In the result I would hold that the suit when filed was within time and it is not necessary to discuss the other question raised, as to whether section 45A of the Banking Companies Act prohibits the institution of a suit in a Court other than the High Court. As the point is rather a novel one, I would leave the parties to bear their own costs of these proceedings.

The Federal Bank of India, (Pb.) Ltd. (In Liquidation) *v.* Shree Durga Das Kapur

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CIVIL REFERENCE

Before Falshaw and Kapur, JJ.

M/S DAYA CHAND HARDIAL,—*Petitioner*

versus

THE COMMISSIONER OF INCOME-TAX PUNJAB,—*Respondent*

Civil Reference 17 of 1952

1953

July 30th

Indian Income-tax Act, (XI of 1922), Section 66(2)—The Excess Profits Tax Act (XV of 1940), Section 2(5) and 21—Finding that assessee carrying on "business"—Whether based on sufficient material—"Dalali", and "Shagirdi" whether chargeable to Excess Profits Tax.

The assessees were acting as selling agents of D.C.M., and its subsidiary company. They were remunerated by commission on total sales and were responsible to their principals for bad debts. They were found by the Tribunal to have been importing and selling cloth on their own account also. This income from the selling agency was held by the Excess Profits Tax authorities liable to be assessed to excess profits tax as business receipts. It was contended by the assessees that there was no material for the finding that the selling agency was a business. It was further contended that the income was of the nature of salary and claimed by a servant.

Held, that the facts (i) that the commission agency which they were carrying on was not a whole-time engagement (ii) that they guaranteed the payment of bad debts, the assessee being more in the position of *del credere* agents, (iii) that though they were required to sell at prices fixed to the customers there was no limitation placed on them as to how they were to dispose of the goods and (iv) that the organisation and establishment to be maintained by them was not subject to the contract of the principals constituted

sufficient material for the finding of the Tribunal that the assessees were carrying on business which was liable to be assessed to Excess profits tax.

Held further, that sums received as "Dalali" and "Shagirdi" by the assessees from the purchasers of the goods have to be included to determine the profits of the assessees.

The case was referred under section 66(2) of Income-tax Act, 1922, read with section 21 of the Excess profits Tax Act, 1940, by the Income-tax Appellate Tribunal, Bombay, (Delhi Bench), consisting of Shri Raja Gopal Shastri, Judicial Member and Shri A. L. Sahgal, Accountant member by the order dated the 7th May, 1952, for decision of the following question of law by the Hon'ble Judges of this court:—

"(1) *Whether there is any material for the finding of the Tribunal that the applicant is carrying on the business within the meaning of section 2(5), of the Excess Profits Tax Act of 1950?*

(2) Whether the income from Dalali, Shagirdi and interest charged to partners is chargeable to excess profits tax?.

K. L. GOSAIN AND BHAGIRATH DAS, for Petitioner.

S. M. SIKRI, Advocate-General and H. R. MAHAJAN, for Respondent.

JUDGMENT

Kapur, J. KAPUR, J.—This is a case referred to this Court by the Income-tax Appellate Tribunal (Delhi Bench), under section 66 (2) of the Income-tax Act read with section 21 of the Excess Profits Tax Act of 1940 under an order of this Court, dated the 7th of June 1951. The questions, which this Court is called upon to answer, are:—

" (1) Whether there is any material for the finding of the Tribunal that the applicant is carrying on the business within the meaning of section 2 (5) of the Excess Profits Tax Act of 1940?

(2) Whether the income from *Dalali, Shagirdi* and interest charged to partners is chargeable to Excess Profits Tax?"

In the statement of the case the Tribunal has stated that the assessee is a registered firm carrying on business mainly in cloth and also acts as sale-agents of the Delhi Cloth Mills and the Lyallpur Cotton Mills on commission basis. At page 2 of the statement of the case it is stated:—

> "The appellant registered firm of three partners derives income from substantial piecegoods business. This consists of selling goods of Delhi Cloth and Lyallpur Cotton Mills on commission basis. It is evident that he deals in ready goods. Instead of selling them on his own risk, he sells them at the risk of manufacturers and charges commission for the work that he puts in. He has in this way made it a business of selling ready goods of his principals on commission basis. He has sufficient knowledge of the market to push up sales. The relationship between the principal and the agents is not that of a master and a servant. He is allowed commission of 1½ per cent on all the total sales and is also responsible for bad debts. There is no element of strictly professional nature involved in the conduct of this agency. Keeping these facts in view it would thus appear that the income earned by him is that from business and not from profession. In view of this state of affairs various amounts received by him whether as commission or as compensation are in the nature of business receipt and are as such assessable to Excess Profits Tax."

