1936 *Present :* **Macdonell C.J., Dalton S.P.J., and Poyser J.**

PEIRIS *v.* COMMISSIONER OF INCOME TAX

54—(*Inty.*) *Special.*

Income Tax—Retirement of public officer on pension—Liability to tax of commuted gratuity and pension paid between date of retirement and end of period of assessment—Commencement of new employment—Ordinance No. 2 of 1932, s. 11 (3) and (6).

Where a public officer retires on pension the commuted gratuity and the pension paid to him during the year of assessment is not liable to tax for that year of assessment as he does not "commence a new employment" on retirement, within the meaning of section 11 (6) of the Income Tax Ordinance.

THIS was a case stated by the Board of Review appointed under the Income Tax Ordinance, No. 2 of 1932, which was referred by Dalton S.P.J. and Maartensz J. to a Bench of three Judges.

The facts relating to the appeal are as follows :—The appellant retired from the Civil Service on February 15, 1935. A notice of assessment under the Ordinance was served on him for the year 1934-1935. The assessment was based on his salary and emoluments from April 1, 1934, up to February 15, 1935, and his pension of Rs. 1,602 from February 16, 1935, to March 31, 1935, and his commuted gratuity of Rs. 43,750. The commuted gratuity was paid to him after the date of his retirement but

within the year of assessment which ended on March 31, 1935. It was stated in support of the assessment that the assessment was made on the ground that under section 11 of the Ordinance the appellant ceased his employment as a Civil Servant on February 15, 1935, and commenced a new employment on February 16, 1935, and that the salary he received up to the date of his retirement as well as the pension and gratuity payable after he ceased that employment were taxable.

The appellant, dissatisfied by the assessment, appealed to the Commissioner of Income Tax, who referred the appeal to the Board of Review. The appellant contended before the Board that neither the commuted pension paid to him on retirement nor the pension paid to him for the period after his retirement on February 15, 1935, was taxable under section 11 (6) (*a*) of the Ordinance. The Board of Review dismissed his appeal.

H. V. Perera (with him *G. E. Chitty*), for appellant.—The question is whether commuted pension is taxable. Tax is ordinarily assessed on income for the previous year, section 11 (1). An exception is provided by section 11 (3). This case is governed by section 11 (6). Income on which tax is payable is only income up to the date of cessation of employment. Any profits after such cessation are not caught up by this subsection. Commuted pension is payable after cessation of employment and was in fact paid afterwards. This may be caught up in the assessment for the following year. It is not correct to say that when a person ceases to be employed, *e.g.*, when he retires on pension he necessarily commences a new employment. The only argument for the Commissioners is that this is the practice in England. That is not an argument that can prevail in a Court of law.

M. W. H. de Silva, Acting S.-G. (with him *Basnayake, C.C.*), for respondent.—Two questions have to be decided. Is this liable to tax, and is it liable to tax in the year of assessment. The Court is not bound by the way in which the case has been stated. It must find whether tax is payable on any basis at all, not necessarily under section 11 (6). This provision is to meet a case where the source of income ends during the year of assessment. The tax is assessed on the income for that year. Income from a source which has ceased to produce income is taxable under section 11 (1). Pension is a new source of income. Section 11 (3) provides for that. New employment is governed by section 11 (4). Pension is a new employment in the English Statute (section 45). Assessee started to get an income which he had not previously received. Pension is profit from any employment (section 6 (2)). Which employment ? Not the employment as a Civil Servant. It must be profits from an employment in existence. Pension presupposes an employment which is a new employment.

[DALTON J.—Who is the employer of a pensioner ?]

The person who pays the pension. For the purposes of this section any pension is presumed to be from an employment. A fiction of an employment has been created by the section.

H. V. Perera, in reply.

March 6, 1936. MACDONELL C.J.—

This was a case stated by the Board of Review appointed under the Income Tax Ordinance, No. 2 of 1932, which was referred by Dalton and Maartensz JJ. to a Bench of three Judges. The case stated was as follows:—

"1. At a meeting of the Board of Review, Income Tax, constituted under the Income Tax Ordinance, No. 2 of 1932, held on April 13, 1935, the appellant above named appealed against an assessment for income tax of his commuted gratuity of Rs. 43,750 and of the pension payable to him for the period from February 16, 1935, to March 31, 1935. The amount of tax payable on the assessment is Rs. 4,573.88.

