

20, 1932

CANADIAN  
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No. 77 of 1931.

# In the Privy Council.

APPELLANT'S CASE.

## ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN

HIS MAJESTY THE KING in right of the Province  
of British Columbia (Plaintiff) - - - - *Appellant*

AND

10 B. C. FIR AND CEDAR LUMBER COMPANY  
LIMITED (Defendant) - - - - *Respondent.*

## Case for the Appellant.

RECORD.

1. This is an appeal by Special leave granted the 16th July 1931 from a decision of the Supreme Court of Canada (Anglin C.J. Newcombe Lamont Smith and Cannon J.J.) dated 13th May 1931 allowing the Respondent's Appeal from the Judgment dated October 7th 1930 of the Court of Appeal of British Columbia (J. A. Macdonald C.J. (B.C.) Galliher McPhillips and M. A. Macdonald J.J.A. Martin J.A. dissenting) affirming the Judgment in the Appellant's favour of Mr. Justice W. A. Macdonald in the Supreme Court of British Columbia dated 9th January 1930. p. 39. p. 24. p. 21.

20 2. The questions for decision in this Appeal are whether certain monies received by the Respondent under fire policies insuring it against loss of net profits are liable to Income Tax under the British Columbia Taxation Act R.S.B.C. 1924 Ch. 254 and whether, if they are not so taxable, the premiums paid in respect of such policies are permissible deductions in arriving at taxable income.

3. The relevant sections of the Taxation Act are as follows :—

“ 2. ‘ Income ’ includes the gross amount earned, derived, accrued or received from any source whatsoever, the product of

capital, labour, industry or skill ; . . . and includes all income, revenue, rent, interest or profits arising, received, gained acquired or accrued due from bonds notes, stocks, debentures or shares (including the stocks, bonds or debentures of the Dominion or of any Province of the Dominion or of any Municipality) or from real and personal property, or from money lent, deposited, or invested or from any indebtedness secured by deed, mortgage, contract, agreement or account or from any venture, business, or profession of any kind whatsoever.”

“ 4. (1) To the extent and in manner provided in this Act, 10 and for the raising of a revenue for Provincial purposes :—

(A) All property within the Province and all output and income of every person resident in the Province, and the property within the Province and the output produced and income earned within the Province of persons not resident in the Province shall be liable to taxation.”

“ 44. (1) The net income of every person shall be ascertained for the purposes of taxation by deducting from his gross income the exemptions provided in section 42, and all expenses incurred in the production of that part of his income which is liable to 20 taxation, and the income-tax thereon payable to the Crown in right of the Dominion ; but no deduction by way of expenses shall be made for :—

(A) Rents, interest, wages, salaries, or other remuneration unless the names and addresses of the persons receiving same are given by the taxpayer in his return :

(B) Fees or salaries paid to a person as director, president, vice-president, or general manager of a corporation, where such person is not a resident in the Province, unless a separate return is made therefor and income-tax paid thereon at the 30 rates provided under section 52 :

(C) Interest on moneys borrowed from without the Province, either by way of loan, advance, or through a bond or debenture issue, unless a separate return is made covering the aggregate amount of such interest and income-tax is paid on that amount at the rates provided under section 52, except that the maximum rate shall not exceed four per centum ;  
and the following shall not in any case be allowed as expenses incurred in the production of income :—

(D) The domestic or private personal expenses of the 40 taxpayer and his family, including rent of house occupied by him or them :

(E) Any interest on capital :

(F) Any interest on moneys loaned or advanced by a parent, subsidiary, or associated corporation :

(G) Any expense which the Minister may consider to be of a capital nature or not an expense necessary to the production of the income that is being assessed and taxed :

(H) Any losses or bad debts, other than those arising out of the business from which an income is derived, and which are irrecoverable and actually written off the books of the taxpayer :

(I) Any loss or expense recoverable under any insurance policy or contract of indemnity."