The Excess Profits Tax in dispute is for the chargeable accounting periods 1943, 1944 and 1945. The submission on behalf of the tax-payer is that the commission, which they have derived from the Delhi Cloth Mills or the Lyallpur Cotton Mills, is not profits of business as defined in section 2(5) of the Excess Profits Tax Act, 1940, and is not liable for

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payment of any Excess Profits Tax. Submission is also made that *dalali* and *shagirdi*, which they have received from the customers, is also not liable to Excess Profits Tax.

This case raises a question of the interpretation of section 2 (5) of the Excess Profits Tax Act which provides as follows:—

> "Business" includes any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture or any profession or vocation, but does not include a profession carried on by an individual or by individuals in partnership if the profits of the profession depend wholly or mainly on his or their personal qualifications unless such profession consists wholly or mainly in the making of contracts on behalf of other persons or the giving to other persons of advice of a commercial nature in connection with the making of contracts".

The contention, which has now been raised before us, is that the assessees are in the position of employees of the Delhi Cloth Mills and are not carrying on any business.

During the course of assessment proceedings the Delhi Cloth Mills wrote a letter to the Appellate Assistant Commissioner of Income-tax, Amritsar, in which the conditions on which the assessees were working, have been given. It is stated in this letter that there was no written agency agreement between the parties, but the substance of the arrangements which can be gathered from the books of the company is as follows :—

(1) Goods continue to be the property of the company until they are sold.

(2) Prices are fixed by the company and Messrs Daya Chand-Hardayal are bound to sell them at those fixed prices.

(3) The company is paying for storing and insurance.

(4) At certain places the cost of establishment is borne by the company and at other places they are allowed slightly higher commission to meet the cost of establishment required for selling the goods.

(5) Messrs. Daya Chand-Hardayal are paid a commission for their services and for safeguarding the company against bad debts.

It was admitted before us that the assessees are liable for the bad debts of the company.

(6) Messrs. Daya Chand-Hardayal are paid their " remuneration " every month.

In paragraph No. 4 of this letter the company has stated as under:—

> " It will be seen from the foregoing that whatever M/s. Daya Chand-Hardayal are doing for our Company, they are doing on our own account and not on their own, and their duties are, to all intents and purposes, like those of our Sales Managers in our shops ".

Mr. Gosain for the assessees has submitted that the occupation of the assessees is not a trade or business owned or carried on by them within the meaning of section 2(5) and consequently they are not liable to pay any Excess Profits Tax and he relied on the judgment of the Court of Appeal in *Robbins* v. *Commissioners of Inland Revenue* (1), which affirmed the judgment of Rowlatt, J., which is reported in (1920) 1 K.B. 51. Rowlatt, J., held the tax-payer in that case to be a mere manager and, therefore, not assessable. There one Robbins had

(1) (1920) 2 K.B. 677

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obtained from an American company to be called 'Felt' the exclusive right to sell comptometers in Great Britain and Ireland and the agreement between the parties contained the following provisions:—

(i) A provision as to the assignability of the right.

(ii) Robbins had to give his whole time to the business and if he did that, he was entitled to extension of period of agency.

(iii) 'Felt' could direct the number of sub-agents that he was to keep and their qualifications. Robbins had to conform to the instructions given by the company.

(iv) The sub-agents, who were appointed, had an agreement direct with the company.

(v) Robbins was to sell in the name of 'Felt' at a fixed price.

(vi) The sale price of the comptometers was to be credited to the account of 'Felt' and Robbins had no power to draw anything out of that.

There was some evidence to show that Robbins was described as the general manager of 'Felt' in England and as I have already said, the business was carried on in the name of the company. It was observed by Lord Sterndale M. R. at page 686 as follows:—

> "Looking at all these matters I think, although this agreement is not absolutely clear, that this man was a whole-time servant, to use Rowlatt, J.'s expression, and was not carrying on a business of his own at all".

Warrington, L.J., described this at page 689:—

> "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 ".