2. The facts relative to, and leading up, to this appeal are as follows:—

3. The appellant retired from the Civil Service of Ceylon on February 15, 1935. A notice of assessment under the Income Tax Ordinance for the year 1934—1935 was served on the appellant on March 9, 1935. The assessment was based on his salary and emoluments from April 1, 1934, up to February 15, 1935, and his pension of Rs. 1,602 from February 16, 1935, to March 31, 1935, and his commuted gratuity of Rs. 43,750. The commuted gratuity was admittedly paid to the appellant after the date of his retirement on February 15, 1935, but within the year of assessment which ended on March 31, 1935.

4. It was stated at the argument, in support of the assessment, that the assessment was made on the ground that, under section 11 the appellant ceased his employment as a Civil Servant on February 15, 1935, and commenced a new employment on February 16, 1935, and therefore the salary he received up to the date of his retirement as well as the pension and gratuity payable to him after he ceased that employment were all taxable. The decision of the Supreme Court in the *Commissioner of Income Tax v. Rodger*[1] was also relied on. It was on this basis that the Assessor assessed the appellant.

5. The appellant, being dissatisfied by the Assessor's assessment, appealed against it to the Commissioner of Income Tax, who referred the appeal direct to the Board of Review, under the provisions of section 72 of the Income Tax Ordinance. In doing so he placed before the Board the fact that it has always been the practice of the Department of Income Tax to treat an individual who retires on pension as having ceased his employment and commenced a new employment, and that the practice in the United Kingdom is similar.

6. The appellant contended at the hearing of his appeal that he did not contest the taxation of his salary and emoluments up to February 15, 1935, but that the appeal was only against the taxation of the commuted pension which he had in fact been paid after the date of his retirement, and against the taxation of the pension paid to him for the period after his retirement on February 15, 1935. He contended that neither of these was taxable as neither of them came within the wording of section 11 (6) (*a*) of the Ordinance, and that they

[1] *(1935) 35 N. L. R. 169.*

did not come within section 11 (3) as he had not commenced any new employment on February 16, 1935, so as to subject any income or profits received by him between February 16, 1935, and March 31, 1935, to income tax.

7. After hearing argument the Board decided on April 13, 1935, that the assessment should be confirmed and accordingly dismissed the appeal.

8. Being dissatisfied with the decision of the Board the appellant has requested the Board to state a case for the opinion of the Honourable the Supreme Court on the question as to whether the commuted gratúity paid after February 15, 1935, but within the year of assessment and the pension payable for the period commencing February 16, 1935, and ending March 31, 1935, are liable to income tax for the year 1934-1935, which case we have accordingly stated and signed".

This case necessitates an examination of section 11 of the Ordinance No. 2 of 1932, sub-section (1) of which is as follows:—"Save as provided in this section, the statutory income of every person for each year of assessment from each source of his profits and income in respect of which tax is charged by this Ordinance shall be the full amount of the profits or income which was derived by him or arose or accrued to his benefit from such source during the year preceding the year of assessment, notwithstanding that he may have ceased to possess such source or that such source may have ceased to produce income". On this sub-section it is useful to quote the remarks of Drieberg J. in *Commissioner of Income Tax v. Rodger* (*supra*): "We have two years to consider. The year of assessment 'and the preceding year'. A person is not taxed on the income of the preceding year as such but on his income for the year of assessment, and by an arbitrary rule his income for the preceding year is accepted as his income for the year of assessment: you do not tax the income of the preceding year but you tax the income of the year of assessment and measure that income by that of the preceding year". This is the normal rule, but this same section 11 establishing that rule contains also the exceptions thereto. The exceptions contained in sub-sections (2), (5), (7), (8), (9), and (10) do not affect the present case stated, but it will be necessary to consider sub-sections (3), (4), and (6), and I will begin with sub-section (6).

