Privy Council Appeal No. 77 of 1931.

The King - - - - - - - - - *Appellant*

v.

The B.C. Fir and Cedar Lumber Company, Limited - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH MARCH, 1932.

Present at the Hearing:

VISCOUNT DUNEDIN.
LORD BLANESBURGH.
LORD MERRIVALE.
LORD RUSSELL OF KILLOWEN.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD BLANESBURGH.]

This, by special leave, is an appeal from a judgment of the Supreme Court of Canada of the 13th May, 1931, whereby, in effect, judgment in favour of the plaintiff-appellant, pronounced at the trial by the Supreme Court of British Columbia and affirmed on the 7th October, 1930, by the Court of Appeal of the same Province, was discharged. The appellant now seeks to have these two earlier judgments restored.

The broad question for decision is whether certain moneys received by the respondents under use and occupancy policies insuring them against loss of profit resulting from the cessation of business consequential upon fire are liable, under the British Columbia Taxation Act, 1924, to be brought into account by them for assessment to Income Tax.

This question has led, in these proceedings, to an acute difference of judicial opinion. The learned Judges of the Supreme Court unanimously favoured a negative answer to the question and their view had the support of Mr. Justice Martin in the

Court of Appeal of the Province. On the other hand, the four remaining learned Judges of that Court, supporting the learned trial Judge, were all in favour of the view that the moneys in question must be brought into account by the respondents for taxation purposes.

The respondents are a company incorporated under the Companies Act of British Columbia. Since 1921 they have been carrying on business at the city of Vancouver as manufacturers of and dealers in lumber and lumber products. On the 21st August, 1923, their plant and premises were destroyed in a conflagration. These subjects were insured against loss and damage by fire under annual policies, taken out or renewed in the previous March with some seventeen insurance companies. The respondents were also insured by the same companies against the further loss or damage they might sustain in the event of their plant either in whole or in part and for a period long or short being shut down or its working suspended in consequence of fire. These policies, the use and occupancy insurances already referred to, were separate from but complementary to the main policies. They insured the respondents in the total sum of $84,000 in respect of loss of " fixed charges " and $60,000 in respect of loss on " net profits." The nature of the liability so assumed by the insuring companies, with the character and quality of the payments made to the respondents in its discharge, is made sufficiently apparent by the definitions of the expressions, " fixed charges " and " net profits," contained in the policies themselves. " Fixed charges " are there defined to mean : " All the standing charges and expenses which must necessarily continue to be paid or incurred by the assured during the time the said plant shall be inoperative." " Net profits " are defined to mean " the net profits that would have accrued had there been no interruption of business caused by fire."

The annual premium upon the use and occupancy insurances amounted to $3,828.29. This premium had, in ordinary course, been brought into the accounts of the respondents as a revenue charge, and it is stated to have been allowed by the taxation authorities as a permissible deduction in the computation of the net income of the respondents for the purpose of income tax under the Taxation Act. This payment of premium out of revenue and its allowance as a disbursement are circumstances of importance in the case.

The loss payable under the main fire policies was, it would appear, separately adjusted with the Companies, was duly received by the respondents, and as to that receipt, admittedly a receipt on capital account, no question is raised. As to the claims of the respondents under the use and occupancy policies, the respondents and the adjuster of the insuring companies agreed that the period of interruption of the respondents' business was 215 business days, this being the length of time estimated to be

required for the rebuilding of the plant, and the loss was adjusted on the following basis :—

Loss of net profits, estimated for $317.23 per day, and allowed at $200 per day	$43,000
Payment of fixed charges, estimated and allowed at $234.80 per day	$52,427.90
Total	$95,427.90

It is not disputed that as between the tax years 1923 and 1924 this sum if assessable to tax at all is properly apportionable as follows :—

1923—113 business days :	
Net profits	$22,600.00
Fixed charges	$27,555.05
1924—102 business days :	
Net profits	$20,400.00
Fixed charges	$24,872.85

The sum of $95,427.90 having been duly received, the respondents in their income tax returns to the Province for the year 1923 included the sum of $41,293.20 as an income receipt, and in their return for the year 1924 they included as a similar receipt the sum of $33,706.80. In the result, provincial income tax for the years 1923 and 1924 was in fact paid in respect of these sums aggregating $75,000 out of the total sum of $95,427.90 received as already stated.

The respondents did not bring into account for either year the balance—$20,427.90. Their view even then was that that sum was exempt from liability to tax for the reason that it represented moneys received from the insurance companies in excess of the actual loss sustained, the rebuilding of the plant having in fact taken a less number of days than that estimated for and allowed by the adjusters.

