

FRED JAMES BLACKWELL
(Appellant)

APPELLANT;

1950
*Nov. 29, 30
*Dec 28.

AND

THE MINISTER OF NATIONAL
REVENUE (Respondent)

RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Excess Profits Tax—Whether commissions paid commercial traveller by several firms exempt—Whether such traveller carrying on a “profession” “mainly dependent upon personal qualifications”—The Excess Profits Tax Act, 1940, S. of C. 1940, c. 32, as amended, ss. 2(1), 3(1) and 7(b).

*PRESENT: Rinfret C.J. and Taschereau, Rand, Estey and Cartwright JJ.

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The Excess Profits Tax Act 1940, S. of C. 1940, c. 32, s. 7(b) provides that the following profits shall not be liable to taxation: "The profits of a profession carried on by an individual * * * if the profits of the profession are dependent wholly or mainly upon his * * * personal qualifications and if in the opinion of the Minister little or no capital is employed; provided that this exemption shall not extend to the profits of a commission agent or person any part of whose business consists in the making of contracts on behalf of others * * * unless the Minister is satisfied that such agent is virtually employed in the position of an employee of one employer in which case the exemption shall apply and in any case the decision of the Minister shall be final and conclusive."

The appellant, a commercial traveller, solicited orders for several firms and was paid by each a commission based on the amount of the orders secured by his efforts and paid for. His authority was confined to obtaining and transmitting orders. He was a free agent who maintained no office and employed only sufficient capital to operate a motor car and pay his travelling expenses. His claim for exemption from excess profits taxes under s. 7(b) was disallowed by the decision of the Minister of National Revenue and the Exchequer Court of Canada affirmed that decision.

Held: that the profits of a profession not liable to taxation under s. 7(b) of *The Excess Profits Tax Act, 1940* apply to a profession where the profits are dependent wholly or mainly upon personal qualifications. The finding of the Court below that the profits of the appellant did not either wholly or mainly depend upon his personal qualifications were supported by the evidence in the case and could not be disturbed and for that reason alone the appeal failed.

Held: also, that as it had not been contended that the Minister's decision, that he was not satisfied that the taxpayer was virtually employed in the position of an employee of one employer, was arbitrarily reached upon a wrong principle; that decision must stand.
 (Decision of the Exchequer Court of Canada [1949] Ex. C.R., 391 affirmed.)

APPEAL from a judgment of Thorson J., President of the Exchequer Court of Canada (1), dismissing the appeal of the appellant from the decision of the Minister of National Revenue affirming assessments levied upon the appellant for the years 1942, 1943 and 1944 under the provisions of *The Excess Profits Tax Act*.

J. C. Osborne for the appellant.

W. R. Jackett K.C. and *E. S. McLatchey* for the respondent.

The judgment of the Chief Justice, Taschereau, Rand and Estey, JJ. was delivered by:

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THE CHIEF JUSTICE:—It is unnecessary to recite the facts in this appeal. They are fully stated in the judgment of the learned President of the Exchequer Court (1) and at Bar counsel for the appellant declared that he accepted them as stated in that judgment.

The appellant is a commercial traveller and during the material years he represented several mills, or business houses. He did not make sales or contracts for the concerns for whom he acted, his authority being confined to obtaining orders for them and transmitting such orders to them. He assumed all expenses for the carrying out of his calling and in no year could it be said that his commissions came from only one concern. He was free to go and solicit orders as he saw fit for any one of the business concerns for whom he acted. He operated from his own house and selected his own customers, his remuneration depending on his own efforts and their results. He was not subject to the direction or control of any one of the business houses. He was independent of them and absolutely his own master. The learned President found that the merchandise for which the appellant solicited orders was the most important factor in his success.

The question is whether, under these circumstances, the appellant was properly assessed for Excess Profits Taxes and the learned President held that he was, on appeal from the decision of the Minister of National Revenue.

The decision of the Minister affirmed the assessment on the ground that “the profits of the taxpayer have been correctly assessed for Excess Profits Tax”, adding that “the Minister is not satisfied that the taxpayer is virtually in the position of an employee of one employer and he is therefore not exempt from tax under the proviso to paragraph (b) of Section 7 of *The Excess Profits Tax Act*.”

By force of Section 3 (1) of that Act, in addition to any other tax or duty payable under any other Act, “there shall be assessed, levied and paid a tax in accordance with the rate set out in the Third Part of the Second Schedule to this Act, during the taxation period.” By section 2 (1)

(1) [1949] 1 Ex. C.R. 391.

(2) [1949] C.T.C. 362.