This provides for the case of a person "ceasing to carry on an employment" and, omitting words immaterial to the present case, reads as follows:—"Where a person . . . . ceases to carry on . . . . employment in Ceylon . . . . his statutory income therefrom (*i.e.*, from the employment) shall be '(*a*) as regards the year of assessment in which the cessation occurs (*i.e.*, April 1, 1934, to March 31, 1935), the amount of the profits of the period beginning on April 1 in that year (*i.e.*, 1934) and ending on the day of cessation (*i.e.*, February 15, 1935), and (*b*) as regards the year of assessment preceding that in which the cessation occurs (*i.e.*, April 1, 1933, to March 31, 1934), the amount of the statutory income as computed with the foregoing sub-sections or the amount of the profits of such year (*i.e.*, 1933—1934), whichever is the greater" and he

shall not be deemed to derive statutory income from such employment for the year of assessment (*i.e.*, April 1, 1935, to March 31, 1936) following that in which the cessation occurs. "Statutory income" is defined in section 2 of the Ordinance as "income from any source computed in accordance with Chapter IV." which chapter consists of section 11, the section under consideration, and section 12 which does not concern the present case.

Now it seems clear that on February 15, 1935, the appellant "ceased to carry on an employment in Ceylon". He demitted his duties as Public Trustee and received a pension. No one apparently could hence-forward lawfully require him to attend at the Public Trustee's office or any other office and work there, and conversely he had no longer the right to perform any of the duties pertaining to the office of Public Trustee or of any other office: He had ceased to carry on an employment within the meaning of the sub-section, and this was, we understand, conceded by both sides to this appeal.

If then on February 15, 1935, the appellant had ceased to carry on an employment in Ceylon, did he on that date "commence to carry on . . . . an employment in Ceylon"? as is contended by the respondent to this appeal. This is the case provided for by section 11, sub-sections (3) and (4).

Sub-section (3), omitting words immaterial to the present case, reads as follows:—"Where on a day" (*i.e.*, February 15, 1935), "within the year of assessment" (*i.e.*, April 1, 1934, to March 31, 1935), "any person commences to carry on . . . . employment in Ceylon . . . . any profit arising therefrom" (*i.e.*, from the employment) "for the period from such day" (*i.e.*, February 15, 1935) "to the end of the year of assessment" (*i.e.*, to March 31, 1935) "shall be statutory income of such person for such year of assessment" (*i.e.*, for the year April 1, 1934, to March 31, 1935). If then the appellant commenced an employment on February 15, 1935, any profit arising from that employment, for instance his commuted gratuity and his pension for the next one and a half months, would be statutory income of his for the year of assessment April 1, 1934, to March 31, 1935. And note that this constitutes an exception to the rule laid down in section 11 (1), that you tax the income of the year of assessment but measure it by that of the preceding year for, adhering to the facts of the present case, here as regards at any rate the commuted gratuity and the pension for the last one and a half months of the year, April 1, 1934, to March 31, 1935, you are measuring the income of the year of assessment not by that of the preceding year but by the year of assessment itself.

Section 11 (4) would seem to provide for the converse case, that, namely, of commencing an employment within the year preceding the year of assessment, and this sub-section (4), again omitting immaterial words, reads as follows:—"Where on a day" (here February 15, 1935), "within the year" (here the year April 1, 1934, to March 31, 1935), "preceding the year of assessment" (which would be the year April 1, 1935, to March 31, 1936), "any person has commenced to carry on, ... employment in Ceylon . . . . his statutory income therefrom for that year of assessment" (in this case the year Fbruary 15,

1935, to February 14, 1936), "shall be the amount of the profits for one year from such day", in this case the year February 15, 1935, to February 14, 1936.

You would surmise that this sub-section (4) was enacted to catch up cases where the person taxable had commenced to carry on employment but where the Income Tax Department had not become aware of that fact until some time in the next year of assessment, and doubtless it was inserted to provide for other cases also, but neither side to this appeal contended that the present case came under sub-section (4), but argued, the appellant that it did not fall within sub-section (3), the respondent that it did. We must return then to sub-section (3) and try to answer the question, did the appellant "commence to carry on employment" within the year of assessment, that is the year April 1, 1934, to March 31, 1935, such commencement having occurred, if it did occur at all, on February 15, 1935.

