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In the Privy Council.

No. 55 of 1946.

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ON APPEAL FROM THE COURT OF APPEAL
 JAMAICA.

BETWEEN
 BERESFORD W. BOYD APPELLANT
 AND
 THE ASSESSMENT COMMITTEE, EXCESS PROFITS
 TAX. RESPONDENT.

CASE FOR THE RESPONDENT.

RECORD

1.—This is an Appeal from a Judgment of the Court of Appeal of Jamaica dated the 27th July, 1945, on a Case Stated on a question of law under Section 23 (8) of the Excess Profits Tax Law, 1941, by the Judge in Chambers. p. 12, l. 37

2.—The matter arises upon assessments to Excess Profits Tax made upon the Appellant by the Assessment Committee under the aforesaid Excess Profits Tax Law, 1941, in respect of profits arising from a trade or business of an insurance broker carried on by him. The Appellant appealed against the assessments to the Judge in Chambers under Section 23 of the said law and on the 31st July, 1943, the Judge in Chambers (Mr. Justice Carberry) gave Judgment dismissing the appeal and upholding the assessments. p. 2, l. 2
 10 p. 3, l. 17

Upon the application of the Appellant the learned Judge stated a Case for the Opinion of the Court of Appeal under sub-section 8 of Section 23 of the said law. p. 7, l. 9
 p. 8, l. 2

The case so stated having come on for hearing in the Court of Appeal (H. H. Hearne, Chief Justice, W. Savery, J., and G. Tracey Watts, J.), that Court gave Judgment on the 27th July, 1945, affirming the conclusion of the Judge in Chambers and dismissing the appeal against the assessments with costs. p. 12, l. 36
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3.—The ground upon which the Appellant based his appeal against the assessments to Excess Profits Tax at the hearing before the Judge in Chambers was that certain activities conducted by him in connection with the insurance business of the World and Marine General Insurance Company Limited (hereinafter referred to in this case for brevity as “ the Insurance Company ”) did not amount to the carrying on by him of a trade or business, but that he was in a position of a mere servant of the Insurance Company and was not in respect of the transactions in question engaged in carrying on a business of his own within Section 3 (1) of the Excess Profits Tax Law, 1941.

p. 2, l. 12

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This provision is as follows :—

“ 3.—(1) This Law shall apply to all trades or businesses of any description carried on in the Island, or carried on, whether personally or through an agent, by persons ordinarily resident in the Island.”

p. 3, l. 17

The learned Judge in Chambers decided that the said activities amounted to the carrying on by the Appellant of a trade or business within the above-mentioned provision and that he was not a servant of the Insurance Company.

p. 15, l. 23

At the hearing of the Case Stated by the learned Judge in Chambers before the Court of Appeal, Counsel on behalf of the Appellant abandoned the contention that the Appellant was a servant of the Insurance Company whilst still maintaining that the activities in question did not form part of any trade or business carried on by him.

4.—Section 23 of the Excess Profits Tax Law, 1941, deals with appeals to the Judge in Chambers against assessments made by the Assessment Committee.

Sub-section 8 thereof is as follows :—

(8) The decision of the Judge hearing the Appeal shall be final: provided that the Judge hearing such appeal may, if he so desires, and shall, on the application of the Appellant or of the Assessment Committee, state a case on a question of law, for the Opinion of the Court of Appeal.

p. 3, l. 17

p. 8, l. 2

5.—The facts of the case appear from the Judgment of the Judge in Chambers by whom the appeals were dismissed and from the Case Stated by him for the Opinion of the Court of Appeal and the documents exhibited thereto. The facts are not in dispute and are herein shortly stated, reference being made to the full statement of them in the Judgment of the Judge in Chambers and the case so stated by him.

The Appellant was assessed to Excess Profits Tax for the chargeable accounting periods ending 31st December, 1940, and 1941 in sums of £83 and £1,118 respectively.

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The Appellant had previously to 1925 acted as insurance agent under a Power of Attorney for the Insurance Company (as well as for other insurance companies, his connection with which ceased in that year and is not material to the present case).

