1943 *Present :* **Moseley A.C.J. and Jayetileke J.**

BONAR CO., Appellant, *and* COMMISSIONER OF INCOME TAX, Respondent.

108-S—D. C. (Inty.) Income Tax.

Excess Profits Duty—Calculation of pre-war standard of profits—Option of taxpayer—Old and new business—Identity of personnel—Excess Profits Duty Ordinance, No. 38 of 1941, s. 6 (3).

The proviso to section 6 (3) of the Excess Profits Duty Ordinance according to which pre-war standard of profits may, at the option of the taxpayer or taxpayers, be computed by reference to the profits arising from any trade, business, office, employment or profession carried on by him or them before his or their new business commenced, applies only where there is complete identity between the personnel forming the old and the new business.

CASE stated to the Supreme Court under section 13 of the Excess Profits Duty Ordinance, No. 38 of 1941.

H. V. Perera, K.C. (with him *E. F. N. Gratian*), for the appellant.

H. H. Basnayake, C.C., for the Commissioner of Income Tax.

Cur. adv. vult.

April 8, 1943. MOSELEY A.C.J.—

This is an appeal by way of case stated for the opinion of this Court as provided by section 74 of the Income Tax Ordinance (Chapter 188) the provisions of which have been made applicable by section 13 of the Excess Profits Duty Ordinance (No. 38 of 1941), to an appeal against an assessment of excess profits duty under the latter Ordinance.

The duty is imposed by section 2 of the Ordinance upon the amount by which the profits arising from any business to which the Ordinance applies exceed, by more than three thousand rupees, the pre-war standard of profits. Section 6 (1) sets out the various formulae by which the pre-war standard of profits is determined, according to whether the business has been in existence for a period of three years or more, for a period less than three years but more than two years, or for a period less than two years but not less than one year. Section 6 (2) read with 6 (4) provides that when the pre-war standard of profits is less than ten per centum of the capital of the business (it is unnecessary to particularize further on this point) the pre-war standard of profits shall be taken to be the said percentage. Section 6 (3) provides for the case where there has

not been one pre-war trade year, and since the decision of the question before us hinges upon the construction of the proviso thereto, it is convenient to set out the sub-section in *extenso* :

"Where there has not been one pre-war trade year, the pre-war standard of profits shall be taken to be the percentage standard.

Provided that where the business is an agency or business of a nature involving capital of a comparatively small amount, the pre-war standard of profits may, if the taxpayer so elects, be computed by reference to the profits arising from any trade, business, office, employment or profession of any sort, whether liable to excess profits duty or not, carried on by him before his new business commenced as if it was the same business : but only to the extent to which the income from the former trade, business, office, employment or profession has been diminished".

Section 6 (5) (*a*) provides for an artificial pre-war standard of profits of four thousand rupees, in the case of a business of which the pre-war standard of profits as determined under the preceding provisions is less than four thousand rupees.

The appellants are in partnership and carry on the business of Engineers & Contractors. The partnership consists of two members, viz., Mr. James Bonar and Mr. Harold Nightingale. Prior to their entry into partnership Mr. Bonar was employed by Messrs. Walker Sons & Co., Ltd., while Mr. Nightingale was, and still is, a consulting engineer. The partnership commenced business on June 1, 1939, and it is common ground that Mr. Bonar is the only working partner.

It will be observed that there had not been, as far as the partnership is concerned, one pre-war trade year. The capital employed in the business is admittedly very small so that, the Assessor, to the advantage of the partnership, adopting the minimum provided for by section 6 (5) (*a*) assessed the pre-war profits at Rs. 4,000. The appellants, however, sought to bring their case under the proviso to sub-section (3), on the ground that each of the partners in the new business is a "taxpayer" for the purposes of the Ordinance and that the diminishment of the income from the former trade, business, office, employment or profession of each or either of them is a factor to be taken into account in computing the pre-war standard of profits of the business.