Now, with reference to these matters two things can at once be said. On the one hand, the $75,000 were brought in before any advice was taken, and it is agreed between the parties that the mere fact that income tax was inadvertently paid by the respondents thereon is not to prejudice them to the extent to which in these proceedings it is not established that these moneys were liable to be brought into charge. On the other hand, it has not been contended by the respondents that any distinction in the matter of liability to tax can really be drawn between the $75,000 in respect of which its existence was originally assumed by them, and the balance of $20,427.90 in respect of which exemption was always claimed.

On the 28th November, 1927, the action out of which this appeal arises was commenced. There was a claim for arrears of personal property tax for interest and for penalties. But it soon emerged that there was no dispute between the parties with

reference to the personal property tax. The claim which remained—not, it must be agreed, very clearly alleged—was originally, in effect, one for income tax, upon the balance figure of $20,427.90, already mentioned. At the trial, however, as a result of preliminary admissions of fact between the parties, it was found that, for special reasons which for the moment their Lordships pass by, the accountability of the respondents to income tax in respect of the receipts representing fixed charges need not be further disputed, and that the real question, effective in result, was confined to the alleged liability of the respondents for income tax in respect of "the loss of net profits" receipt, and it was agreed that, if it were held that the respondents were liable to income tax on that receipt, the sum remaining recoverable in the action, after all adjustments, was $3,922.86, any question of liability to penalties being held over. Thus it was that the learned trial Judge who held the respondents to be so accountable, entered judgment for the Crown in the sum stated. Thus also it was that in all the Courts attention has been focussed on this one major issue, and it is with reference thereto alone that the judgments under review have been given.

The question whether this "loss of net profits" receipt is one which must be brought into calculation for the purpose of arriving in each of the tax years in question at the sum for which the respondents are assessable to Provincial income tax must depend upon the provisions, properly construed, of the taxing statute of the Province. But it will be convenient before these provisions are applied to that receipt to ascertain apart from any question as to income tax its precise place and character in the economy of the respondents' business. And there is, it would appear, little difficulty in ascertaining this.

The main purpose of the respondents, as it is of all similar industrial units, is the acquisition of gain, such acquisition in the case of each unit being effected by the exercise of such of the powers conferred upon it by its constitution as it may determine to exercise. In the case of the respondents acquisition of gain was primarily to result from their carrying on of the business of manufacturers of and dealers in lumber and lumber products. In the conduct of that business they were exposed to the grave risk of fire, and the insurance of their premises and plant was an insurance against a possible capital loss dictated by every consideration of prudence. If the risk were not so guarded against, then by a fire sufficiently disastrous the whole operations of the respondents might, definitely be brought to a close and acquisition of gain for them definitely ended.

But such a fire, even if so far insured against, might still prove a hindrance more or less prolonged to the unbroken acquisition of gain from their business by reason of the fact that its continuance might not be possible during the period of reinstatement.

This insurance receipt therefore was the product of a revenue payment prudently made by the respondents to secure that the gains which might have been expected to accrue to them had there been no fire should not be lost, but should be replaced by a sum equivalent to their estimated amount.

Further, this was a receipt which had to be brought into the respondents' revenue account, so that it might enter into the calculation necessary to determine their profits available for dividend. It had been produced by a premium out of revenue, and therefore out of potential profits—a premium paid for the express purpose of ensuring in an event a sum in substitution for and the equivalent of net business profits over a defined period of time. All this is clear from the terms of the insurances themselves. Accordingly this insurance receipt was necessarily a revenue receipt of the business, which must not only have been brought into the respondents' revenue account, but if, for instance, it had happened that any of the stockholders were specially interested in the profits of a particular year, being, for example, non-cumulative preference stockholders, then the receipt must have been brought into credit proportionately for the years in which the profits represented would but for the stoppage presumably have been earned.

Finally, the receipt was one of which, as their Lordships think, it can be fairly said that it arose from the business of the respondents. The two English cases of *The Commissioners of Inland Revenue* v. *Newcastle Breweries*, 12 T.C. 927, and *J. Glikstein & Son, Limited* v. *Green*, 1928, 2 K.B. 193; 1929, A.C. 381, are authorities for this proposition. This receipt was inseparably connected with the ownership and conduct of the respondents' business. Had the respondents not been insured under their main fire policies, these particular use and occupancy policies would not have been available to them. As a result, the respondents have secured for themselves a net receipt involving gain—an unusual mode of deriving gain from the business, it may be agreed, but, as Lord Warrington said in similar circumstances in the *Newcastle Breweries* case (12 T.C., at p. 947), not so divorced from the business as to prevent it entering the accounts as a receipt arising therefrom. And it was not a windfall. As observed by Sargant L.J. in *Glikstein's* case (1928), 2 K.B., at p. 203, it was an ordinary receipt in the sense, not that it would occur every year or regularly at stated intervals, but in the sense that in the case of a business prudently conducted it would ordinarily be received so often as the risk insured against materialised.