It was argued in the case cited, paragraph 5, that "it has always been the practice of the Department of Income Tax to treat an individual who retires on pension as having ceased his employment and commenced a new employment and the practice in the United Kingdom is similar". During the argument no English case was cited to us to show that this is the practice in the United Kingdom and the cases cited in *35 N. L. R. 169* hardly seem to bear out this contention. In *Davies v. Braithwaite*[1], Rowlatt J. discusses fully the meaning of employment in the English Income Tax Act, 1918, and the Finance Act, 1922, trying to distinguish it from "profession" or "vocation", and he points out that a person may well have a profession and yet hold an employment, and he says at page 635: "A musician who holds an office or employment under a permanent engagement can at the same time follow his profession privately". It should also be mentioned that he was dealing with Statutes which on this subject are differently worded from our own section 11 and which seem to have tried to put "profession" or "vocation" into one category, and "office" or "employment" into another. See also section 45 (3) of the Finance Act, 1927, which distinguishes "office or employment" from "annuity, pension or stipend". In view of this difference between the English Acts and our own Ordinance, I doubt that the former are of very much help, and the judgment I have quoted does not seem to contain anything in favour of the proposition that a person going on pension thereby commences an employment. The other case cited in *35 N. L. R. 169*, is that of *Seldon v. Croome-Johnson* in 1932,[2] where the head-note says: "Held that a junior Barrister on becoming a K.C. does not set up a new profession but, it would seem, continues his former profession". This case was again decided by Rowlatt J., and does not deal with a person going on pension, as will be apparent from the portion of the head-note which I have just quoted. If then the practice in the United Kingdom is to treat an individual who retires on pension as having ceased his employment, and having commenced a new employment, one can only say that no authority was cited to us in support of that proposition, and even if it is the practice there, the difference between their Statutes and our own Ordinance would tend to make English decisions of doubtful authority with us.

[1] *(1931) 2 K. B. 628.*

[2] *(1932) 1 K. B. 759.*

This case then narrows down to a point of very small compass. What did the appellant do by going on pension on February 15, 1935 ? He ceased to carry on an employment in Ceylon, section 11 (6) ; of that there can be no doubt ; and it seems to me equally clear on the plain meaning of words that he did not on that day commence to carry on employment in Ceylon. If you say that he did, it is a necessary question, who was his employer, and what was his employment ? His employer, if he had one, was the Government of Ceylon paying him his pension ; his employment, if he had one, was drawing the pension. It is surely a strain on language to say that drawing a pension is an employment. At least I would ask for statutory or other authority before I agree that it was.

While writing this judgment I have had the advantage of seeing that of my brother Dalton, and would respectfully concur in his interpretation of section 6 taken with the definition of "profits" or "income" in section 2. It is true that section 6 (2) enacts that "for the purposes of that section" the term "profits from any employment" includes a "pension" and that section 6 (1) says that "for the purposes of the Ordinance" the term "profits and income" mean "profits from any employment", consequently a "pension" will be a "profit from an employment" and a "profit and income", but the Ordinance does not anywhere say that a pension, even though a profit from an employment, commences an employment. Income derived from the investment of a stock exchange speculation doubtless is "from that speculation" but it does not "commence" the speculation ; on the contrary it is a *sine qua non* of the income that the speculation should be a thing of the past before the income "from" it can arise. So here, surely on any ordinary analysis of the words used ; the pension is "from" the employment or because of the employment, but the very term, pension implies that the employment is over or it would be called "wages" or "salary"—section 6 (2) (*a*) (i)—nor is there anything in the Ordinance that I can discover which says that a pension though a profit from an employment, yet "commences" an employment.

If the above considerations are correct, it seems to follow that the appellant, though he ceased to carry on employment in Ceylon on February 15, 1935, section 11 (6), did not commence any employment or new employment on that date, section 11 (3), and consequently the answer to the case stated must be that the commuted gratuity paid after February 15, 1935, but within the year of assessment, and the pension payable for the period commencing February 16, 1935, and ending March 31, 1935, are not liable to income tax for the year 1934 to 1935.