Owing to the Appellant's financial embarrassment the Insurance Company in 1925 cancelled his Power of Attorney and appointed a firm, J. S. Webster & Sons (referred to herein as "Webster's") as their local attorneys under a Power of Attorney which is annexed to the case.

10 In a letter dated 31st October, 1925, Webster's arranged with the Insurance Company to engage the Appellant as the Underwriter in connection with the agency business. The working of the arrangement at the material times was (as appears from sub-paragraphs (c) to (g) inclusive in paragraph 11 of the case) as stated below. p. 9, l. 3 p. 10, l. 8

20 Since the year 1936 the Appellant has provided his own office and appointed and paid his own staff. In the relevant period he rented an office at 17A Duke Street at an annual rental of £64 10s. and his office staff cost him in 1940 £185 11s. and in 1941 £347 17s. 6d. The Insurance Company pays the Appellant a sum of £150 per annum towards his office expenses and this sum was paid to the Appellant even during the period when Webster's, without charge, furnished the Appellant with office space.

30 The Appellant is supplied by the Insurance Company with stationery forms and books of account to enable him to do the Company's business. The Appellant in fact did keep separate accounts for that business. He is also supplied with Insurance Certificates of the Company and Forms of Policies. A space is provided in the certificates and in these forms for the Appellant's signature and he is described in the Certificate as the Local Underwriter. Specimens of the forms and of the letter-heads are attached as a part of the case. pp. 30 to 33

All commissions earned by the agency are payable to the Appellant less a sum of £200 per annum which is payable to Webster's as their remuneration. Webster's keep a separate account for the Insurance Company and the Appellant pays all premium receipts to this account and cheques in payment of claims are paid out of the said accounts.

40 Nearly all the actual business of the Insurance Company is transacted by the Appellant. Webster's have the power to supervise his actions and are expected to maintain financial control. Persons desiring insurance apply to the Appellant, and if the risk is one which the Company accepts the Appellant prepares and signs a policy and collects the premiums. The Appellant submits to Webster's for their signature the insurance thus negotiated for the Company which they actually complete by signing. They have never refused to complete a contract

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negotiated by the Appellant. The Appellant in the regular course of his activities investigates claims and arrives at settlements in respect thereof. If the matter requires to be referred to the Insurance Company the Appellant communicates directly with them and abides by their instructions. When the final amount to be paid has been determined, the Appellant draws a cheque for signature by Webster's and forwards it with the necessary supporting vouchers and they complete the cheque and payment is made.

Where the risk was of a kind usually accepted by the Insurance Company the Appellant would always deal with the matter by writing up the Policy of Insurance countersigning it as local underwriter and forwarding it to Webster's who signed it as attorney for the Company. Expenses for cables and correspondence with the Company in connection with this work are refunded by the Company to the Appellant. 10

The Appellant engaged in other insurance activities during the period in question, as described in paragraph 12 of the case, which consisted (stated shortly) in the offering of risks of the type that the Insurance Company would not accept to local insurance companies or through London brokers to other insurance offices and his remuneration from such work was derived from sharing commissions with the brokers through whom he arranged the matters. 20

In paragraph 13 of the Case it is found that the Appellant used his office and his staff for all his activities and that neither the Insurance Company nor Webster's had control of the office or the staff or the hours of work of the Appellant. The Appellant, it is further found, was not entitled to leave and was not a pensionable officer of the Insurance Company. He in fact stated to the Court "I am my own master."