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(g) "profits" in the case of a taxpayer other than a corporation or joint stock company, for any taxation period, means the income of the said taxpayer derived from carrying on one or more businesses, as defined by section three of the *Income War Tax Act*, and before any deductions are made therefrom under any other provisions of the said *Income War Tax Act*.

Now, although there is no definition of the word "business" in either the *Income War Tax Act*, or *The Excess Profits Tax Act*, it is easy to understand the meaning of the word "business" in the latter Act by the context of the *Income War Tax Act*. Of course, the appellant cannot be considered as exercising a "profession" within the meaning of that word in the usual language, but he relies on the use of the word "profession" in section 7 (b) of the Act, and he claims to be entitled to the exemption therein provided. As it can be said that it is important to consider every word of that section for the purpose of deciding the present appeal, the section is quoted in full:

7. The following profits shall not be liable to taxation under this Act:
- (b) the profits of a profession carried on by an individual or by individuals in partnership if the profits of the profession are dependent wholly or mainly upon his or their personal qualifications and if in the opinion of the Minister little or no capital is employed: Provided that this exemption shall not extend to the profits of a commission agent or person any part of whose business consists in the making of contracts on behalf of others or the giving to other persons of advice of a commercial nature in connection with the making of contracts unless the Minister is satisfied that such agent is virtually in the position of an employee of one employer in which case this exemption shall apply and in any case the decision of the Minister shall be final and conclusive.

It will be noted from the wording of that section that the exemption applies first to a "profession" and by no means can the appellant, in the ordinary sense, be held to exercise a "profession". But, moreover, it is not "all professions" that can claim the exemption. It must be a "profession" where the profits are dependent wholly or mainly upon his personal qualifications; and the finding of the learned President that the profits of the appellant in the present case do not either wholly or mainly depend upon his personal qualifications but that, on the contrary, his merchandise is the most important factor in his success,

cannot be disturbed upon the evidence in the case. For that reason alone, therefore, the appellant would fail to bring himself under the exemption of section 7(b). Of course, in order to claim the exemption, the appellant had first to show that his profits depended entirely, or at least mainly, upon his personal qualifications, but the proviso in the section must also be considered. He is not a commission agent, nor, as we have seen, does his business consist in the making of contracts on behalf of others, nor in the giving to other persons advice of a commercial nature in connection with the making of contracts. In these several respects the proviso does not apply to him.

Finally, he was not able to satisfy the Minister that he was virtually in the position of an employee of one employer—the evidence is decisive on the point that he is not such an employee. The decision of the Minister states that he was “not satisfied that the taxpayer is virtually in the position of an employee of one employer and he is therefore not exempt from tax under the proviso to paragraph (b) of section 7 of *The Excess Profits Tax Act*.” On that point the section enacts:

In any case the decision of the Minister shall be final and conclusive.

In this case, the decision of the Minister is to that effect. Therefore, as it has not been contended that the decision of the Minister was arbitrary and reached upon a wrong principle, it follows from all points of view that section 7(b) does not relieve the appellant.

The appeal should be dismissed with costs.

CARTWRIGHT J.:—This is an appeal from a judgment of the President of the Exchequer Court pronounced on the 26th of October, 1949, affirming the decision of the Minister holding the appellant liable to taxation under *The Excess Profits Tax Act* in respect of his earnings as a commercial traveller during the years 1942, 1943 and 1944.

The following findings of fact made by the learned President are accepted by both parties:

The appellant is a commercial traveller and resides in London, Ontario. During the years in question he represented several mills or business houses, nine altogether in 1942 and 1943 and eight in 1944. His activities consisted in travelling throughout his territory with samples of the merchandise of the business concerns he represented, calling on customers,

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displaying the samples and soliciting and obtaining orders for the merchandise. When he obtained such orders he sent them to the credit manager of the mill or business house concerned. If the order was accepted the merchandise was shipped to the customer and thirty days after the date of such shipment the appellant was paid a commission based on its amount. He received no salary, wages or remuneration from any of the mills or business houses except these commissions and if a customer did not pay for the goods the commission that had been paid to him thereon was charged back to him. He did not make sales or contracts for the concerns for whom he acted, his authority being confined to obtaining orders for them and transmitting such orders to them. He had no office or office staff and no telephone, typewriter or stationery of his own. The samples he carried belonged to the concerns he represented. In the course of his activities he incurred expenses for such items as hotels and meals, baggage and sample rooms, telephone, telegrams and tips, rail fares and excess baggage, car, gasoline, oil, etc. He did not send in any expense accounts in respect of these items to any of his mills or business houses or apportion them amongst them but assumed them all himself. The particulars of his commissions with the amount received from each mill or business house for each of the years in question appear in his income tax returns. In no year could it be said that they came virtually from one concern.