Scrutton, L.J., said at page 692:—

" I have come to the conclusion, though the agreement is oddly expressed, that Robbins is a whole-time servant of " Felt ".

Lord Sterndale at page 679 laid down the test. He said:—

" The test is whether the employer has the right to determine how the employee shall do his work in detail ".

But the Master of the Rolls was careful to point out:—

" As I have said, I do not say that there may not be a business of a person remunerated by commission for services where those services are rendered to one employer and the person remunerated has to devote his whole time. I do not say it is impossible that there can be such a case, but it is a very strong factor in coming to the conclusion that the man is a servant, that he has to devote his whole time to the employer ". P. 686.

Two cases which counsel for the Commissioner relies on were in this judgment distinguished at page 691—*Burt* v. *Commissioners of Inland Revenue* (1), on the ground that the tax-payer carried on the business of providing secretarial staff and offices for various companies, and *Radcliff* v. *Commissioners of Inland Revenue* (2), where the tax-payers' business was to act as manager and shipbroker for various single-ship companies. The second case that Mr. Gosain relies

(1) (1919) 2 K.B. 650
(2) 89 L.J. (K.B.) 267

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upon is *Marsh* v. *Commissioners of Inland Revenue* (1), where the appellant was employed as a commercial agent by P. & P. on the basis of salary and commission. He also travelled for other firms with the permission of P. & P. From these other firms he received commission on the orders he received and he was assessed to Excess Profits Tax on the ground that he was carrying on a trade or business as a commercial traveller. He contended that there was no evidence on which the Commissioners could find that he was carrying on a business at all. It was held that if he had been employed solely by P. & P., he could not be held to be carrying on a trade or business, but because he acted for other firms, there was evidence from which it could be concluded that he was carrying on the business of a commercial traveller and was, therefore, assessable to Excess Profits Tax in respect of that business.

But in my opinion neither of these two cases is applicable to the facts of the case now before us.

The Master of the Rolls in Robbins case laid down the test of employment to lie in the fact whether the company has the right to determine as to how the agent shall do his work in detail and although the working for one company or giving the whole time to that company were considered to be strong factors in coming to the conclusion that the agents are servants, his Lordship was careful to say that there could be a business of a person even where these factors were present.

The assessee, according to the statement of the case before us, is a registered firm carrying on business mainly in cloth. No doubt some objection was taken to this part of the statement of the case, but this was not accepted by the Tribunal in the statement of the case when they stated at page 3 that "the accuracy of the statement that the assessee has an import office at Amritsar where goods are imported for sale on the

(3) (1943) 1 A.E.R. 199

assessees' own account is not questioned" and, therefore, they were of the opinion that what was stated in the statement of the case was correct. From this it is obvious that the commission agency which they are carrying on is not a whole-time engagement. Secondly, the assessees have guaranteed the payment of bad debts. In other words, the moneys (as price of goods) payable by the buyers are being guaranteed by the assessees. In this respect the assessees seem to be more in the nature of a *del credere* agent who for an additional commission (called a *del credere* commission) guarantees the solvency of the purchaser and his performance of the contract. Wharton's Law Lexicon p. 316. Or as Lord Ellenborough in *Hornby* v. *Lacy* (1), has said: "The Commission imports that if the vendee does not pay the factor will pay; it is a guarantee from the factor to the principal against any mischief to arise from the vendee's insolvency." And according to Lindley, L.J., in *Thomas Gabriel & Sons* v. *Churchill & Sim* (2). "The liability of the *del credere* agent is a contingent pecuniary liability, not a liability to perform the contract; it is a pecuniary liability to make good in an event the default of the buyer in respect of a pecuniary liability." He sells goods on credit for an additional commission and guarantees the solvency of the purchaser and his performance of the contract. See also Bowstead's Law of Agency, page 3, where he is defined as—

> "A *del credere* agent is a mercantile agent who in consideration of extra remuneration called a *del credere* commission, guarantees to his principal that third persons with whom he enters into contracts on behalf of the principal shall duly pay any sums becoming due under those contracts".