This then as applied to the respondents' business is the nature of the receipt with reference to which the inquiry must now be made, whether under the Taxation Act, 1924, it is of a character to be brought into charge.

That Act is very lengthy, it consists of 200 sections, but its provisions relevant to the inquiry in hand are not numerous.

Section 2 is an interpretation section. It places a meaning upon 28 expressions used in the statute. In 13 instances the definitions which follow are said to be "included" in the term defined; in 15 instances the term defined is said to "mean" that which follows."

The word "income" is in the former class, and their Lordships cannot doubt that in consequence the word, as used in the statute, includes, unless the context otherwise requires, not only those things which the interpretation clause declares that it shall include, but such things as the word signifies according to its natural import. See *Dilworth* v. *Commissioners of Stamps* (1899), A.C. 99, 106. By Section 2, unless the context otherwise requires,

> "income," amongst many other things, "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 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."

"Person" includes corporations.

By Section 4 (1) it is provided that:

> "To the extent and in the manner provided in this Act 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 . . . shall be liable to taxation."

Part III of the Act relates to taxation of income, and certain classes of income are made exempt from taxation by Section 42.

Section 44 (1) is as follows:—

> "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 taxation . . . and the income tax thereon payable to the Crown in right of the Dominion . . . but the following shall not in any case be allowed as expenses incurred in the production of income.
>
> * * * * * *
>
> "(*e*) 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. . . .
>
> * * * * * *
>
> "(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.
>
> * * * * * *
>
> "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."

A reference to Section 44 (1) (i) and Section 48 (3) shows very clearly why in this case the receipt by the respondents in

respect of "fixed charges" disappeared from the discussion. In their accounts for the purpose of arriving at their "net income" the respondents were entitled to the benefit of a deduction for fixed charges as an expense: they were, however, required by Section 44 (1) (i) as against these lost fixed charges to bring in the fixed charges insurance receipt. The effect (the account being otherwise in credit) was necessarily to increase by the amount of that receipt the ultimate net income of the respondents.

Leaving therefore that item, the question is whether within the meaning of the Act the insurance receipt in respect of "loss of net profits" was also "income" to be brought into account so as to enter into the calculations for determining the "net income" of the business for income tax purposes.

In view of the nature and origin of the receipt, as they have traced these, their Lordships have reached the conclusion that within the meaning even of the interpretation clause this receipt was "income from a business" and that in ordinary parlance it was income or gain derived from the business of the respondents which had necessarily to be brought into receipt as such in the profit and loss account of the business referred to in Section 48 (3) of the statute.

In effect, this was the view taken by the learned trial Judge and by the majority of the Court of Appeal of British Columbia. Mr. Justice Martin's dissenting view, although perhaps less clearly expressed, may be taken to coincide with that of the learned Judges of the Supreme Court, which was that the statute nowhere provides for taxation of moneys paid by way of indemnity for profits not earned but irretrievably lost: that the moneys in question represented insurances placed by the respondents in order to meet the possibility of destruction by fire of its means of earning profits: that that event occurred, with the result that the respondents made no profit out of the property which could be taxed for the period in question; that there were therefore no profits to tax, and in the absence of clear language authorising such a course, there was no warrant for taxing money substituted for profits by way of indemnity for their loss.

Their Lordships feel that the true question at issue has not in this statement been really dealt with by the learned Judges of the Supreme Court. The real question was whether the insurance moneys in question constituted "income" of the respondents within the meaning of the Taxation Act, and not whether these moneys were "profits" of its business. Moneys which are not strictly "profits" of a business may yet be income of the taxpayer. But even on the question whether the moneys here could properly be described as "profits" the learned Judges do not seem to have referred to the reasoning of the House of Lords in *Gliksten's case*, *supra*, which would appear to be in conflict with their own.

But however the receipt be described, it is because it is truly " income " of the respondents that it must be brought into charge in their revenue account for the purpose of arriving in respect of the year of charge at the respondents' net income. Whether the whole or any part of it is finally chargeable depends upon the result of the whole annual expenditure and revenue accounts of which it constitutes one item only.

For these reasons their Lordships find themselves in the result in agreement with the learned trial Judge. They are unable to concur in the conclusion of the Supreme Court. They think accordingly that this appeal should be allowed, and the judgment of the Court of Appeal of British Columbia restored. This will automatically revive the judgment of the learned trial Judge.

And their Lordships will humbly advise His Majesty accordingly.

The Crown must have its costs before the Supreme Court, but in view of the observations of their Lordships upon this subject made on the application for special leave there will be no costs of this appeal.

In the Privy Council.

THE KING

v.

THE B.C. FIR AND CEDAR LUMBER COMPANY, LIMITED.

DELIVERED BY LORD BLANESBURGH.

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