It was admitted at the trial by counsel for the respondent that the appellant employed capital only to the extent sufficient to maintain a car and to pay his expenses on the road. One further finding of fact made by the learned President is as follows:

The appellant has not shown that his profits, even if it were conceded that they are those of a profession, depended wholly or mainly upon his personal qualifications. When he was asked what his success as a commercial traveller depended upon he mentioned his personality, his ability to show his merchandise to the best advantage, his health and his experience but on cross-examination he stated that his merchandise was the most important factor in his success.

In my view this finding is supported by the evidence.

The main grounds relied upon in support of the appeal were, first, that the appellant's earnings were not "profits" within the meaning of the charging provisions of *The Excess Profits Tax Act* and secondly, that even if such earnings fell *prima facie* within the terms of such charging provisions they were exempt under the terms of section 7(b) of the Act.

It was submitted by counsel for the respondent that on the pleadings the first point was not open but I think it desirable to deal with the appeal on the assumption, but without deciding, that the point is properly before us.

By section 3 of *The Excess Profits Tax Act* the tax claimed is levied upon the profits of every person residing or ordinarily resident in Canada or who is carrying on business in Canada. The relevant definition of "profits" is contained in section 2(g):

(g) "Profits" in the case of a taxpayer other than a corporation or joint stock company, for any taxation period, means the income of the said taxpayer derived from carrying on one or more businesses, as defined by section three of the *Income War Tax Act*, and before any deductions are made therefrom under any other provisions of the said *Income War Tax Act*;

The relevant words of section 3 of the *Income War Tax Act* are as follows:

3. (1) For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Canada or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source including * * *

It is suggested that section 3 of the *Income War Tax Act* divides all earned income into three classes according to whether it is received from (i) any office or employment or (ii) any profession or calling or (iii) any trade, manufacture or business, and that the words in section 2(g) of *The Excess Profits Tax Act* "Income derived from carrying on one or more businesses" refer to income received from source (iii) to the exclusion of that received from sources (i) and (ii); and that the income earned by a commercial traveller is more aptly described as being derived from a "calling" than from a "business". It is suggested that the words in section 3 of the *Income War Tax Act* "profits from a trade, or commercial or financial or other business or calling" also show that the word "business" is used in contradistinction from the word "calling". It seems to me from reading the last mentioned section as a whole that the purpose of Parliament was not to subdivide earned income into classes according to its source but rather to use words which would embrace earned income from every

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source. I do not think that the words "business" or "calling" are used in the section as terms of art intended to define mutually exclusive categories of sources of income but in the popular and ordinary sense and, so used, I think that the words "profits derived from a commercial or financial or other business" are wide enough to include the earnings of a commercial traveller.

It was further argued in support of the first ground of appeal that when *The Excess Profits Tax Act* is read as a whole it appears that the intention of Parliament was to tax only such persons as employ capital in their businesses and that the whole scheme of the Act contemplates the taxation of abnormal return on capital received during the life of the Act. It appears to me that the words of the charging section are too wide to permit so restricted an application. If the matter were doubtful, a consideration of the words of section 7(b) would seem to indicate that the fact that little or no capital is employed by a person is not alone sufficient to create an exemption from taxation under the Act.

In my view the earnings of the appellant fall within the terms of the charging provisions and are liable to tax unless specially exempted.

It now becomes necessary to examine the second main ground of appeal, that the appellant is entitled to exemption under the terms of section 7(b) reading as follows:

7. The following profits shall not be liable to taxation under this Act:
 (b) the profits of a profession carried on by an individual or by individuals in partnership if the profits of the profession are dependent wholly or mainly upon his or their personal qualifications and if in the opinion of the Minister little or no capital is employed: Provided that this exemption shall not extend to the profits of a commission agent or person any part of whose business consists in the making of contracts on behalf of others or the giving to other persons of advice of a commercial nature in connection with the making of contracts unless the Minister is satisfied that such agent is virtually in the position of an employee of one employer in which case this exemption shall apply and in any case the decision of the Minister shall be final and conclusive * * *

Assuming, without deciding, that the appellant's occupation falls within the meaning of the word "profession" as used in this clause, and without passing upon the submission of counsel for the respondent that the opinion of

the Minister that little or no capital is employed has not been obtained, I think that this argument cannot prevail. It is a condition of the operation of the exemption that the profits of the person claiming it be dependent wholly or mainly upon his personal qualifications. On this question of fact the learned President has found against the appellant and, as stated above, I think this finding is supported by the evidence. I therefore do not find it necessary to consider the proviso to the clause.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Raymond, Spencer, Law & MacInnes.*

Solicitor for the respondent: *R. S. W. Fordham.*

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