" 48. (1) A return of income as required by this Act shall be made by each taxpayer annually without any notice or demand, and filed with the Assessor of the assessment district in which the income is liable to taxation : Provided that where the taxpayer is an individual whose gross income does not exceed nine hundred dollars he shall not be required to file a return under this section except upon demand of the Assessor.

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(3) Where the return contains a statement of income derived from any business, the taxpayer shall attach thereto a copy of his certified balance-sheet and profit and loss account relating to that business for the period covered by the return R.S. 1924 c. 254, s. 48 ; 1926-27, c. 71, s. 9."

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"51. The tax on income shall be assessed levied and paid annually upon the net income of the taxpayer during the last preceding calendar year . . ."

4. The Respondent during the time material to the issue was a Lumber Company carrying on business in British Columbia and in the course of its business insured its plant and property against loss and damage by fire with some seventeen insurance companies. It also took out with the same companies policies locally known as " Use and Occupancy policies " insuring it against the loss of net profits which would be sustained and providing for the payment of fixed charges which would be incurred in consequence of the total or partial suspension of business caused by fire. p. 7, l. 28. p. 7, l. 33.

5. Net profits payable under such policies are defined as " the net profits which would have accrued had there been no interruption of business caused by fire." Fixed charges were such fixed charges as continued " to be paid or incurred by the assured during the time the said plant shall be inoperative." p. 10, l. 36. p. 10, l. 23.

p. 8, ll. 4-17.

6. In August 1923 the Respondent's plant and premises were destroyed by fire. The Respondent before the rebuilding of the plant agreed with the adjuster for the Insurance Companies the period of suspension of business at 215 days and received from the Companies for loss of net profits \$43,000 and for fixed charges \$52,427.90 making a total of \$95,427.90.

p. 8, l. 30.

7. The Respondent in preparing its income tax returns for the years 1923 and 1924 included as income \$75,000 of such insurance moneys and paid income tax thereon but refused to pay income tax upon the balance of such moneys claiming them to have been received in excess of the actual loss sustained owing to the fact that the rebuilding took less than the time allowed by the adjuster. 10

p. 4, l. 24.  
p. 9, l. 7.

8. It would appear that during the period of the said Use and Occupancy policies the Respondent had deducted the premiums paid as an expense incurred in the production of income liable to taxation and such deduction had been allowed.

p. 21, l. 12.  
pp. 7-20.

9. The action came before the Supreme Court of British Columbia on 12th September 1929 upon pleadings and upon an agreed Statement of Facts which is set out in the record herein.

10. As the result of a discussion at the trial the pleadings were 20 amended on 12th September 1929 and it was agreed between the parties that there was no dispute as to the liability of the Respondent for Income Tax upon that portion of the Insurance moneys representing payment of fixed charges and that the sole question for decision was the liability of the Respondent to Income Tax in respect of that part of the proceeds of the policies representing loss of net profits.

11. The parties further agreed that the decision should cover the part of the proceeds of the policies upon which Income Tax had been paid and that in the event of a decision in the Respondent's favour credit should be given to the Respondent for the amount of tax so paid, in respect of 30 profits insured.

p. 20, l. 32.

p. 20,  
ll. 34-36.

p. 20,  
ll. 5-22.

12. In his reasons for judgment the learned trial Judge Mr. Justice W. A. Macdonald found that " the Defendant (Respondent) by adequately protecting itself received profits which were properly assessed and taxes duly paid " and thought that " the sum so paid (proceeds of the policies) can be regarded as a fruit or earning of the business or an ingredient in the profits thereof " and he adopted as " sound and applicable " to the present case the Judgment of Sternhagen J. in International Boiler Works Co.

in Volume 3 of United States Board of Tax Appeal Reports at p. 283 who said, in dealing with similar policies :—

“ Such profits (so insured), had they not been lost would unquestionably have been gross income and there is no reason why an amount received in substitution for net profits should be any more excluded from taxes than if received directly in the conduct of the business.” p. 20, l. 18.