6.—It is also found by the Judge in Chambers that in 1940 and 1941 the Appellant's income derived from the Insurance Company was £1,510 and £3,879 respectively, and that his income from other insurance work was £181 and £229 in the same years respectively. 30

7.—The Appellant's submissions to the Judge in Chambers summarised were that his work done for the Insurance Company was to be distinguished from his other work and that he was an employee of the Company and was not in respect of his activities for the Company carrying on his own business but the business of the Company, and that the brokerage business carried on by him and his employment with the Insurance Company were so distinct and different that they could not be said to be a trade or business and that the method of payment by commissions did not exclude the possibility of his being a servant of the Insurance Company. The submissions on behalf of the Respondent summarised were that upon the evidence the Appellant was not shown to be a servant of the Company in 40

p. 11, l. 44

that his activities were inconsistent with those of a mere servant or agent, his remuneration depended solely on the amount of business that he did, he was not subject to the direction and control of the Company and he maintained his own office and employed his own staff. RECORD
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It was further submitted that there was no division of his activities and that the activities on behalf of the Insurance Company were not severable from his other activities, and that they all constituted a single business which belonged to the Appellant. p. 12, l. 9

8.—The learned Judge came to the conclusion that the Appellant was not an employee or agent of the Insurance Company and that he carried on a single trade or business of an insurance broker. He stated the question for the Opinion of the Court of Appeal as being as follows :— p. 12, l. 14

“ The question for the Opinion of Court is whether upon the facts found as set out by me I was justified in coming to the conclusion that the Appellant carried on the trade or business of an Insurance Broker so as to be liable to Excess Profits Tax under the provision of Section 3 and 4 of Law 65 of 1941 in respect of all his activities.” p. 12, l. 26

9.—The Court of Appeal in its Judgment referred to the wide charging words of the Excess Profits Tax Law “ all trades or businesses of any description ” but considered that it was clear that the trade or business must be carried on by the taxpayer on his own account. p. 12, l. 37

As stated above the argument advanced to the Judge in Chambers that the Appellant was an employee of the Company was abandoned before the Court of Appeal and it was submitted that though he was not such an employee he was a person occupying some undefined and peculiar position towards the Company which justified the Court in taking the view that the business which he was carrying on was not his own but that of the Company. In the opinion of the Court it was not necessary to determine the exact relationship between the Appellant and the Insurance Company, but the Court came to the conclusion that the Appellant was carrying on a business of an insurance agent on his own account and that the Judge in Chambers was justified in coming to the conclusion that the Appellant was liable to Excess Profits Tax. p. 15, l. 6

Reference was made in the Judgment of the Court of Appeal to the case of *Robbins v. Inland Revenue Commissioners* (1920) 2 K.B. 677 where the Court of Appeal in England had to determine a similar problem arising out of the words “ trade or business ” for the purpose of the Finance (No. 2) Act, 1915. In this case (where it was held that the taxpayer was a servant) importance was attached to the facts that under the agreement between the taxpayer and his employers the Appellant had to give his whole time exclusively to the business and could not do business for anybody else and that in addition the employers had a right to direct the details of the business and paid for the office furniture and all the expenses except travelling expenses. p. 15, l. 6

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p. 16, l. 30

The Court of Appeal accordingly gave Judgment dismissing the Appeal with costs. Leave to appeal to His Majesty in Council was granted by the Court of Appeal to the Appellant.

10.—The Respondent humbly submits that the decision of the Court of Appeal is right and should be affirmed and that this Appeal should be dismissed with costs for the following amongst other

REASONS

- (1) Because the Appellant was carrying on a trade or business within the meaning of Section 3 (1) of the Excess Profits Tax Law, 1941, and was rightly assessed to Excess Profits Tax 10 in respect of profits arising therefrom for the chargeable accounting periods ending 31st December, 1940, and 31st December, 1941, respectively.
- (2) Because the Appellant in respect of his activities in connection with the Insurance Company was not serving in the capacity of a servant or employee of the Company, but was exercising independent activities of his own.
- (3) Because the said activities are not severable from his other activities in connection with insurance and all such activities taken together constituted one trade or business carried on 20 by him.
- (4) Because the Judge in Chambers has found that the Appellant's aforesaid activities constituted a single trade or business and there was evidence upon which he could so find.
- (5) For the reasons given in the Judgment of the Court of Appeal.

DAVID MAXWELL FYFE.
REGINALD HILLS.

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BETWEEN

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AND

THE ASSESSMENT COMMITTEE,
EXCESS PROFITS TAX ... RESPONDENT.

CASE FOR THE RESPONDENT

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