This view was rejected successively by the Commissioner and by the Board of Review to whom the partnership appealed. The Board before dismissing the appeal had considered the case of Mills from *Emelie, Ltd. v. Commissioners of Inland Revenue*[1] which is not directly in point since, in that case, it was sought by the members of a new business to set up, as the pre-war standard profits, the profits of a defunct business of which they had been employees. In the present case the appellants do not seek to take advantage of the pre-war profits made by Messrs. Walker Sons & Co., Ltd., but only of the income drawn from the company by Mr. Bonar. This distinction should be borne in mind in considering the following observation of Rowlatt J. at page 80 :—

"The rule (the counterpart of the proviso to section 6 (3)) means that, where a man leaves a business of his own to take up another

[1] *12 Report of Tax Cases 73.*

business, also his own, then you may look at the amount which he has sacrificed by deserting the 1st business against the profit which he has made by setting up the new business."

If those words stood alone and full value were given to each word, disregarding the fact that they were uttered in a context which treated mainly of the profits of a business where the man referred to was merely an employee, there would be strong support for the position taken up by the successive authorities who considered the present case. But before giving utterance to those words Rowlatt J. had said this :

"It is said that the appellant company carried on trade before the new one. The appellant company only came into existence for the purposes of this new shop and, therefore, strictly, that certainly could not have been the case."

This remark taken with that previously quoted would seem to indcate that, irrespective of the actual question then in issue, the learned Judge's view was that, in order that the rule should be applicable, the personnel forming the new business must be identical with that carrying on the former business. This was the attitude taken up by Counsel for the Commissioner. The design of the Ordinance, he contended, is to impose a tax upon business, and the "taxpayer" referred to in the proviso to section 6 (3), as well as in section 2 (1) and section 6 (1) is the *business.* Counsel for the appellants preferred to regard the term as a figure of speech on the footing that, while the trade or business is the unit of assessment, the burden of payment may ultimately fall on either of the individual partners. This argument does not appeal very strongly, since it would normally only be upon failure to extract the tax from the business that recourse would be had to an individual member. The analogy which he drew between this tax on businesses and the more familiar taxes upon motor cars and dogs will not bear close examination although the unit of assessment in these cases is respectively the business, the motor car and the dog.

Mr. Perera also, and I think that this was his main argument, invoked the aid of the provision of the Interpretation Ordinance to the effect that words in the singular number include the plural, and contended that what the proviso to section 6 (3) means is that the pre-war standard of profits may, at the option of the taxpayer or taxpayers, as the case may be, be computed by reference to the profits arising from any trade, business, office, employment or profession carried on by him or them, or either of them, before his or their new business commenced.

It seems to me that this construction carries too far the meaning of that provision of the Interpretation Ordinance and that there is no justification for importing into the proviso the words "or either of them", although without them the paraphrase is unobjectionable, since the words "carried on by him or them" could only refer respectively to "taxpayer or taxpayers". It seems to me that the Excess Profits Duty Ordinance not only intended that there should be complete identity between the personnel forming the old and new businesses but has made that intention clear.

We were presented with a picture of the hardship that would fall upon two partners, who had been in separate businesses before, the sum of whose

individual incomes was greater than the income of the subsequently formed partnership, and who would nevertheless be liable to pay this duty if the principle adopted here by the successive authorities is affirmed. That is a matter with which we cannot concern ourselves. Indeed, it may be that the Legislature, out of consideration for such a case, or similar cases which may result in hardships or anomalies, has thought fit to create the artificial minimum standard of pre-war profits of four thousand rupees.

The question which we are invited in the first place to decide is "whether, in terms of the proviso to section 6 (3) of the Excess Profits Duty Ordinance, No. 38 of 1941, the appellant partnership (whose business is of a nature involving capital of a comparatively small amount) is entitled to elect that the pre-war standard of profits of the appellant's business be computed by reference to the profits arising from the trade, business, office, employment or profession' carried on by Mr. Bonar, the only working partner in the appellant partnership, before the partnership business commenced".

The answer to that question is in the negative. That being so, the supplementary questions do not arise. I would dismiss the appeal with costs.

JAYETILEKE J.—I agree.

Appeal dismissed.