter of law or a matter of fact ? I do not know that it is possible to give a positive answer to that question, because it must depend upon the circumstances with which the Court is dealing. There may be circumstances in which nobody could arrive at any other finding than that what the man was doing was carrying on a profession; and therefore, taking it from the point of view of a judge directing a jury, or any other tribunal which has to find the facts, 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 is a very large tract of country in which the matter becomes a question of degree; and where it becomes a question of degree, it is then undoubtedly, in my opinion, a question of fact; and if the Commissioners come to a conclusion of fact without having applied any wrong principle, then their decision is final upon the matter."

This decision was followed by the Court of Appeal in *Carr v. Inland Revenue Commissioners* [2]. At page 166 Scott L.J. stated as follows:—

" I prefer to follow Lord Sterndale M.R. in *Currie v. Commissioners of Inland Revenue*, at page 336, where he said in very clear language that in a case of an appeal before the Commissioners, where there is some evidence each way, it must be a question of degree, with which it is characteristically the function of the Commissioners to deal, and to deal finally. It is a well-known passage and, in my view, could hardly be improved upon. I do not think it necessary to refer to the other cases cited to us. There was one case (*Webster v. Commissioners of Inland Revenue* (3), in which the Commissioners had held, with evidence before them upon which they might have decided either way, that there was no profession being carried on. In the present case, also, with evidence upon which they might have decided either way, they have held that a profession was being carried on. I leave it at that."

[1] *12 Tax Cases 245.* [2] *(1944) 2 A. E. R. 163.*

Again in *Webster v. Commissioners of Inland Revenue* [1] Macnaghten J. stated as follows:—

"The question whether an individual is carrying on a 'profession' is a question of fact, and it has been pointed out that the facts of the case as found by the Commissioners may be such that it would be impossible to hold that he was carrying on a 'profession', or, on the other hand, that it would be unreasonable to deny that he was carrying on a 'profession'; and as between those two extremes there may be intermediate cases in which it would be possible for one person to come to one conclusion and for another person to come to the opposite conclusion, but that, if there is evidence to support the conclusion at which the Commissioners have arrived, then that conclusion cannot be set aside by the Court."

In the cases of *Currie v. Commissioners of Inland Revenue*, *Carr v. Inland Revenue Commissioners* and *Webster v. Commissioner of Inland Revenue* the question that the Commissioners had to decide was whether the appellants were carrying on a "business" or a "profession". In my opinion the principle laid down by Lord Sterndale would apply when the question is whether the appellant is carrying on a "business" or is merely an "employee". In this connection I would refer to the following passage from the judgment of Scrutton L.J. in *Burt & Company v. Inland Revenue Commissioners* [2]:—

"Where they do not do anything in connection with the sale to get commission on it, it is a transaction, and they appear to me to come entirely within the words 'business of any person taking commissions in respect of any transactions or services rendered'. It is not necessary for us to find as a fact that they do. It is enough to say that there is evidence upon which the Commissioners could so find."

Are the circumstances in this case such that nobody could arrive at any other finding than that Mr. Arumugam was an employee of Messrs. Lee Hedges & Co. Ltd.?

In *Robbins v. Inland Revenue Commissioners* [3] the Court of Appeal upheld the decision of Rowlatt J. who had reversed the decision of the Special Commissioners confirming as assessment to excess profits duty of Mr. H. E. Robbins, the respondent on appeal. The Court of Appeal held that Robbins was a whole-time servant of a firm called "Felt". He had no "business of a person taking commissions", the business was the business of his employer "Felt", nor had he the business of "an agent of any description" because Parliament did not use these words to cover a whole time servant who, if an agent, has no business. At page 689 Warrington L.J. stated as follows:—

"We have had before us a long discussion upon the question whether upon the true construction of the agreement the respondent would properly be described as a servant of the company, and the agreement as one of service. For some purposes the precise nature of the legal relation in this respect may be of importance, but I do not think it is so in the present case. The respondent is substantially in the position

[1] *(1942) 2 A. E. R. at page 518.*
[2] *(1919) 2 K. B. at page 668.*
[3] *(1920) 2 K. B. 677.*

of a servant in this respect, that he is bound to perform certain duties for a particular employer and to give his whole time exclusively to the performance of those duties. Those duties consist in conducting in this country the business of selling the goods of his employer. Can he be properly described as engaged at the same time in a separate business of his own—namely, that of earning his remuneration by the work he does as agent for his employer ?

It seems to me that the occupation of a person in such a position would not be naturally described as the carrying on of a business (except of course that of his employer) nor would his remuneration be described as profits of a business. ''

Also at page 683 the following passage from the judgment of Lord Sterndale M.R. is most relevant:—

'' That, I think, is the construction of the section, and that leaves as the only question: what was the position of Robbins? Was he a whole-time servant, or was he a person carrying on a business of rendering services for commission or of an agent of any description? I do not for a moment say there may not be such a business; in fact the businesses in *Burt v. Inland Revenue Commissioners* and *Radcliffe v. Inland Revenue Commissioners* were instances where a man was carrying on a business of an agent and carrying on a business of a person remunerated for services by commission. I do not say that it is impossible that a person who was rendering services only to one other person, that is to say, who had to give his whole time to that business, might not be carrying on a business. It would be very much more difficult to see how he was carrying on an independent business; but I do not say it is impossible. But the question here is: was Robbins in that position; or, rather, I ought to say, in which position was he? Was he in the position of a whole-time servant, or was he in the position of a man carrying on a business of rendering services for which he was paid by commission or of an agent of any description? In order to see that, we have to look at the agreement under which he was employed.''

The facts with regard to Robbins' contract with '' Felt '' and Mr. Arumugam's with Messrs. Lee Hedges & Co. are very different. It is impossible to describe Mr. Arumugam as a whole-time servant, although he was not in fact rendering services to any other person who was carrying on transactions of buying and selling plumbago. He was not bound to give his whole time exclusively to the performance of his duties in connection with his contract with Messrs. Lee Hedges & Co. In my opinion there was evidence on which the Board could decide that Mr. Arumugam was carrying on business within section 3 (1) of the Ordinance. They have so held and the decision must stand. The appeal is therefore dismissed with costs.

CANEKERATNE J.—I agree.

Appeal dismissed.