I do not know what effect this may have on the amount which the appellant will ultimately have to pay as income tax on his commuted gratuity and pension. After the conclusion of argument figures were handed to us, with the consent of both sides, showing what tax the appellant would pay (*a*) on the basis that there was no cessation of employment, (*b*) on the basis that there was no cessation of one employment and commencement of another, and (*c*) on the basis that there was a cessation of employment without the commencement of a new one, but counsel for appellant earnestly besought us not to go into such questions as they would be outside the case stated to us, and any remarks thereon

merely *obiter dicta.* This is certainly correct and it will be sufficient to decide the case stated to us without speculating as to matters not strictly within that case.

For the reasons given above, I am of opinion that this appeal must be allowed with costs, and the question asked of us must be answered, as I have said above, in the negative.

DALTON S.P.J.—

It is conceded by the Commissioner that the standard basis for computing the statutory income of every person for each year of assessment is the full amount of the income derived from all sources during the year preceding the year of assessment. The year of assessment referred to in the question raised in the case stated is the year April 1, 1934, to March 31, 1935. The onus therefore is on the Commissioner to establish that the payments made to the appellant for pension and commuted pension between the dates February 15 and March 31, 1935, *i.e.*, during that year of assessment, can be included for the purpose of ascertaining the statutory income of the appellant for that year of assessment.

He purports to do this by seeking to show that the case falls within the provisions of section 11 (3) of the Income Tax Ordinance. That section provides that where on a day within the year of assessment any person commences to carry on or exercise a trade, business, profession, vocation or employment, any profit arising therefrom for the period from such day to the end of the year of assessment shall be statutory income of such person for such year of assessment. It is urged that on February 15, 1935, the appellant commenced to carry on the employment of a pensioner and therefore any profit arising to him as pensioner from February 15 to March 31, 1935, the end of the year of assessment, is statutory income of the appellant for that year of assessment.

In support of the argument that going on pension is the commencement of a new employment, the Commissioner relies on the provisions of section 6 of the Ordinance. It is there enacted that the term "profits from any employment" includes a pension, or any sum received in commutation of pension. It is argued that because the law provides that a pension or commuted pension is for the purpose of that section a profit from an employment, therefore it necessarily follows that a person on pension is carrying on the employment of a pensioner, and on the day on which he goes on pension he commences the employment of a pensioner. I am quite unable to agree with any such argument.

The word "from" in the term "profits from any employment" can be construed as "by reason of" or "out of", and "profits from any employment" mean profits arising by reason of or out of any employment. Reference to an English dictionary as to the meaning of the word "pension" shows that amongst other things it means "a stated allowance to a person in consideration of past services", or "a periodical payment made to a person retired from service on account of age, disability or the like", or "a yearly sum granted by government to retired public officers . . . . who have served a number of years . . . ." The payments of pension as a general rule, and taking the ordinary meaning of the word "pension", are made in respect of past services or past employment, and not because of any further service to

be done or performed after retirement to earn the payment of the pension. Section 2 of the Ordinance provides that for the purpose of that section a pension is to be deemed a profit from an employment, and is a statutory recognition of the meaning of the word "pension" which I have set out above, for the purpose of this Ordinance, presumably because a pension is in fact a payment for service or employment, although that employment was in the past. This is recognized in section 16 of the Ordinance when the term "earned income" comes to be defined, although it is difficult to understand on what principle a difference is drawn between persons on the score of residence in regard to "earned income" in Ceylon. The definition in section 2, however, in no way supports or justifies the fiction upon which the case for the Commissioner depends, namely, that a pensioner on retirement and going on pension commences a new employment.

For these reasons I am of opinion that section 11 (3) of the Ordinance has no reference to this case inasmuch as the appellant did not commence any new employment on February 15, by going on pension on that date.

The reference in the case stated to what is the English practice in these matters is incorrect. There the matter is amply covered by the provisions of the Finance Act, section 45. There the term "employment" when referring to present employment is clearly distinguished from such terms as "pension" or "annuity".

I agree therefore, for the above reasons, that the answer to the question submitted to this Court in the case stated must be that the commuted gratuity paid after February 15, 1935, but within the year of assessment, and the pension payable for the period commencing February 16, 1935, and ending March 31, 1935, are not liable to income tax for the year 1934—1935.

The appellant is entitled to his costs of appeal.

POYSER J.—I agree.

Appeal allowed.