13. Judgment was accordingly entered in the Supreme Court of British Columbia for the Appellant in the sum of \$3,922.86 and costs. p. 21.

10 14. The Respondent appealed from this Judgment to the Court of Appeal of British Columbia which by a majority of four Judges to one dismissed the Appeal on 7th October 1930. p. 24.

15. The majority concurred in the reasoned Judgment of Mr. Justice W. A. Macdonald. Mr. Justice Martin dissented. pp. 21-23.

16. The Respondent appealed to the Supreme Court of Canada which on 13th May 1931 unanimously allowed the Appeal. p. 39.

17. In delivering his reasons for Judgment in which the other members of the Court concurred the learned Chief Justice of Canada said :— p. 38, l. 31.

20 “ The monies in question here represent insurance placed by the Appellant in order to meet the possibility of destruction by fire of its means of earning profits. That event occurred with the result that the Appellant made no profits whatever out of the property in respect of which it had placed the insurance which could be taxed for the period in question. There are therefore no profits to tax and in the absence of clear language authorising such a course I find nothing in the Statute to warrant the taxation of money substituted for the profits by way of indemnity for their loss.”

30 18. The Appellant submits that the real question is whether the proceeds of the insurance policies constitute “ Income ” within the meaning of the Taxation Act and that the reasons given by the Supreme Court of Canada do not really decide that point, for monies which are not profits of a business may yet be income of the taxpayer. Even if the question is whether the monies are profits or not, the decision of the Supreme Court of Canada, it is submitted, cannot be reconciled with the reasoning of the House of Lords in *Glicksten v. Green* 1929 A.C. 381 and is therefore erroneous.

40 19. The Appellant humbly submits moreover that when in the course of the ordinary operation of its business a lumber Company takes

the usual business step of insuring its profits the proceeds of the policy are none the less profits of its business which includes the taking out of such insurances, than the proceeds of its other activities and that when it claims to deduct and is allowed to deduct as a necessary insurers' expense directly incurred in earning income, the premiums paid, it cannot be heard to say that the results of that business expenditure are not profits and are not income.

20. The Appellant therefore humbly submits that the Judgment of the Supreme Court of Canada is wrong and should be reversed and that the Judgments of the Court of Appeal of British Columbia and of Mr. Justice Macdonald in the Supreme Court of British Columbia were right and should be restored for the following amongst other 10

### REASONS.

- (1) BECAUSE the Insurance monies in question were income of the Respondent within the meaning of the Taxation Act and liable to taxation as such.
- (2) BECAUSE the Insurance monies in question are "income or profits received acquired from personal property or from money invested or from indebtedness secured by contract or from business" within the meaning of the Taxation Act. 20
- (3) BECAUSE the Insuring of profits was part of the ordinary business of the Respondent.
- (4) BECAUSE the Insurance monies in question were profits and should have been brought into account in ascertaining the net income of the Respondent.
- (5) BECAUSE the Insurance monies in question were not capital and were not a "wind-fall" but monies receivable by virtue of an ordinary business contract and therefore fall to be assessed as Income. 30
- (6) BECAUSE the Respondent cannot deduct the premiums on the policies as an expense incurred in the production of income and at the same time contend that the proceeds of the policies do not constitute income.
- (7) BECAUSE the reasons set out in the Judgment of Mr. Justice W. A. Macdonald and in the Judgments of the majority of the Court of Appeal are correct.

GEOFFREY LAWRENCE.

ERIC PEPLER.

WILFRID BARTON.

**In the Privy Council.**

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**ON APPEAL**  
*From the Supreme Court of Canada.*

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**BETWEEN**  
**HIS MAJESTY THE KING**  
in right of the Province  
of British Columbia  
(Plaintiff) - - - *Appellant*

**AND**  
**B. C. FIR AND CEDAR**  
**LUMBER COMPANY**  
**LIMITED** (Defendant) - *Respondent*

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**Case for the Appellant.**

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