Thirdly no limitation has been placed upon the assessees as to how they are to dispose of the goods. The only limitation placed is the fixation of the price. This, it is submitted by the learned

(1) 6 M. and S. at p. 171
(2) (1914) 3 K.B. 1272, 1279

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Advocate-General, falls within the rule laid down by the Allahabad High Court in *L. N. Gadodia and Co.* v. *Commissioner of Income-tax* (1). In this case the agreement between the assessee and the company, *inter alia,* provided that the sales were to be effected by the assessee at the current market rate subject to the approval of the managing directors of the company and that the assessee or his representative should attend daily at the office of the company. The assessee was not subject to the control of the company in the matter of establishment and organisation to be maintained by him and was entitled to carry on other independent business. The discount and brokerage on all transactions were to be paid by the assessee out of his commision, which he was entitled to receive from the company even on direct sales and he was liable for payment for all goods on delivery irrespective of the price being realised from the purchasers and was to take delivery of the goods sold even if the purchasers failed to do so. The other conditions are not necessary for the purposes of the present case. On these facts the Allahabad High Court held at page 470:—

> "In these circumstances, it is not possible for us to hold that the Tribunal had no material to come to a finding that the selling agency business of the Cawnpore Cotton Mills Company run by Messrs. L. N. Gadodia and Company was their business and that the income, profits or gains from it were the income, profits or gains from that business and not the salary received as a servant. Consequently, all income, profits or gains from the selling agency business were liable to be assessed to Excess Profits Tax."

It was then submitted on behalf of the Commissioner that even if a person sells somebody else's goods, it is still business and for this reliance is placed on a judgment of the Lahore High Court

(3) (1951) 20 I.T.R. 460

in *Basheshar Nath & Co.* v. *C. I. T.*, (1). The assessee there was representing a Bombay Textile Mills and was to receive 5 per cent commission on the proceeds of the orders received from Indian Stores Department. In the course of the judgment it was observed at page 429:—

> "What we have to decide in this case is whether the assessee's business as that of a commission agent is covered by the definition.
>
> We have no doubt that it is so covered. It is wholly immaterial that the assessee was not concerned in selling *his own goods*, or that he was not empowered to sign contracts on behalf of his principal or that he may or may not have been required to give advice of a commercial nature. Even if it were so, this would not help the assessee's case as such business does not fall within the terms of the exception and would still be covered by the definition. The assessee was an 'Agent' employed on commission within the meaning of section 182 of the Indian Contract Act, viz., to do any act for another or to represent another in dealings with third persons, and clearly his business as a commission agent was a business within the meaning of subsection (5)".

Reference was then made to a judgment of the Court of Appeal, *Charles Radcliffe & Co.* v. *Inland Revenue Commissioner* (2), a case to which I have already made reference above. There Radcliffe had promoted certain ship-owing companies and he was to act as a ship-broker and ship agent at a fixed rate of commission. He was not precluded from carrying on any other business which he thought desirable and he was to receive commission at $2\frac{1}{2}$ per cent on company's earnings, but in the event of a ship being on time charter, he as

(1) 13 I.T.R. 425
(1) (1920) 89 L.J.K.B. 267

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manager was to get commission at 7½ per cent on the chartered freight. Besides he was a ship-broker and ship agent with the usual 5 per cent brokerage. In these circumstances it was held that he was carrying on a business within the meaning of sections 38 and 39 of the Finance Act and that this was not filling an office or employment. *Burt & Company* v. *Commissioners of Inland Revenue* (1), was then referred to. This is a case, which also I have already referred to and it is not necessary to do so again or to discuss it at any great length.

I have already dealt with the conditions on which the assessees are proved to have been working as selling agents. They were working for the Delhi Cloth Mills and, we are told, for a subsidiary company of theirs, the Lyallpur Cotton Mills. It is also shown that this is not a whole-time employment. They were liable for payment of bad debts and there was no limitation as to how they were to dispose of the goods of their principals. One significant distinguishing feature in their case is that the moneys received by them by sale of goods have not been proved to be the moneys of the principals, although the price of the goods had to be paid to the principals. In circumstances such as these following the judgments given above, I am of the opinion that the assessees' business would fall within the definition of the word 'business' as given in section 2 (5) of the Excess Profits Tax Act and the answer to the first question is in the affirmative.

In regard to the second question, i.e., the question of *dalali* and *shagirdi*, which the assessees get from persons to whom goods are sold, they are certainly payments which have to be included in the income of the firm from which profits are to be determined. I would answer the second question referred to us accordingly.

The assessees must pay the costs of the Commissioner. Counsel's fee Rs. 500 for all the cases.

Falshaw, J.

FALSHAW, J.—I agree.

(1) (1919) 2 K.B. 650